LOOK BEFORE YOU LEAP: THE MEASURED APPROACH TO ANALYZING REGISTRATION STATUTES UNDER THE DORMANT COMMERCE CLAUSE

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ABSTRACT

The United States Supreme Court recently held in Mallory v. Norfolk Southern Railway Company that an out-of-state corporation unwittingly consented to general personal jurisdiction by registering as a foreign corporation with a Secretary of State's office. The decision incentivizes states to lean into their self-interests by amending their long-arm statutes to mirror Pennsylvania's law. Justice Alito concurred, arguing that these jurisdiction-via-registration statutes suffer from an entirely different constitutional defect. Citing to cases predating International Shoe Company v. Washington, Justice Alito argues that Pennsylvania's law may violate the Dormant Commerce Clause by either facially discriminating against out-of-state companies or, at the very least, impermissibly interfering with interstate commerce. Justice Alito is correct that these statutes may fail Pike balancing under certain circumstances. However, his concurrence leaves the door open for a corporate defendant to make a facial challenge to jurisdiction-via-registration statutes. Courts should decline to invalidate a state's long-arm jurisdictional statute on its face under the guise of a Dormant Commerce

Clause violation. Instead, this Article, in line with other scholars who addressed this issue pre-Mallory, urges courts to rely on the Pike balancing test to settle fringe instances of forum shopping.

INTRODUCTION

The tale of The Fox and the Goat from *Aesop's Fables* begins by setting up what appears to be a precarious situation, placing a fox at the bottom of a deep drinking well.[1] Though it is unclear how long the Fox sat isolated, the Fox is eventually met by a thirsty Goat that peers into the hole from above.[2] Rather than offer the Fox any assistance, the Goat inquired about the quality of the drinking water at the well's core.[3] Realizing this Goat presented the best opportunity for its escape, the Fox touted the wellwater as "[t]he finest in the whole country."[4] Pursuing an expected bounty, the Goat jumps down to the bottom of the well at his own folly; the Fox finds freedom by catapulting off the Goat's back, leaving him stranded.[5] Once the Goat looked skyward and realized its fate, the Fox, in not as few words, imparted the story's moral: "[l]ook before you leap."[6] This tale exemplifies how common sense rebels against taking bold action without an escape plan.

The Supreme Court took bold action in *Mallory v. Norfolk Southern Railway* in 2023, holding that an out-of-state corporation validly consented to general personal jurisdiction in the Commonwealth of Pennsylvania by registering to do business with the Secretary of State's office.[7] This decision paves the way for Pennsylvania's neighboring states to amend their long-arm statutes to maximize their domiciliaries' chances of recovering against foreign corporations.

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* Belmont University College of Law, Class of 2023. I owe tremendous thanks to my friends, colleagues, and mentors who helped me with this Article amidst my preparation for the bar exam. Specifically, I continue to appreciate the Honorable Jeffrey Usman's guidance on legal scholarship and Professor Amy Moore's advice on federal civil procedure. My budding legal career owes its existence to my incredibly supportive and loving family and my wonderful girlfriend who all support me in my endeavors. Writing this Article would have been impossible without their constant encouragement and feedback. Finally, thank you to the staff of the Vermont Law Review for helping me prepare and publish this Article.

1. Æsop, *The Fox & the Goat*, LIBR. OF CONG., https://read.gov/aesop/019.html (last visited Apr. 21, 2024).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. 143 S. Ct. 2028, 2043, 2044 n.11 (2023) (explaining the Court's holding).

Justice Alito, however, suggested in a concurring opinion that statutes like Pennsylvania's violate the Dormant Commerce Clause.[8] Laying the groundwork for an even bolder move, Justice Alito urged the Court to revive century-old Dormant Commerce Clause decisions like *Davis v. Farmers Co-operative Equity Company* and invalidate business registration statutes as facially discriminatory enactments if the opportunity arises in a future case.[9] The plurality anticipated after oral argument that such a theory will be litigated on remand and accordingly declined to offer any thoughts, leaving lower courts stranded without any guidance on this important question—like the Goat.[10]

There is some water at the bottom of this Dormant Commerce Clause well. As Justice Alito points out, the Court previously held in *Davis* that Kansas's 1923 jurisdiction-via-registration statute was "obnoxious" to the national marketplace and violated the Dormant Commerce Clause.[11] Justice Alito joined a growing chorus of personal jurisdiction scholars who also advocate for the Court to reinvigorate Dormant Commerce Clause principles into personal jurisdiction cases.[12] Though Justice Alito cites Professor John Preis's 2016 law review article on this issue to support his conclusion that "Pennsylvania's registration-based jurisdiction law discriminates against out-of-state companies,"[13] that conclusion finesses Professor Preis's view. By contrast, Professor Preis acknowledges that "jurisdiction-via-registration laws do not facially discriminate . . . . They generally apply to all companies that desire to do business in the state, regardless of whether the companies also claim that state as their home."[14] That distinction is key in modern Dormant Commerce Clause jurisprudence. A lack of facial discrimination would trigger a balancing inquiry rather than

8. *Id.* at 2049–55 (Alito, J., concurring in part).

9. *See id.* at 2052–53 (citing Davis v. Farmers Co-op. Equity Co., 262 U.S. 312, 315 (1923)).

10. *Id.* at 2033 n.3 (plurality opinion) (acknowledging the Dormant Commerce Clause "alternative argument" but leaving it available "for consideration on remand").

11. *Id.* at 2052–53 & n.6 (Alito, J., concurring in part) (citing *Davis*, 262 U.S. at 315 (1923)); *see also* Sioux Remedy Co. v. Cope, 235 U.S. 197, 203 (1914) ("If the statute . . . burdens interstate commerce, it must be adjudged to be invalid . . . ." (quoting W. Union Tel. Co. v. Kansas, 216 U.S. 1, 27 (1910))).

12. *See, e.g.*, Alan B. Morrison, *Safe at Home: The Supreme Court's Personal Jurisdiction Gift to Business*, 68 DEPAUL L. REV. 517, 564 (2019) (arguing "a shift from a Due Process to a Dormant Commerce Clause analysis would produce fairer, simpler, and more coherent results"); John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 123 (2016).

13. *Mallory*, 143 S. Ct. at 2053 n.7 (citing Preis, *supra* note 12, at 138–40) (Alito, J., concurring in part).

14. Preis, *supra* note 12, at 138 (citing Kevin D. Benish, Pennoyer's *Ghost: Consent, Registration Statutes, and General Jurisdiction After* Daimler AG v. Bauman, 90 N.Y.U. L. REV. 1609, 1647–61 (2015)).

going as far as Justice Alito contends and ruling a statute invalid on its face.[15] Though it is true that "[n]ot every case poses a new question," not every old question should be answered the same way over time; this is exactly what the Court would be doing if it revived *Davis* and its progeny without serious recalibration.[16]

This Article urges lower courts to "look before you leap"[17] into the process of invigorating century-old Dormant Commerce Clause cases into personal jurisdiction analyses in the context of consent-based, business registration statutes. If Mallory or a similarly situated plaintiff presents the issue to the Supreme Court for review, then the Court should refrain from endorsing a facial challenge and declaring these statutes *per se* unconstitutional. If the Court does decide that Dormant Commerce Clause principles are once again relevant to personal jurisdiction analyses,[18] it should instead invoke the battle-tested balancing framework from *Pike v. Bruce Church* to resolve any constitutional challenges.[19] Not only would using the *Pike* balancing framework preserve the near universal patchwork of long-arm statutes passed after *International Shoe Company v. Washington* and, by extension, state autonomy,[20] but it would also allow district courts to weed out "the *true* forum shopper—the plaintiff who has selected a forum

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15. *See, e.g.*, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153 (2023).

> Even under our received [D]ormant Commerce Clause case law, petitioners begin in a tough spot. They do not allege that California's law seeks to advantage in-state firms or disadvantage out-of-state rivals. . . . [C]onced[ing] that California's law does not implicate the antidiscrimination principle at the core of this Court's [D]ormant Commerce Clause cases . . . .

Id.; *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (explaining balancing test).

16. *See Mallory*, 143 S. Ct. at 2045. Justice Gorsuch and the plurality used this phrase to describe their decision to rely upon *Pennsylvania Fire Insurance Company v. Gold Issue Mining & Milling Company* as an answer to the due process question presented by Mallory. *Id.* That same approach should not be used for the Dormant Commerce Clause question, as explored *infra* Part II.

17. *See* Æsop, *supra* note 1.

18. The Court certainly does not have to reach this conclusion. As explained *infra* Part III, several of the Court's recent Commerce Clause decisions suggest that some issues do not concern interstate commerce at all. These decisions necessarily impact the Dormant Commerce Clause analysis, given the two doctrines are intrinsically linked. Thus, the Supreme Court could just as easily decline to conclude that jurisdiction-via-registration statutes impact interstate commerce and avoid disrupting the already robust due process analysis typical in personal jurisdiction disputes. *Cf.* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 895–96 (1988) (Scalia, J., concurring) (questioning the impact of general jurisdiction on interstate commerce).

19. *See* 397 U.S. 137, 142 (1970) (describing balancing test); *see also* Morrison, *supra* note 12, at 557–58 (favoring *Pike* balancing over the "very steep uphill battle" of Due Process challenges).

20. *See* Jeffrey A. Van Detta & Shiv K. Kapoor, *Extraterritorial Personal Jurisdiction for the Twenty-First Century: A Case Study Reconceptualizing the Typical Long-Arm Statute to Codify and Refine* International Shoe *After Its First Sixty Years*, 3 SETON HALL CIR. REV. 339, 342 (2007) (citing 326 U.S. 310 (1945)) (explaining public policy rationales behind uniform long-arm statutes).

that has no relevance to the suit, save its comparative likelihood to favor the plaintiff."[21]

Part I explores the Commerce Clause's rich history. It also introduces the Commerce Clause's drowsy cousin, explains the theory's historical underpinnings, and identifies predominant jurisprudential considerations that have shaped several recent decisions. Part II shifts to *Mallory*, providing a brief synopsis of the Court's due process holding before turning its full attention to Justice Alito's concurrence. Because Justice Alito's concurrence relies somewhat heavily upon a theory advanced in a 2016 law review article by Professor John Preis and the Supreme Court's *Davis* decision, Part II also summarizes both. Part III presents several objections that a court should consider before ruling a personal jurisdiction statute is facially invalid under the Dormant Commerce Clause. Specifically, this Part questions the basic premise that personal jurisdiction statutes actually burden interstate commerce in a way contemplated by the Court's recent decision in *United States v. Lopez* and its progeny; encourages courts to distinguish between the types of statutes at issue in *Davis* and the majority of post-*International Shoe* long-arm statutes; and raises public policy concerns a court should consider before endorsing an all-or-nothing approach such as declaring a statute facially invalid. Finally, Part IV urges those courts that do choose to reinvigorate Dormant Commerce Clause principles into personal jurisdiction cases to decline facial constitutional challenges and instead subject business registration statutes to *Pike* balancing. That test properly accommodates the relevant state sovereignty interests while weeding out bizarre cases like *Mallory*.

I. AMERICA'S WAKEFUL AND "DORMANT" COMMERCE CLAUSES

The Commerce Clause, enshrined in Article One, Section Eight of the United States Constitution, is revered as one of the government's most powerful legislative tools.[22] The United States Supreme Court has repeatedly invoked the Commerce Clause when elevating federal power in an effort to distance itself from the "'tortured' history" of the Articles of Confederation government.[23] The Dormant Commerce Clause, by contrast, is an unwritten theory of constitutional interpretation animated by interstate federalism

21. Preis, *supra* note 12, at 133.

22. Lainie Rutkow & Jon S Vernick, *The U.S. Constitution's Commerce Clause, the Supreme Court, and Public Health*, 126 PUB. HEALTH REPS. 750, 750 (2011).

23. Molly E. Homan, United States v. Lopez: *The Supreme Court Guns Down the Commerce Clause*, 73 DENV. U. L. REV. 237, 241 (1995) ("For over fifty years, the Court . . . upheld all of Congress's commercial regulations, and Congress saw nearly unbounded power.").

principles that stands in the way of state-initiated protectionism.[24] Though not always the case, the Dormant Commerce Clause often operates in direct contradistinction to Article One, Section Eight, preventing states from enacting economic measures that infringe upon the national marketplace in order to preserve federal supremacy.[25]

That is not a perfect comparison between the two doctrines, so this Part explores the historical interplay between the written Commerce Clause and its unwritten counterpart. Because the Commerce Clause may help contextualize the scope of the Dormant Commerce Clause theory and identify some of its animating principles, this Part addresses Article One, Section Eight first.

A. America's Constitutional Behemoth

The colonists' commercial woes served as a primary motivator of the American Revolution.[26] Royal subjects shouted "[no] taxation without representation" in response to the Crown's strict, war-funding taxation schemes before eventually dumping tons of tea into Boston Harbor.[27] This persistent economic pressure spurred armed skirmishes, such as the Boston Massacre, before boiling over into all-out war.[28]

The patriots enacted the Articles of Confederation to create an organizing entity strong enough to fight against one of the world's most famous empires.[29] In theory, they thought, the Articles government would blossom into a "perpetual union" between the colonies.[30] However, this system only operated well as "a confederation of independent sovereign nations" during the war,[31] and that configuration suffered from many

24. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1152 (2023) (calling the doctrine "[r]eading between the Constitution's lines" but noting that "[e]veryone agrees that Congress may seek to exercise this power to regulate the interstate trade of pork, much as it has with various other products. Everyone agrees, too, that congressional enactments may preempt conflicting state laws").

25. Benjamin C. Bair, *The Dormant Commerce Clause and State-Mandated Preference Laws in Public Contracting: Developing a More Substantive Application of the Market-Participant Exception*, 93 MICH. L. REV. 2408, 2408–09 (1995) (explaining relationship between traditional and Dormant Commerce Clauses).

26. *See Revolutionary War*, HISTORY (Aug. 11, 2023), https://www.history.com/topics/american-revolution/american-revolution-history#causes-of-the-revolutionary-war.

27. *Id.*

28. *Id.*

29. *10 Reasons Why America's First Constitution Failed*, NAT'L CONST. CTR. (Nov. 17, 2022), https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed.

30. *Id.*

31. Frank Bane, *Interstate Trade Barriers: General Introduction*, 16 IND. L. J. 121, 121 (1940).

practical problems.[32] For one, the supposed central government existed in name only, exercising zero control over each colony's foreign and monetary policies.[33] The Articles of Confederation government was helpless anytime that a colony defected from the endorsed national currency to adopt a local alternative.[34]

These economic fractures incentivized competition between the states.[35] Many created trade barriers, i.e., "statute[s], regulation[s] or practice[s] which operate[d] or tend[ed] to operate to the disadvantage of persons, products or commodities coming from sister states, to the advantage of local residents or industries."[36] Scholars and courts describe this tense time preceding the ratification of the Constitution as one of "economic Balkanization."[37]

Delegates from each colony were motivated to eliminate these trade barriers once and for all, and sought to do so by introducing the Commerce Clause at the Constitutional Convention.[38] The drafters presented the Commerce Clause as the principal solution to economic protectionism, making "its general substance . . . everybody's darling" at the Constitutional

32. *10 Reasons Why America's First Constitution Failed*, *supra* note 29. Though the colonies desperately needed organization, even the formation of the Articles of Confederation government lacked efficiency. For example, it took until 1781—a year and a half after being submitted for consideration—for all thirteen colonies to actually adopt the Articles. *Id.*

33. *Id.*

34. *Id.*

35. *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019) (citing Granholm v. Heald, 544 U.S. 460, 472 (2005) (describing the colonies pre-ratification economic struggles); *see also* 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, 752 (2013) ("The central problem was that the Articles of Confederation left the regulation of commerce entirely to the states, which, 'understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole.'" (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2615 (2012) (Stevens, J., concurring)); Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since* Lopez: *A Survey*, 32 CAP. U. L. REV. 671, 715 & n.309 (2004) (citing Roger Pilon, *Freedom, Responsibility, and the Constitution, On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 533–34 (1993)).

36. Bane, *supra* note 31, at 122 (quoting S. Chesterfield Oppenheim, Marketing Laws Survey, in Address Before the National Conference of Interstate Trade Barriers, Chicago (Apr. 15, 1939)).

37. *See Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2461 (quoting *Granholm*, 544 U.S. at 472); *see also* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984) (quoting Hughes v. Oklahoma, 411 U.S. 322, 325 (1979)).

38. Goodson, *supra* note 35, at 761 (citing C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (citing THE FEDERALIST NO. 22, at 143–45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); then citing 2 JAMES MADISON, *Vices of the Political System of the United States*, *in* THE WRITINGS OF JAMES MADISON 362–63 (Gaillard Hunt ed., 1901)). Alexander Hamilton, for example, believed that economic protectionism could ignite more armed conflicts in the future, this time between states that were supposed to be uniting to form a greater union. Mark, III, *supra* note 35, at 715 n.309 (citing THE FEDERALIST, No. 42, at 267–68 (James Madison) (Clinton Rossiter ed, 1961)).

Convention.[39] Ironically, the same colonists who fought the highly centralized regime that was the Crown's rule accepted "a re-constitution of the federal arrangement" in "nearly universal" terms by adopting the Commerce Clause.[40]

Scholars heavily debate the founders' intent.[41] Despite these insightful debates, it is undisputed that the plain text of the Commerce Clause only grants the federal government authority to regulate three aspects of the national economy[42]: (1) international trade,[43] (2) tribal matters,[44] and (3) interstate commerce.[45] Because the Commerce Clause was presented as the solution to discriminatory protectionism, it would make sense that the

39. Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 446 (1941).

40. *Id.* at 443–45 n.49–50 (collecting convention remarks). That is not to say that the founders universally accepted the Commerce Clause. Several delegates voiced concerns about the downstream consequences of another consolidation of federal power, but these concerns were eased by those who articulated the clause's intended narrow scope. *Id.*

41. *Compare* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 103 (2001) (collecting sources that support a narrow view of the commerce clause), *and* Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 703 (1996) (same), *and* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) (same), *and* Abel, *supra* note 39, at 432 (same), *with* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues,* 85 IOWA L. REV. 1, 6 (1999) (advocating broader understanding of the founders' intent for the Commerce Clause), *and* WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 17–18 (1953) (same), *and* WALTON H. HAMILTON & DOUGLASS ADAIR, THE POWER TO GOVERN: THE CONSTITUTION—THEN AND NOW 119–121 (1937) (same).

42. *See* Barnett, *supra* note 41, at 132 (arguing the founders did not intend for Congress's regulatory power "'among the several states'" to wholly "embrace *all* commerce"). Some of the evidence relied on by advocates of a broad interpretation of the Commerce Clause's scope exists in response to arguments raised by anti-federalists that opposed the ratification of the Constitution. For example, James Madison wrote in the Federalist Papers that Congress's powers under the Commerce Clause would be "few and defined" in comparison to state powers, which would "remain . . . numerous and indefinite," in order to try and appease states on the fence about ratification. *Id.* at 132–33 (quoting THE FEDERALIST NO. 45 (James Madison) (Clinton Rossiter ed., 1961)). Others like Alexander Hamilton, by contrast, made more aggressive pronouncements, arguing that to continue under a nation without the Commerce Clause would essentially "clip[] the wings by which we might soar to a dangerous greatness." THE FEDERALIST NO. 11 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Hamilton boldly called on the States to "b[i]nd together in a strict and indissoluble Union, [and] concur in erecting one great American system, superior to the control of all transatlantic force or influence . . . ." *Id.*

43. U.S. CONST. art. I, § 8 (regulating commerce "with foreign nations").

44. *Id.* (regulating commerce "with the Indian Tribes").

45. *Id.* (regulating commerce "among the several States"). Professor Barnett argues that, since Article I, Section 8 contains three distinct grants of power, reading the Commerce Clause as a grant of universal Congressional authority to regulate "would render the phrase 'among the several States' superfluous." Barnett, *supra* note 41, at 132.

drafters designed it to eliminate outward facing trade barriers and not to entirely stifle the states' economic autonomy.[46]

Early Commerce Clause cases suggest that the Supreme Court at least believed that the founders intended for the Commerce Clause to have a narrow scope. Many outcomes turned on the definition of the word "commerce," and statutes often withstood scrutiny when the Court concluded that every aspect of a challenged activity met the Court's definition of commerce.[47] For example, the Court held that Congress could legislate the transportation of lottery tickets,[48] railroad safety standards,[49] employee negligence,[50] and stockyard guidelines.[51] Congress's authority was less clear in other contexts. For example, the Court held that activities like manufacturing and the regulation of child labor[52] either did not qualify as commerce on their face[53] or were disqualified because the legislature was too focused on social issues.[54] The Court also invalidated statutes when Congress focused on activities that had "indirect" effects on interstate commerce,[55] suggesting that the Commerce Clause concerns significant economic enterprises.[56]

The Supreme Court abandoned this formalism during the Great Depression, pivoting away from a definitional approach and toward a holistic analysis.[57] The Court clarified that Congress held authority to regulate three functional categories under the Commerce Clause: (1) the channels of commerce, like highways and rivers; (2) the instrumentalities of commerce, like planes, trains, and automobiles; and, (3) any remaining enterprises that

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46. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1152–53 (2023) (emphasizing the "antidiscrimination principle"); *see also* Bane, *supra* note 31, at 123 (contrasting "[o]ne trade barrier" as being "of little importance to the national economy" with "one thousand" as being "a matter of grave concern").

47. Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1210 (2003).

48. Mark, III, *supra* note 35, at 676 (citing Champion v. Ames, 188 U.S. 321, 357–64 (1903)).

49. Schapiro & Buzbee, *supra* note 47, at 1212 (citing S. Ry. Co. v. United States, 222 U.S. 20, 23, 26–27 (1911)).

50. *Id.* (citing Second Employers' Liability Cases, 223 U.S. 1, 51–52 (1912)).

51. *Id.* at 1213 (citing Stafford v. Wallace, 258 U.S. 495, 516 (1922)).

52. *Id.* at 1210–11 n.36 (citing Hammer v. Dagenhart, 247 U.S. 251, 271–72 (1918); United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895)).

53. *Id.* at 1211 (citing *E.C. Knight Co.*, 156 U.S. at 17–8).

54. *Id.* (citing *Hammer*, 247 U.S. at 271–72). These decisions strike against Alexander Hamilton's view of an expansive Commerce Clause and reinforce a narrow interpretation of the provision's scope. *See id.*

55. *Id.* at 1214 (citing Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1113–14, 1127–28 (2000)).

56. *Id.* (first citing Carter v. Coal Co., 298 U.S. 238, 307–11 (1936); and then citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548–50 (1935)).

57. *See id.* at 1216–17.

"substantially affect[] interstate commerce."[58] The third bucket essentially serves as a catchall that is enormous in scope, evidenced most famously by the case of *Wickard v. Filburn*.[59] *Wickard* addressed the question of whether Congress could penalize farmers for growing too much wheat, even if a farmer grows wheat simply for personal consumption.[60] The Court said Congress could penalize that activity—even though the wheat at issue never crossed a state line.[61] Justice Jackson explained that "[t]he wheat industry has been a problem industry for some years,"[62] and the rest of the world (not bound by the Constitution) would eclipse the United States if that industry went unregulated.[63] Justice Jackson provided the necessary constitutional hook for regulation in one sentence: "Home-grown wheat . . . competes with wheat in commerce."[64] Consequently, the Commerce Clause empowers Congress to capture and regulate purely intrastate commercial activity.[65] The Court used cases like *Wickard* to advance what scholars call the "'plenary power theory," i.e., the notion that the Commerce Clause attaches to "everything . . . in a physically and economically interconnected world, effectively making the power unlimited."[66]

The pendulum swung the other way in 1995. Starting with *United States v. Lopez*, the Supreme Court systematically recalibrated its Commerce

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58. Mark, III, *supra* note 35, at 675 (first citing United States v. Morrison, 529 U.S. 598, 617 (2000); and then citing United States v. Lopez, 514 U.S. 549, 558–59 (1995)).

59. *See generally* 317 U.S. 111, 124–25, 128–29 (1942) (creating a third category of Commerce Clause regulation).

60. *Id.* at 113, 119.

61. *Id.* at 124–25.

> That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. . . . But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier times have been defined as "direct" or "indirect."

Id.

62. *Id.* at 125.

63. *Id.* at 125–26.

64. *Id.* at 128.

65. *See id.*; *but see* Barnett, *supra* note 41, at 146 (explaining the founders likely viewed this language to mean commerce crossing state lines).

66. Mark, III, *supra* note 35, at 728 (quoting Lino A. Graglia, United States v. Lopez, *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 729 (1996) (citing United States v. Morrison, 529 U.S. 598, 640–45 (2000) (Souter, J., dissenting))); *accord* Heart of Atlanta Motel v. United States, 379 U.S. 241, 244 (1964); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("That [commerce] power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'"); Rutkow & Vernick, *supra* note 22, at 750; *see also* Goodson, *supra* note 35, at 746 (citing H. Jefferson Powell, *Reflections on* United States v. Lopez, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 651 (1995)) (calling legislative power from 1937 to 1995 "unlimited" under the Commerce Clause).

Clause framework by reviving some elements of the forgotten definitional formalism that had defined its founding-era cases.[67] In *Lopez*, the Court held that the Gun Free School Zone Act, which sought to limit gun possession near schools, did not sufficiently touch upon interstate commerce to qualify for regulation under the Commerce Clause.[68] The *Lopez* majority also paved the way for future cases by articulating a two-step Commerce Clause test.[69] Under this new test, courts must first determine whether the regulated activity concerns the channels or instrumentalities of commerce.[70] If the targeted activity is unrelated to those categories, then the reviewing court must assess whether the activity falls within the scope of *Wickard*'s aggregation principle.[71] If the activity does, Congress can regulate it. If not, legislation will be invalidated. This renewed judicial scrutiny effectively "read a commercial-purpose requirement back into post-1937 Commerce Clause doctrine,"[72] and the Court would rely upon the new test to invalidate numerous legislative pronouncements, including federal arson statutes,[73] prohibitions of "gender-motivated violence,"[74] and, famously, the Affordable Care Act.[75]

B. The States' Dormant, Yet Significant, Adversary

Even though the Commerce Clause remains the subject of intense scholarly debate, critics and advocates alike agree that the clause's impactful role in constitutional law is well established.[76]

By contrast, the Dormant Commerce Clause is far less safe from scrutiny.[77] Advocates of the theory, including Justice Alito, contend that the

67. *See* Mark, III, *supra* note 35, at 684–87.

68. *Id.* at 684 (citing United States v. Lopez, 514 U.S. 549, 617–18 (1995)).

69. *Id.* at 686.

70. *Id.*

71. *Id.*

72. Schapiro & Buzbee, *supra* note 47, at 1229.

73. *See* Mark, III, *supra* note 35, at 686–87 (citing Jones v. United States, 529 U.S. 848, 850 (2000)).

74. *Id.* at 686 (quoting United States v. Morrison, 529 U.S. 598, 614–19 (2000)).

75. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549, 552–55, 558 (2012) ("Such a law cannot be sustained under a clause authorizing Congress to 'regulate commerce.'").

76. *See, e.g.*, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1152 (2023) (citing U.S. CONST. art. VI, cl. 2) ("Everyone agrees that Congress may seek to exercise this power to regulate the interstate trade of pork, much as it has done with various other products. Everyone agrees, too, that congressional enactments may preempt conflicting state laws.").

77. *See id.* (calling the doctrine "[r]eading between the Constitution's lines"); *see also* Camps Newfound v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.").

founders' decision to grant Congress exclusive authority over interstate commerce via the Commerce Clause creates a negative implication with the force of law.[78] This implication prohibits individual states from interfering with the efficient operation of interstate commercial enterprises, even if Congress has vocalized no desire to legislate in a particular area.[79] Accordingly, the doctrine stands in the way of any state statute that could *even arguably* be considered an "undu[e] restrict[ion] [on] interstate commerce."[80]

Scholars believe that the seminal case of *Gibbons v. Ogden* supports the existence of the Dormant Commerce Clause doctrine.[81] Though the underlying steamboat-centric controversy that sits center stage in *Gibbons* is intriguing,[82] Chief Justice John Marshall's expansive articulation of the Commerce Clause declaration in *Gibbons* has proven foundational.[83] He explained that the Commerce Clause's scope is wide enough to include "every species of commercial intercourse between the United States and foreign nations" and "cannot stop at the external boundary line of each [s]tate, but may be introduced into the interior."[84] Justice Johnson concurred, suggesting that the Commerce Clause gives Congress the exclusive power to regulate interstate commerce.[85] His view was that the "clause negatives the exercise of that power to the States . . . remove[s] every temptation to . . . interfere with the powers of Congress over commerce, and . . . show[s] how far Congress might consent to permit the States to exercise [it]."[86]

78. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019) (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988)); Nat'l Pork Producers Council, 143 S. Ct. at 1152.

79. *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2459 (citing *New Energy Co. of Ind.*, 486 U.S. at 273); *Nat'l Pork Producers Council*, 143 S. Ct. at 1152.

80. *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2459.

81. Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1407 (2004) (citing 22 U.S. 1, 186 (1824)). Chief Justice Marshall's decision in *Gibbons v. Ogden* leaves much of the background to the imagination, so this Article relies on Professor Williams' retelling. *See id.* at 1406 (explaining that "the vast bulk" of background necessary to understand *Gibbons* fails to appear on the face of the case).

82. *See generally id. Gibbons* concerned the New York state legislature's grant to Robert Livingston of an "exclusive privilege" to operate steamboats on New York waters. *Id.* at 1412; *see also Gibbons*, 22 U.S. at 186. When Congress granted Thomas Gibbons "a federal coasting license," the Supreme Court had to decide whether the former preempted the latter. Williams, *supra* note 81, at 1408, 1411–12. The Court ultimately relied upon the Supremacy Clause to decide the case, concluding that the federal license trumped New York's intended monopoly. *Id.* at 1418. Though the Supremacy Clause really sunk Ogden's battleship, *Gibbons* served as the perfect opportunity for the Chief Justice to promote his view of the Commerce Clause.

83. *See* Gibbons v. Ogden, 22 U.S. 186, 187–88 (1824) (questioning the strict construction of the Commerce Clause's power).

84. *Id.* at 193–94.

85. *See id.* at 236 (Johnson, J., concurring).

86. *Id.* at 236–37; *but see* Barnett, *supra* note 41, at 132.

Emphasizing the Chief Justice's point, Justice Johnson implied that some areas of commerce are simply not compatible with state regulation, even if state regulation would be otherwise amenable to Congress.[87]

The Court continued to tinker with the Dormant Commerce Clause theory in later cases. In *Cooley v. Board of Wardens*, a law requiring vessels traveling in Pennsylvania waters to "receive a [local] pilot," which necessarily burdens a channel of interstate commerce, withstood Dormant Commerce Clause scrutiny.[88] This decision recognized that Pennsylvania has legitimate local interest in controlling river vessel operations; but it also creates an apparent tension with *Gibbons*.[89] The justices observed that different states have varied "systems of regulation, drawn from local knowledge and experience, and conformed to local wants" that guide their decision making and recognized, at least impliedly, that striking down a state law based solely upon a "mere grant to Congress of the power to regulate commerce" could undermine nearly every law in the United States.[90]

The dramatic expansion of the Commerce Clause that took place in the *Wickard* era put *Cooley* to the test. *Gibbons* and *Cooley* obviously touched on core commercial activity, but not every law is about steamboats and sailing vessels. If the Commerce Clause gives Congress the authority to regulate *purely intrastate* activity that—when taken in the aggregate—impacts interstate commercial interests,[91] why would the Dormant Commerce Clause not have such an enormous scope as well?

The Supreme Court attempted to resolve some of the growing tension in its case law in *Pike v. Bruce Church*.[92] *Pike* concerned Arizona's decision to adopt packing standards for perishable fruit and vegetables.[93] The state alleged that Bruce Church's cantaloupe transportation business violated Arizona law and ordered the company to stop sending shipments to California.[94] Bruce Church countered, arguing that the shipment-stopping

87. *Gibbons*, 22 U.S. at 237 (Johnson, J., concurring) ("Beyond those limits, even by the consent of Congress, they could not exercise it. And thus, we have the whole effect of the clause. The interference which counsel would deduce from it, is neither necessary nor consistent with the general purpose of the clause.").

88. 53 U.S. 299, 311, 316, 320 (1852).

89. *Id.* at 319–320.

90. *Id.* at 320.

91. Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) ("That appellee's own contribution to the demand of wheat may be trivial by itself [but] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

92. *See generally* 397 U.S. 137 (1970).

93. *Id.* at 138.

94. *Id.*

order unduly burdened interstate commerce, and the Court agreed.[95] The Court held that Arizona's food-packaging statute, which effectively stopped Bruce Church's cantaloupes from crossing state lines, imposed "a straitjacket" on an entire commercial enterprise.[96] The majority emphasized that Arizona's local interest in promoting the state's brand across the country could not outweigh a clear infringement upon interstate commerce[97] and input these considerations into a brand new analytical test for Dormant Commerce Clause questions. In a controversial single paragraph,[98] the Court created what has come to be known as the *Pike* balancing test:

> Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[99]

Whereas *Lopez* signaled changes in the Commerce Clause landscape, several recent cases also foreshadow how the Court will operate in future Dormant Commerce Clause cases. Three warrant discussion here: (1) *South*

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95. *Id.* at 140–41.

96. *Id.* at 146.

97. *See id.*

98. Transcript of Oral Argument at 15–16, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468).

> [I]sn't this Pike balancing test a bit reading too much into too little? It's one paragraph in a short unanimous opinion and it relies on three very old cases . . . that involve price fixing or price affirmation statutes that, in effect, are a form of discrimination against out-of-state market participants. At least that's how many people in many courts have read them . . . What's wrong with that understanding, especially when the alternative you are selling us appears to be that this Court should engage in a freewheeling balancing test *à la Lochner* to protect an economic liberty rather than defer to state regulation on health and safety?

Id.; *see also* Bair, *supra* note 25, at 2413 n.29 (collecting cases in which individual justices cite *Pike* disapprovingly).

99. *Pike*, 397 U.S. at 142 (citing Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)) (internal citations omitted).

Dakota v. Wayfair;[100] (2) *Tennessee Wine & Spirits Retailers v. Thomas*;[101] and (3) *National Pork Producers Council v. Ross*.[102]

In *Wayfair*, the Court held that South Dakota's mandate requiring out-of-state corporations to collect sales tax did not offend the Dormant Commerce Clause.[103] Relying on *Gibbons*, *Cooley*, *Pike*, and other cases, the Court attacked the pre-2018 "physical presence" rule, which prevented states like South Dakota from requiring online retailers to collect sales tax revenue, as "flawed."[104] The Court overruled precent, invalidating a *per se* physical presence rule in favor of a flexible, case-by-case test that bears some resemblance to *Pike* balancing.[105] *Wayfair* laid important groundwork for later decisions by upholding a key principle: Just because a law reaches actors across state lines does not necessarily mean that the law violates the Dormant Commerce Clause.

A year later, in *Tennessee Wine & Spirits Retailers v. Thomas*, the Supreme Court held that Tennessee's two-year residency requirement for liquor permits violated the Dormant Commerce Clause.[106] Less important than the background of that case is Justice Alito's rearticulation of modern Dormant Commerce Clause principles. After defending the doctrine as "deeply rooted" in history, precedent, and tradition and a more appropriate tool to use to deal with state protectionism than the Import-Export Clause or the Privileges and Immunities Clause of Article Four,[107] Justice Alito dismantled Tennessee's argument that the residency requirement furthered public safety and alleviated health concerns.[108] He said those concerns, which are similar in kind to those mentioned by Justice Jackson in *Wickard*, may be

100. *See generally* 138 S. Ct. 2080 (2018).

101. *See generally* 139 S. Ct. 2449 (2019).

102. *See generally* 143 S. Ct. 1142 (2023).

103. *Wayfair, Inc*., 138 S. Ct. at 2099–2100.

104. *Id.* at 2089–92 (citing Granholm v. Heald, 544 U.S. 460 (2005)); Quill Corp. v. North Dakota, 504 U.S. 298 (1992); Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967); Pike v. Bruce Church, 397 U.S. 137, 142 (1970); Cooley v. Bd. of Wardens, 53 U.S. 299 (1852); Gibbons v. Ogden, 22 U.S. 1 (1824).

105. *Wayfair, Inc*., 138 S. Ct. at 2099. Though the Court rejected the United States' suggestion to screen taxation statutes through *Pike* balancing, the prevailing analytical framework from *Complete Auto Transit, Inc. v. Brady* requires a similar, factual inquiry. *See id.* at 2091 (citing 430 U.S. 274 (1977)). *Complete Auto* demands that states seeking to tax out-of-state corporations must establish "a substantial nexus" between the tax and that corporation's activity. *Id.* at 2099 (citing *Complete Auto Transit, Inc*., 430 U.S. at 279). In the case of a sales tax, mere purchases online by taxpayers is sufficient. *See id.* (citing Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)). That analysis will necessarily lend itself to as-applied challenges rather than rigid, bright-line rulings.

106. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2457 (2019).

107. *Id.* at 2460–61 (citing U.S. CONST. art. 1, § 10, cl. 2; then citing U.S. CONST. art. IV, § 2) ("[W]e reiterate that the Commerce Clause by its own force restricts state protectionism.").

108. *Id.* at 2474.

valid in some cases, but the "mere speculation" and "unsupported assertions" lacking "concrete evidence" presented in *Tennessee Wine* will not carry the day in a typical Dormant Commerce Clause inquiry.[109] This case reaffirms the basic *Pike* balancing inquiry and clarifies that the state carries the burden of defending laws that arguably interfere with interstate commerce with real, rather than hypothetical, justifications. *Tennessee Wine* also illuminates a practical reality: The current Court does not appear to have enough votes to erase the Dormant Commerce Clause from existence.

The third Dormant Commerce Clause case worth mentioning is *National Pork Producers Council v. Ross*. In *Ross*, the Court upheld California's prohibition on "the in-state sale of whole pork . . . from breeding pigs . . . 'confined in a cruel manner.'"[110] Unlike *Tennessee Wine*, where Justice Alito staunchly defended the theory, Justice Gorsuch took an opportunity in *Ross* to question the validity of the Dormant Commerce Clause. Despite having joined the *Tennessee Wine* plurality, he said the Dormant Commerce Clause was created by "[r]eading between the Constitution's lines."[111] In spite of his skepticism, Justice Gorsuch suggested that the Dormant Commerce Clause cases do share a common throughput that he called the "antidiscrimination principle."[112] Justice Gorsuch wrote that absent the existence of a discriminatory trade barrier, which the pork producers in *Ross* expressly disavowed, the voters of the State of California effectively constitutionalized Proposition 12: "policy choices like these usually belong to the people and their elected representatives."[113] Echoing *Wayfair*, the Court rejected the notion that non-discriminatory laws could be automatically invalidated solely on the basis of impacting corporations across a state's own border.[114]

The Court's treatment of the traditional and Dormant Commerce Clauses provides important context for the rest of this Article. Several key takeaways bear repeating. First and foremost, the founding fathers relied on the Commerce Clause, at least in some part, to tackle the growing problem of discriminatory economic protectionism. Accordingly, and especially after the Court's recalibration in *Lopez*, the Commerce Clause is limited in scope, allowing Congress to legislate in areas that are either directly related to

109. *Id.* (quoting Granholm v. Heald, 544 U.S. 460, 490 (2005) (internal quotations omitted)).

110. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1150 (2023) (quoting CAL. HEALTH & SAFETY CODE § 25990(b)(2) (West 2023)).

111. *Id.* at 1152.

112. *Id.* at 1153.

113. *Id.* at 1153, 1160.

114. *See id.* at 1164–65 (discussing the Court's decision not to expand the Dormant Commerce Clause to non-discriminatory laws).

interstate commerce or those activities that impact interstate commerce in the aggregate. Conversely, the Dormant Commerce Clause exists to prevent states from taking actions that otherwise fall into Congress's domain under the traditional Commerce Clause. But the Dormant Commerce Clause is not all-encompassing; it only is triggered in situations that truly impact interstate commerce within the context of traditional Commerce Clause cases. This means that even laws that have extraterritorial effects may still withstand Dormant Commerce Clause scrutiny. Finally, it bears repeating that *Pike* created a test with two exclusive pathways: Either a statute facially discriminates and is subject to harsh scrutiny, or a statute treats out-of-staters and in-staters evenhandedly and consequently triggers a balancing inquiry that measures state priorities and public policy interests against the perceived impact to interstate commerce. The state's priorities must not be speculative or hypothetical. Rather, they must be legitimate interests that support the proliferation of the challenged state statute.

II. MALLORY V. NORFOLK SOUTHERN RAILWAY COMPANY

Part I provides important context that will be useful when examining the United States Supreme Court's June 27, 2023 decision in *Mallory v. Norfolk Southern Railway Company*. The case itself does not concern the Dormant Commerce Clause, but Justice Alito's concurrence brings it directly to the forefront, applying the theory to business registration statutes.[115] Accordingly, this Part briefly discusses the doctrine of personal jurisdiction before proceeding to the background and results of the case, both of which precede a detailed analysis of Justice Alito's concurring opinion.

A. Mallory's Core: A Due Process Dispute

The Fourteenth Amendment prevents the government from taking "life, liberty, or property" without providing "due process of law" to the affected individual.[116] *Mallory* concerned personal jurisdiction, a term of art that describes "the authority of a court to issue a judgment that binds a

115. *See* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2047 (2023) (Alito, J., concurring in part) (opining that a state exercising personal jurisdiction over a lawsuit that lacks any substantial connection to the state violates the Dormant Commerce Clause).

116. U.S. CONST. amend. XIV, § 1.

defendant."[117] Courts may only exercise personal jurisdiction where permitted by the Constitution and an applicable state statute.[118]

The constitutional hook has a storied history grounded in principles of state sovereignty, harkening back to the classic case of *Pennoyer v. Neff*.[119] Personal jurisdiction was at one time "dispute-blind," meaning a court could adjudicate a case so long as the defendant made one qualifying contact with the forum state.[120] Relevant here, this means any corporation guilty of "'doing business'" within a state was sentenced to personal jurisdiction.[121] "[S]ending agents or products into another State" *equated* to physical presence.[122] But everything changed in 1945. The Supreme Court rebuked the *Pennoyer* bright-line rule in *International Shoe Company v. Washington*, holding that mere business contacts—even if they crossed a state line—might still be insufficient bases to create jurisdiction.[123] This potentially small tweak actually enacted "revolutionary" change.[124] Courts suddenly gained the gift of sight, discarding the aforementioned dispute-blind analysis in favor of an approach that judges party relationships rather than latitude and longitude.[125] For corporations, this means that sales, product shipments, and rogue agents do not automatically confer jurisdiction. Rather, they merely *can* under the correct circumstances.

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117. *Mallory*, 143 S. Ct. at 2055 (Barrett, J., dissenting).

118. *Id.* (first citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 290 (1980); and then citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

119. Shaffer v. Heitner, 433 U.S. 186, 197 (1977) (highlighting the *Pennoyer* system's emphasis on the "inherent limits of the State's power"); *see also* Daimler AG v. Bauman, 571 U.S. 117, 125 (2014) (citing Pennoyer v. Neff, 95 U.S. 714, 720 (1878)).

120. Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 665 (2019) (for example, a foreign domiciliary could be hailed into court as a result of having been served with papers during an interstate train ride); *see* Burnham v. Superior Ct., 495 U.S. 604, 628 (1990). In *Burnham v. Superior Court of California*, the United States Supreme Court held that history and "'traditional notions of fair play and substantial justice'" support a rule that perfecting service of process upon an individual physically located within a state's borders, even if that presence is only for a limited time or otherwise transitory in nature, "constitutes due process." 495 U.S. at 619. The *Mallory* court referenced *Burnham* as a useful analogy supporting the legality of jurisdiction-via-registration statutes. 143 S. Ct. 2034, 2040, 2044 ("[I]t is no wonder that we have already turned aside arguments very much like Norfolk Southern's.").

121. Peterson, *supra* note 120, at 667 n.43 (quoting St. Louis Sw. Ry. Co. v. Alexander, 227 U.S. 218, 226–27 (1913)).

122. Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1036 (2021) (Gorsuch, J., concurring). For an in-depth analysis of the United States Supreme Court's recent decision in *Ford*, see Amy L. Moore, *Sweeping General Jurisdiction Under the Specific Jurisdiction Rug: A Doctrinal Map of the Contraction and Expansion of Personal Jurisdiction as Told by* Ford, 93 MISS. L.J. 661 (2024).

123. Peterson, *supra* note 120, at 668–69 (citing 326 U.S. 310 (1945)).

124. Van Detta & Kapoor, *supra* note 20, at 434.

125. *See* Daimler AG v. Bauman, 571 U.S. 117, 126 (2014) (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)) (calling contact evaluation "the central concern" of constitutional personal jurisdiction).

In other words, *International Shoe* created a bipolar due process regime.[126] Each pole affects corporations differently. At the "case-linked" jurisdiction pole, an out-of-state business is subject to specific personal jurisdiction when it "purposefully avails itself of the privilege of conducting activities within the forum State" and those contacts give rise to the plaintiff's cause of action, so long as "traditional notions of fair play and substantial justice" do not counsel against hailing that defendant into a foreign forum.[127] This system benefits both states in the jurisdictional analysis, allowing the forum to protect its domiciliaries against out-of-state bad actors, while reassuring other states that their corporations will only be hailed into foreign courts under limited circumstances.[128] By contrast, general jurisdiction, which sits at the opposite pole, subjects a defendant to suit for any and all claims filed in a jurisdiction that is the corporation's state of incorporation or houses its principal place of business.[129]

Mallory deals with a cheat code to this bipolar system: consent.[130] Unlike subject matter jurisdiction, which is not waivable and is a mandatory prerequisite for any court to hear a case, personal jurisdiction "is a personal constitutional right" which can be affirmatively waived by an out-of-state defendant.[131] Generally speaking, the entire personal jurisdiction analysis ceases if a court concludes that the defendant consented to jurisdiction because no one doubts that it would be fair to honor the defendant's consent.[132]

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126. *See generally Int'l Shoe Co*., 326 U.S. 310 (1945), *aff'd Ford Motor Co*., 141 S. Ct. at 1024 (2021).

127. *Ford Motor Co.*, 141 S. Ct. at 1024–25 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)); *Int'l Shoe Co*., 326 U.S. at 316.

128. *Ford Motor Co*., 141 S. Ct. at 1025 (citing Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773 (2017)); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

129. *Ford Motor Co*., 141 S. Ct. at 1024 (citing *Daimler AG*, 571 U.S. at 137–39). The general jurisdiction framework dramatically changed in 2014. Before then, a corporation was subject to general personal jurisdiction "anywhere the corporation conducted extensive business." Preis, *supra* note 12, at 127. But the Supreme Court's *Daimler AG v. Bauman* decision curtailed that rule, replacing it with the aforementioned business-friendly alternative. *Daimler AG*, 571 U.S. at 142.

130. *See* Preis, *supra* note 12, at 129 (discussing plaintiffs' use of consent to establish personal jurisdiction in some cases).

131. *Id.*

132. B. Travis Brown, *Salvaging General Jurisdiction: Satisfying* Daimler *and Proposing a New Framework*, 3 BELMONT L. REV. 187, 195 (2016) (citing Lea Brilmayer, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 755 (1988)) ("[A] party may always consent to personal jurisdiction, since it is a waivable affirmative defense."). Similarly, a defendant can be deemed to have consented to personal jurisdiction via a forum selection clause, though no such clause was involved in *Mallory*. *See, e.g.*, Carnival Cruise Lines v. Shute, 499 U.S. 585, 594 (1991) (upholding consent-based jurisdiction in the context of forum selection clauses).

Even if constitutional due process requirements are satisfied, a relevant state statute must also authorize the exercise of state court jurisdiction. States were quite surprised by *International Shoe*.[133] The decision presented both an opportunity and a burden. On the one hand, *International Shoe* paved new roads for states seeking to protect their citizens from harmful, external actors.[134] Each sovereign naturally "desire[s] . . . to have personal jurisdiction over nonresidents coterminous with due process" because doing so provides the greatest benefit to their own public policy objectives.[135] But on the other hand, the departure from geographic formalism brought about uncertainty.[136] Specific personal jurisdiction analysis has become far more exhausting, fact-dependent, and flowchart-spawning than before. Perhaps the analytical framework more readily honors the Fourteenth Amendment's promises,[137] but there is no question that *Pennoyer* was easier for courts.

In the wake of *International Shoe*, Illinois sought to craft a statute that legally stretched its state courts' personal jurisdiction capabilities to the Constitution's outer bounds.[138] If general jurisdiction effectively preserved *Pennoyer*'s legacy, then perhaps states could put more weight on that side of the scale by statute.[139] So, that is what Illinois did. The vast majority of states followed, passing "categorical long-arm statutes" that automatically subject certain types of defendants to personal jurisdiction.[140] Some states expressly define their categories or crafted "catch-all" provisions, and others essentially copied and pasted *International Shoe*'s language into the statutory text itself.[141] Pennsylvania was one of many states that strove to provide its domiciliaries with the greatest possible chances of recovery against out-of-state defendants—without offending the Due Process Clause.[142]

133. *See generally* Van Detta & Kapoor, *supra* note 20.

134. *See id.* at 345 (discussing the use of long-arm statutes as an exercise of personal jurisdiction).

135. *Id.*

136. *See id.* at 348 (discussing the limits of due process when dealing with long-arm statutes).

137. Int'l Shoe Co. v. Washington, 326 U.S. 310, 325 (1945).

138. *See* Van Detta & Kapoor, *supra* note 20, at 342 (expressing how the introduction of a Illinois long-arm statute began the drastic changes in personal jurisdiction).

139. *See id.* (discussing the challenges and disarray placed upon the judiciary in the wake of *International Shoe*).

140. *Id.* at 344 n.3.

141. *Id.* at 345–46 n.7.

142. *See generally id.*

B. Mallory's Context: Relevant Background

For a long time, Norfolk Southern Railway Company utilized asbestos and other harmful chemicals in its day-to-day operations.[143] During his 20-year stay with the company, Robert Mallory was just one of the many employees exposed to those substances.[144] Sadly, doctors later diagnosed Mallory with cancer.[145] He brought a negligence lawsuit against Norfolk Southern under a federal worker's compensation statute, and the case eventually made its way to the United States Supreme Court.[146]

Why did, what sounds like, a fairly typical state court lawsuit make it all the way up to the Supreme Court? Well, for reasons not yet adequately explained,[147] Mallory sued Norfolk Southern in Pennsylvania.[148] This was an odd venue choice. Despite having previously lived in Pennsylvania, Mallory did not live in Pennsylvania on the day that he filed his complaint.[149] Nor is Norfolk Southern a corporate citizen of Pennsylvania, at least in the traditional sense.[150] Though it is undisputed that the railway employs plenty of residents and laid hundreds of miles of railroad ties in Pennsylvania,[151] Mallory never stepped foot on any of those railroad lines or even worked a single shift there.[152] Consequently, any theory based on specific personal jurisdiction was a no-go. So too would general jurisdiction, because Pennsylvania is neither Norfolk Southern's place of incorporation nor its "principal place of business."[153] These salient abnormalities pushed Norfolk Southern to file a motion to dismiss Mallory's complaint for lack of personal

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143. *See* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2032 (2023) (stating that Norfolk Southern Railway Company used asbestos on boxcar pipes and other chemicals in the paint shop).

144. *Id.*

145. *Id.*

146. *Id.* at 2032–33.

147. *See* Transcript of Oral Argument at 49, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (No. 21-1168). Mallory's counsel offered the following explanation at oral argument:

> Mr. Mallory used to live, not in Philadelphia, in Pennsylvania, and his lawyers are from there. The union lawyer who initially solicited for this case and then made a referral, both of those counsel were in Pennsylvania, in Philadelphia, but I won't pretend for a moment that those ground jurisdiction. They have nothing to do with jurisdiction. Those contacts are not sufficient to create jurisdiction.

Id.

148. *Mallory*, 143 S. Ct. at 2032.

149. *Id.* at 2032–33.

150. *Id.* at 2033.

151. *Id.* at 2033, 2041–42 (pointing out that the railway "boast[ed] . . . its presence" through several fact sheets).

152. *Id.* at 2032–33.

153. *Id.* at 2039 (quoting Ford Motor Co. v. Mont. Eighth Jud. Dist. Court, 141 S. Ct. 1017, 1024 (2021) (Gorsuch, J., concurring in judgment)).

jurisdiction.[154] Under normal circumstances, Norfolk Southern could have been confident about its odds of success.

One arrow remained in Mallory's quiver, however, because some representative of Norfolk Southern—perhaps many decades ago—filed a piece of paper in a state office "in exchange for status as a registered foreign corporation and the benefits that entails."[155] Mallory argued that the physical act of filing that single piece of parchment constituted Norfolk Southern's consent to suits in Pennsylvania state court for any and all causes of action regardless of their connection, or in this instance lack thereof, to the forum.[156] Pennsylvania's Supreme Court rejected his theory.[157] Fortunately for Mallory, the Georgia Supreme Court had reached the opposite conclusion in a similar case,[158] creating a split that provided an enticing legal basis for a successful petition for writ of certiorari to the United States Supreme Court.[159] Mallory's "sole question" for the Court[160] was "[w]hether the Due Process Clause of the Fourteenth Amendment prohibits a State from requiring a corporation to consent to personal jurisdiction to do business in the State."[161]

Before Norfolk Southern filed its response, numerous amici raised questions about the validity of using business registration statutes to subject companies to general personal jurisdiction under the Dormant Commerce Clause.[162] So, Norfolk Southern incorporated that tangent into its argument, writing that allowing a consent-based jurisdictional scheme to stand would require the Court to "dust off and modernize the fact-specific *Pennoyer*-era cases" on the matter.[163] Notable amici like Solicitor General Elizabeth

154. Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 547, 551 (Pa. 2021), *overruled by Mallory*, 143 S. Ct. 2028 (2023).

155. *Mallory*, 143 S. Ct. at 2033 (citing *Mallory*, 266 A.3d at 561–63).

156. *See id.* (discussing that Mallory put forth the argument that out-of-state corporations must register and consent to appear in its courts regarding "'any cause of action'" against them as a prerequisite to doing business in Pennsylvania (quoting 42 PA. CONS. STAT. § 5301(a)(2)(i),(b) (2019))).

157. *See Mallory*, 266 A.3d at 564–66.

158. *Mallory*, 143 S. Ct. at 2033 (citing Cooper Tire & Rubber Co. v. McCall, 312 Ga. 422, 863 S.E. 2d 81 (2021)).

159. *See id.* (stating that there is a "split of authority," so the United States Supreme Court "agreed to hear the case.").

160. *Id.* at 2047 (Alito, J., concurring in part).

161. Brief for Petitioner at (i), Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (No. 21-1168).

162. *See* Respondent's Brief at 18, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (No. 21-1168) (citing Brief of Scholars on Corporate Registration and Jurisdiction as *Amici Curiae* in Support of Neither Party at 22–24, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (No. 21-1168)).

163. *Id.* (citing Davis v. Farmer's Coop. Equity Co., 262 U.S. 312, 317 (1923)).

Prelogar,[164] Harvard Law Professor Stephen Sachs,[165] and a group of six professors including Professor Preis also weighed in on the matter.[166] While the Court devoted most of oral argument to Mallory's certified question, several Justices inquired about both the Dormant Commerce Clause and the unconstitutional conditions doctrine.[167] For example, Justice Kavanaugh engaged Mallory's counsel in the following colloquy:

> JUSTICE KAVANAUGH: . . . do you think a state, as we sit here today, . . . [has] the power to exclude out-of-state businesses from that state?
>
> MR. KELLER: Conditioned on consent to jurisdiction, yes, I do.
>
> JUSTICE KAVANAUGH: How about—delete the "conditioned on." Does a state have the power, as we sit here today, to exclude out-of-state businesses from that state's market?
>
> MR. KELLER: It depends on what conditions they're imposing. So not always, but sometimes. And this would definitely be one of the sometimes situations. I'm happy to go more into the dormant Commerce Clause.
>
> *.*.*.*
>
> JUSTICE KAVANAUGH: . . . without any conditions, just the state of Pennsylvania wants to exclude businesses from

164. Brief for the United States as Amicus Curiae Supporting Respondent at 21–22, 33, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (No. 21-1168) ("Petitioner gives no principled reason for exhuming *Pennsylvania Fire* but not contemporaneous Commerce Clause cases that might block this suit.").

165. *See* Brief of Professor Stephen E. Sachs as *Amici Curiae* in Support of Neither Party at 5–6, 22–26, 31–32, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (No. 21-1168) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)) ("As it is understood today, the dormant commerce doctrine may turn out to forbid Pennsylvania from requiring consent to general jurisdiction, on the ground that this requirement unduly burdens interstate commerce.").

166. *See* Brief of Scholars on Corporate Registration and Jurisdiction as *Amici Curiae* in Support of Neither Party at 22–24, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (No. 21-1168) ("[W]hen the plaintiff is not shopping for plaintiff-friendly law or jurors, but instead sues in a natural State convenient to the parties and witnesses, the Commerce Clause is not offended when a registration statute confers jurisdiction.").

167. *See generally* Transcript of Oral Argument, *supra* note 147 (showing Justice Gorsuch, Justice Kavanaugh, Justice Alito inquiring about the Dormant Commerce Clause in *Mallory* oral arguments).

> certain states, from its market, or from certain kinds of businesses from its market, can it do that?
>
> MR. KELLER: Yes. So the reason I accepted the premise is because [of] the unconstitutional conditions doctrine . . . . Your question is a separate one, which is forget unconstitutional conditions . . . are all of these statutes unconstitutional under the negative Commerce Clause? The first point I'd make is, respectfully, that has not been briefed by myself, by my friend. It's an issue for remand, as Professor Sachs says. So I would—I would suggest that we not get into in great detail the dormant Commerce Clause when the actual litigants to this case or controversy will have an opportunity to do so on remand.[168]

But despite this heavy questioning, Mallory did not attack *International Shoe* or its guiding framework. Instead, he touted consent as his only theory.[169] And in line with his requests, all non-due process doctrines were left for remand.[170]

The Supreme Court ultimately sided with Mallory.[171] Justice Gorsuch and his plurality held that Pennsylvania's jurisdiction-via-registration long-arm statute did not offend the Due Process Clause of the Fourteenth Amendment.[172] The consent cheat code worked. Justice Jackson, in her concurrence, reminded readers that the right to be free from personal jurisdiction in an unsavory forum is a personal right subject to waiver.[173] Justice Gorsuch scoured the Court's precedent and found that most corporate jurisdiction cases—including *Daimler A.G. v. Bauman*—featured non-consenting corporate defendants.[174] The plurality pointed to Justice Holmes's 1917 opinion in *Pennsylvania Fire Insurance Company v. Gold Issue Mining*

168. *Id.* at 28–30. The Solicitor General also requested the Court engage in a similar level of restraint. *See, e.g.*, *id.* at 102.

169. *See id.* at 49 ("We're relying on consent and consent alone. Without consent, we don't prevail.").

170. *See* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2033 n.3 (2023) (stating "any argument along those lines remains for consideration on remand").

171. *See id.* at 2044–45 (vacating the Supreme Court of Pennsylvania's decision).

172. *See id.*

173. *Id.* at 2045 (Jackson, J., concurring) (citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982)).

174. *Id.* at 2039 (first citing Daimler AG v. Bauman, 571 U.S. 117, 129 (2014); then citing Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 927–28 (2011); and then citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

& Milling Company as evidence for the contention that history supports Mallory's position.[175]

Pennsylvania Fire concerned Missouri's jurisdiction-via-registration statute.[176] As its name suggests, the Pennsylvania Fire Insurance Company incorporated in Pennsylvania.[177] But thankfully for the plaintiff, Gold Issue Mining & Milling Company, Pennsylvania Fire filed a piece of paper in a government office in Missouri in order to "'transact [any] business'" there.[178] Consequently, when lightning struck a Pennsylvania Fire-insured, Arizona-based Gold Issue building and burnt it to the ground, Missouri qualified as one of several correct forums.[179] Justice Holmes wrote that it was perfectly appropriate to subject a business to personal jurisdiction by consent in any state "where it has appointed an agent to receive whatever suits may come."[180] The *Mallory* plurality proved to be fans of this view. "Not every case poses a new question," Justice Gorsuch wrote, as the *Mallory* plurality dragged *Pennsylvania Fire* back into modern personal jurisdiction analysis.[181]

A dismayed dissent followed. Justice Barrett explained her view that the Due Process Clause did not support endless corporate litigation.[182] She and the dissenters pointed out that *International Shoe* arguably did away with most every case of the pre-1945 personal jurisdiction regime.[183] Multiple cases relied upon by the plurality—including *Pennsylvania Fire*—meet that description. In her view, the plurality's decision effectively "gut[s] *Daimler*," sending it and other modern personal jurisdiction cases "halfway out the door" in favor of reviving a century-old case.[184] Consent is not the problem for the dissenters; rather, they believe jurisdiction-via-registration statutes do not qualify for that label.[185] "Corporate registration triggers a statutory repercussion," Justice Barrett wrote, "but that is not 'consent' in a conventional sense of the word."[186] The plurality's decision to permit consent

175. *Id.* at 2033, 2035–38 (citing 243 U.S. 93, 95 (1917)).

176. *Id.* at 2036.

177. *Id.*

178. *Id.* (quoting Gold Issue Mining & Milling Co. v. Pa. Fire Ins. Co. of Phila., 184 S.W. 999, 1003 (1916)).

179. *Id.*

180. *Id.* (citing Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95–96 (1917)).

181. *Id.* at 2045.

182. *See id.* at 2063 (Barrett, J., dissenting).

183. *See id.* ("[P]rior decisions . . . inconsistent with this standard . . . are overruled.") (quoting Shaffer v. Heitner, 433 U.S. 186, 212 & n.39 (1997)).

184. *Id.* at 2062–65.

185. *See id.* at 2057 (Barrett, J., dissenting).

186. *Id.* at 2057.

to overcome *Daimler* and *Goodyear Dunlop Tires Operations v. Brown*'s reserved general jurisdiction framework would allow "[a] [s]tate [to] defeat the Due Process Clause by adopting a law at odds with the Due Process Clause."[187] Only time will tell if *Mallory* enacts the "sea change" feared by the dissent.[188] Those murky waters lie beyond the scope of this Article.

187. *Id.*
188. *Id.* at 2065.

C. Mallory's Periphery: Justice Alito's Concurrence

Thanks to the joint efforts of amici, questioning at oral argument, and the end result of the case, the future is, relatively speaking, less likely to involve Due Process disputes. Even though both the plurality and dissent respected the parties' wishes by refraining from addressing the Dormant Commerce Clause and unconstitutional conditions doctrines,[189] Justice Alito took a different path. He is "not convinced . . . that the Constitution permits a State to impose such a submission-to-jurisdiction requirement" without offending the Commerce Clause.[190]

Alito's argument is ambitious. He begins by retreading the same controversial waters he did in *Tennessee Wine*: A Dormant Commerce Clause theory accompanies the grant of legislative authority to Congress under Article One, Section Eight that allows the judiciary to void state laws impacting interstate commerce.[191] From there, he *assumes* that corporations must have an antecedent right to engage in interstate commerce.[192] With that assumption in hand, he writes that "it stands to reason that this doctrine may also limit a State's authority to condition that right."[193] Justice Alito mimics the plurality's methodology, invoking a century-old decision called *Davis v. Farmers Co-operative Equity Company* to support his conclusion that the Dormant Commerce Clause is a silver bullet to jurisdiction-via-registration statutes.[194]

Davis began in 1920 when a Kansas corporation sued the director of the Atchison, Topeka & Santa Fe Railway Company after the railway lost a grain shipment in Kansas.[195] The corporation brought suit in Minnesota, which allegedly gained jurisdiction over the Kansas railway corporation via its

189. *See id.* at 2033 n.3 (plurality opinion).

190. *Id.* at 2047 (Alito, J., concurring in part). Justice Alito respected the plurality's adherence to *Pennsylvania Fire* and explained his view that Pennsylvania's plaintiff-friendly laws do not affect the personal jurisdiction analysis. *See id.* at 2048 (citing Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co, 243 U.S. 93 (1917)); Mark A. Behrens & Cary Silverman, *Litigation Tourism in Pennsylvania: Is Venue Reform Needed?*, 22 WIDENER L. J. 29, 30–31 (2012)).

191. *Id.* at 2051–52 (first citing BMW of North Am. v. Gore, 517 U.S. 559, 571 (1996); and then citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–96 (1824)). Justice Alito routinely breaks away from other conservative justices like Clarence Thomas and Neil Gorsuch to defend the continued validity of Dormant Commerce Clause doctrine. *See, e.g.*, Tenn. Wine and Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2460 (2019) (cataloguing "vigorous and thoughtful critiques" by fellow conservative justices who go as far as to question the doctrine's very existence).

192. *See Mallory*, 143 S. Ct. at 2052 (Alito, J., concurring in part).

193. *Id.* (first citing Granholm v. Heald, 544 U.S. 460, 472 (2005); then citing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949)).

194. *Id.* at 2052 (citing 262 U.S. 312, 317 (1923)).

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

business registration statute.[196] The Minnesota judge denied the railway's motion to dismiss, and eventually found that the railway was liable for the grain shipment.[197] Perhaps skeptics might claim this was bound to happen to a Kansan defendant since "the transaction was in no way connected with Minnesota or with the soliciting agen[t] located there."[198] The Minnesota Supreme Court affirmed that decision.[199]

Davis, as railway director, successfully petitioned the Supreme Court on the issue of whether Minnesota's business registration statute complies with the Dormant Commerce Clause.[200] The Court promptly reversed the Minnesota Supreme Court.[201] Justice Brandeis focused on whether the railway's activity, rather than the statute itself, fell within the scope of the Commerce Clause.[202] He believed the railway's activity qualified as commerce, and as a result, applying the statute to the railway company would pose burdens on interstate commerce that were "obnoxious" to the Constitution.[203] Brandeis contended that lawsuits themselves create an impermissible burden since most claims at that time went to trial, causing a transient loss of employees due to testimony needs in remote cases that consequently harmed efficiency and "indirectly [generated] heavy expense[s]."[204] "[T]hese are matters of common knowledge," he wrote, but the Court also took judicial notice of Minnesota's heavy docket filled with out-of-state defendants.[205]

Justice Alito's concurrence had to account for another logical hurdle: Does *Davis* comport with modern doctrine? Yes, it does, he answered, because one of two things *must* be true. Either (1) business registration statutes like Pennsylvania's facially discriminate against out-of-state corporations by requiring the appointment of a special agent; or, (2) "at the very least" a balancing inquiry carried out according to the *Pike* framework will favor invalidating these statutes on an as-applied basis in cases like Mallory's, where "an out-of-state company [is forced] to defend a suit

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* (citing Farmers' Co-op. Equity Co. v. Payne, 186 N.W. 130 (Minn. 1921), *rev'd*, 262 U.S. 312 (1923)).
200. *Id.* at 314–15.
201. *Id.* at 318.
202. *See id.* at 315.
203. *Id.*
204. *Id.*
205. *Id.* at 315–16 & n.2.

brought by an out-of-state plaintiff on claims wholly unconnected to the forum State."[206]

Justice Alito's argument tracks an argument made by Professor John Preis in a 2016 law review article, which Alito cited in his concurrence.[207] In that article, Professor Preis contended that the Supreme Court should end the approximately 70-year drought of only subjecting personal jurisdiction cases to scrutiny under *International Shoe* by reinvigorating the *Davis*-style Dormant Commerce Clause analysis back into the equation.[208] Professor Preis provides evidence of at least four 20th century United States Supreme Court cases, including *Davis*, that engaged in this Dormant Commerce Clause inquiry.[209] All of them, he argues, reject state efforts to "steer commerce into or away from a particular state."[210] Professor Preis also points out that a post-1945 case, *Bendix Autolite v. Midwesco Enterprises*, reached a similar conclusion as well.[211] There, the Supreme Court declared Ohio's jurisdiction-via-registration statute unconstitutional because it fully prevented a non-registered foreign corporation from benefitting from a statute of limitations defense.[212] That impact was not clear on the face of the statute, so the Court used *Pike* balancing to invalidate the statute rather than taking the aggressive step of ruling the statute facially unconstitutional.[213]

The Court's decision to use *Pike* balancing in *Bendix Automotive* provides ammunition for Professor Preis's ultimate conclusion: Jurisdiction-via-registration statutes should fail in situations like *Mallory*, where no true connection to the forum is present, rather than be ruled unconstitutional on their face.[214] Justice Alito's assertion that "Pennsylvania's registration-based jurisdiction law discriminates against out-of-state companies," however, overlooks Professor Preis's observation that "jurisdiction-via-registration laws do not facially discriminate . . . . They generally apply to all companies

206. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2054 (Alito, J., concurring).

207. *Id.* at 2053 n.7 (citing Preis, *supra* note 12, at 138–40).

208. *See* Preis, *supra* note 12, at 133 ("The Dormant Commerce Clause once played an important role in personal jurisdiction, and it can do so again.").

209. *Id.* at 132 & n.58 (first citing Denver & Rio Grande W. R.R. Co. v. Terte, 284 U.S. 284, 287 (1932); then citing Mich. Cent. R.R. Co. v. Mix, 278 U.S. 492, 496 (1929); then citing Atchison, Topeka & S.F. R.R. Co. v. Wells, 265 U.S. 101, 103 (1924); and then citing Davis v. Farmers' Coop. Equity Co., 262 U.S. 312, 314 (1923)).

210. *Id.* at 133.

211. *Id.* at 139 (citing 486 U.S. 888, 893 (1988)).

212. *Id.* at 146–47 (citing *Bendix Autolite*, 486 U.S. at 894).

213. *Id.* at 146 n.140 (citing *Bendix Autolite*, 486 U.S. at 891).

214. *See id.* at 125 ("[W]here a nonresident is injured out of state—i.e., the plaintiff is a true forum shopper—the state interest is insufficient, and allowing jurisdiction in such situations violates the Dormant Commerce Clause.").

that desire to do business in the state, regardless of whether the companies also claim that state as their home."[215]

Professor Preis's argument is more nuanced than Justice Alito's concurrence. On the one hand, Professor Preis suggests that jurisdiction-via-registration laws may have discriminatory "practical effect[s]" which violate the Dormant Commerce Clause.[216] But so long as a state's jurisdiction-via-registration statute is being applied to "a state resident . . . or a non-resident injured in state," Preis believes there would be no constitutional problem.[217] On the other hand, even if the Court did not take the practical effects route, Preis believes *Pike* balancing provides another appropriate avenue to invalidate state long-arm statutes under the Dormant Commerce Clause.[218] Though Justice Alito eventually arrives at this alternative conclusion, he does not do so without first advancing the view that these statutes may be facially discriminatory.[219]

215. *Compare* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2053 (Alito, J., concurring in part), *with* Preis, *supra* note 12, at 138 (citing Benish, *supra* note 14, at 1647–61).

216. Preis, *supra* note 8, at 135, 138 (quoting Hunt v. Wash. Apple Adver. Comm'n, 432 U.S. 333, 350 (1977)). In support of this argument, Professor Preis relies on *Hunt v. Washington Apple Advertising Commission*, which involved a statute that "applied to *all* apple producers, in-state and out-of-state alike . . . [but] was nonetheless discriminatory because it 'insidiously operated to the advantage of local apple producers.'" *Id.* at 139–40 (quoting *Hunt*, 432 U.S. at 351).

217. *Id.* at 143.

218. *See id.* at 147.

219. *Mallory*, 143 S. Ct. at 2053 & n.7 (2023) (Alito, J., concurring in part) ("There is reason to believe that Pennsylvania's registration-based jurisdiction law discriminates against out of state companies.").

III. THE CASE AGAINST FACIALLY INVALIDATING BUSINESS REGISTRATION STATUTES

Justice Alito's concurrence encourages sizeable corporate defendants to raise Dormant Commerce Clause challenges to jurisdiction-via-registration statutes.[220] Because the full Court declined to opine on Justice Alito's theory, the task of traversing Dormant Commerce Clause questions will fall to district courts and the United States Courts of Appeal. These courts will need to adopt intentional frameworks for addressing the constitutionality of jurisdiction-via-registration statutes.

The modern Dormant Commerce Clause framework helpfully identifies hurdles that a corporate defendant would have to overcome in order to invalidate a jurisdiction-via-registration statute. The question that would guide courts when considering a claim of facial invalidity is straightforward: Does the statute discriminate against out-of-state corporations? To successfully convince a court that jurisdiction-via-registration statutes discriminate, a corporate defendant will first have to demonstrate that these statutes actually burden interstate commerce.[221] If the corporation overcomes that first hurdle, it would then most likely try to convince the court that modern business registration statutes align with the statutes at issue in *Davis* and that cases like *Davis* comport with modern Dormant Commerce Clause principles.[222] Finally, though perhaps not a mandatory hurdle, the defendant will have to assure the court that a ruling of facial invalidity, as opposed to less drastic alternatives like *Pike* balancing, is appropriate, understanding that foregoing a *Pike*-style balancing inquiry might risk undoing the near

220. Emily W. Black & Sophie Copenhaver, *Antitrust and Business Litigation*, 86 TEX. B. J. 896, 896 (Dec. 2023) ("[C]orporations subject to these [jurisdiction-via-registration] schemes may use Justice Alito's concurrence as a roadmap for asserting new constitutional challenges."); *Personal Jurisdiction General Jurisdiction Consent-by-Registration Statutes* International Shoe *and Its Progeny* Mallory v. Norfolk Southern Railway Co., 137 HARV. L. REV. 360, 369 (Nov. 2023) ("[T]he possible return of the [D]ormant [C]ommerce [C]lause to personal jurisdiction is noteworthy.").

221. *See* United States v. Morrison, 529 U.S. 598, 601–02, 627 (2000); United States v. Lopez, 514 U.S. 549, 617–18 (1995); *cf.* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 895–96 (1988) (Scalia, J., concurring) (addressing the impact of general jurisdiction on interstate commerce). By contrast, some courts have skipped this step, assuming automatically that these statutes must somehow impact interstate commerce. *See, e.g.*, Rodriguez v. Ford Motor Co., 458 P.3d 569, 580 (N.M. Ct. App. 2018), *overruled on other grounds by* Chavez v. Bridgestone Ams. Tire Operations, LLC, 503 P.3d 332 (N.M. 2021).

222. *Compare* Davis v. Farmers' Coop. Equity Co., 262 U.S. 312, 314 (1923), *with* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1165 (2023) (holding that state laws may regulate consumer goods inside the state on "nondiscriminatory terms") *and* South Dakota v. Wayfair, 138 S. Ct. 2080, 2099 (2018).

universal patchwork of long-arm jurisdictional statutes enacted following *International Shoe* to promote maximum state sovereignty.[223]

Part III examines these three hurdles, fleshing out some doctrinal and practical concerns that courts should consider along the way.[224] Then, by way of conclusion, Part III urges courts to defer to *Pike* balancing, which is discussed at some length in Part IV.

A. Applying Lopez and Its Progeny to Jurisdiction-Via-Registration

Do jurisdiction-via-registration statutes *really* bludgeon interstate commerce in a way that violates the Dormant Commerce Clause?[225] One quick answer to this question might be no, if *Cooley* still held significant weight. *Cooley* suggests that the Dormant Commerce Clause should not impact the validity of state action unless Congress regulates in the same general area,[226] and no one disputes that Congress has not enacted a nationwide personal jurisdiction regime for typical lawsuits.[227] Perhaps personal jurisdiction is an issue that itself is meant for the states, providing even more reason to exempt business registration statutes from the Dormant Commerce Clause's reach.[228] However, given the expansive nature of Congress's powers under the Commerce Clause and the fact that the Dormant

223. *See* Van Detta & Kapoor, *supra* note 20, at 343–48.

224. Accordingly, this Article does not go so far as to challenge the Dormant Commerce Clause theory on its face. In other words, this Article proceeds forward on the assumption that the Dormant Commerce Clause still exists as a valid constitutional theory to challenge state statutes. *But see* Camps Newfound v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.").

225. *Cf. Bendix Autolite Corp.*, 486 U.S. at 895 (Scalia, J., concurring) ("Although the Court labels the effect of exposure to general jurisdiction of Ohio's courts 'a significant burden' on commerce, I am not sure why that is.").

226. *See* Cooley v. Bd. of Warden, 53 U.S. 299, 320 (1852).

227. By contrast, Congress has essentially sanctioned some type of national personal jurisdiction through the promulgation of the multi-district litigation statute. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1168–69 (2018). Some scholars have suggested that any Congressional attempt to enact a national personal jurisdiction regime might itself violate the Constitution. *See, e.g.*, Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 883 n.83 (2012) (citing Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in Federal Courts*, 79 NW. U. L. REV. 1, 4 (1984)). The constitutionality of any attempt to regulate personal jurisdiction at the national level is not relevant to this discussion, but what is relevant is the very fact that Congress has not previously waded into this territory outside the context of multidistrict litigation.

228. *Cf. Bendix Autolite Corp.*, 486 U.S. at 897–98 ("I would . . . leave essentially legislative judgments to the Congress . . . . 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.").

Commerce Clause exists in contradistinction to that immense power, it is unlikely that a state's exercise of personal jurisdiction is entirely exempt from scrutiny.[229]

This begs the question: Would personal jurisdiction be an issue of the sort that falls within Congress's power to regulate? Jurisdiction-via-registration statutes certainly are not designed to regulate the channels or instrumentalities of interstate commerce, even if litigants traveling to a courtroom might opt to proceed on state highways or by plane.[230] The question then becomes whether jurisdiction-via-registration statutes "hav[e] a substantial relation to interstate commerce," meaning they "substantially affect interstate commerce."[231] The Gun Free School Zone Act did not meet this standard in *Lopez*, despite the Government presenting three apparently plausible theories for how gun possession near schools impacts the national economy.[232] The Court rejected the Government's assertions that (1) insurance costs in response to violent crime harm the general population; (2) invalidating the statute could disincentivize interstate travel; and (3) allowing guns near schools will undermine the education system, all on the basis that they lacked any limiting principle.[233] The Court exclaimed, "we are hard pressed [under those rationales] to posit any activity by an individual that Congress is without power to regulate."[234] *United States v. Morrison* and *National Federation of Independent Business v. Sebelius* reaffirmed this line of logic, reasoning that a statute only addresses interstate commerce if it addresses an "economic endeavor."[235]

At first glance, it may seem strange to analogize to *Lopez* in this context. *Lopez*, after all, concerned an enactment by the federal government and whether Congress acted constitutionally.[236] But the Dormant Commerce Clause is an inverse reflection of Congress's power to regulate. In other words, if an issue is not significant enough to constitute interstate commerce,

229. *See, e.g.*, *Lopez,* 514 U.S. at 559 (citing Maryland v. Wirtz, 392 U.S. 183, 196 (1968); then citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)) (extending the Commerce Clause's scope to cover any activity that, taken in the aggregate, "substantially affect[s]" interstate commerce).

230. *See* Mark, III, *supra* note 35, at 686 (citing United States v. Lopez, 514 U.S. 549, 617–18 (1995)).

231. *Lopez*, 514 U.S. at 559 (first citing *NLRB*, 301 U.S. 1, 37 (1937); and then citing Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).

232. *See id.* at 563–64.

233. *See id.* at 563–64 (citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 253 (1964); United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991)).

234. *Id.* at 564.

235. United States v. Morrison, 529 U.S. 598, 611 (2000) (citing *Lopez*, 514 U.S. at 559–60); Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 552–57 (2012).

236. *Lopez*, 514 U.S. at 551 ("We hold that the Act exceeds the authority of Congress 'to regulate Commerce . . . among the several states . . . .'" (quoting U.S. CONST. art. 1, § 8, cl. 3)).

then Congress could never regulate it, and the Dormant Commerce Clause cannot be triggered in opposition to a state statute. The definition of interstate commerce, then, remains the same in both traditional and Dormant Commerce Clause analyses. Thus, the question that a court should ask is whether the exercise of personal jurisdiction itself is an act that substantially affects interstate commerce such that Congress *could* regulate it, all other constitutional concerns aside.

Justice Brandeis provides some answer to this question in *Davis*, but not one that is immune from criticism.[237] Justice Brandeis cast Kansas's statute in *Davis* as a "[s]olicitation of traffic by railroads" and contended that such solicitations to engage in business are "a recognized part of the business of interstate transportation."[238] Perhaps Justice Brandeis was correct in the sense that a typical business solicitation could factor into the broader national economy, but his reasoning in *Davis* relied upon the premise that jurisdiction-via-registration statutes operate as the functional equivalent of business solicitations. Even if Justice Brandeis were correct about the mechanics of that particular 1920 Kansas statute, modern long-arm regimes and consent to registration statutes certainly do not operate as solicitations. They are ex-post rules of the road, not ex-ante conditions upon corporate existence.[239]

Moving past the solicitation point, it is also worth examining Justice Brandeis's argument that the exercise of personal jurisdiction itself could unduly burden interstate commerce.[240] According to *Davis*, the

237. Nor are any of its progeny handed down prior to *International Shoe*. True, Justice Brandeis's opinion received substantial support in the years that followed. The first instance came in *Atchison, Topeka & Santa Fé Railway Company v. Wells* where Justice Brandeis got the opportunity to reaffirm *Davis* in a short, three-paragraph holding. *See* 265 U.S. 101, 103 (1924). The facts of *Davis* were "substantially identical" to *Michigan Central Railroad Company v. Mix*, so the Court really did not question Justice Brandeis' logic. 278 U.S. 492, 494 (1929). And by *Denver & Rio Grande Western Railroad Company v. Terte*, the Court believed that the assumptions baked into *Davis* were obvious. 284 U.S. 284, 287 (1932). None of these cases ever wrestled with Justice Brandeis' necessary assumptions, and eventually the tectonic *International Shoe* shift to due process analyses all but disposed of *Davis*' relevance. *See* Preis, *supra* note 12, at 123, 132–33 (discussing *International Shoe*'s effect on the Dormant Commerce Clause).

238. Davis v. Farmers Co-op. Equity Co., 262 U.S. 312, 315 (1923) (citing McCall v. California, 136 U.S. 104 (1890)).

239. Whether or not *Mallory*'s business registration statute situation effectively recaptures foreign corporations in a manner offensive to the unconstitutional conditions doctrine is outside the scope of this Article. Justice Gorsuch and his plurality would say no because registration is a manifestation of consent. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 138 (2023); *see also id.* at 147–49 (Jackson, J., concurring); *see also id.* at 150–53 (Alito, J., concurring). But if that consent was unconstitutionally obtained, then maybe the plurality's decision rests on a wobbly stool. *See id.* at 178 (Barrett, J., dissenting) ("The only innovation of Pennsylvania's statute is to make 'doing business' synonymous with 'consent.' If *Pennsylvania Fire* endorses that trick, then *Pennsylvania Fire* is no longer good law.").

240. Though he relies heavily on *Davis*, Justice Alito's reasoning also suffers from some pitfalls. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2052 (Alito, J., concurring in part). Justice Alito claims

exercise of personal jurisdiction by a state court imposes economic costs on a defendant, both as a result of the retention of counsel as well as associated court costs and also by virtue of the very act of litigating a case.[241] However, these are really the downstream effects of a court sanctioning an already-filed lawsuit, not the exercise of personal jurisdiction itself.

An advocate for facial invalidity also might argue that personal jurisdiction qualifies as an "economic endeavor" because a district court's decision to allow a lawsuit to proceed opens the floodgates of discovery and trial costs, all of which would be nullified if a suit were dismissed for lack of personal jurisdiction.[242] This argument is not immune from criticism either. On its face, the argument seems to conflate a bar from suit with an affirmative defense. Under the Federal Rules of Civil Procedure, a lack of personal jurisdiction is an affirmative defense, subject to waiver by failure to timely object to the filing of a lawsuit, that companies would have to fight via motion.[243] That differs substantially from something like qualified immunity, which actually bars a defendant from being haled into court for particular types of conduct.[244] This further reinforces the point made above: The plaintiff's lawsuit imposes a burden on the defendant's business, not a court's decision to exercise personal jurisdiction over a particular defendant in line with a state's long-arm statute.[245]

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that the very antecedent right to do business across state lines "is based on the [D]ormant Commerce Clause . . . ." *Id.* (first citing Granholm v. Heald, 544 U.S. 460, 472 (2005); and then citing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949)). But this seems more like an unconstitutional conditions problem than a Dormant Commerce Clause guarantee. By his own admission, the Dormant Commerce Clause is just the negative implication of the general Commerce Clause, which grants a right to Congress. *See* U.S. CONST. art. 1, § 8. Perhaps this is why Justices Gorsuch and Thomas suggest that other avenues such as the Import-Export Clause or the Privileges and Immunities Clause should be recalibrated to confer positive rights instead of relying on the Dormant Commerce Clause's otherwise negative function. *See, e.g.*, Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2460 (2019) (first citing U.S. CONST. art. 1, § 10, cl. 2; and then citing U.S. CONST. art. IV, § 2); *see generally id.* at 2478–84 (Gorsuch, J., dissenting) (criticizing modern Dormant Commerce Clause doctrine).

241. *See Davis*, 262 U.S. at 315.

242. *See* United States v. Morrison, 529 U.S. 598, 611 (2000) (citing United States v. Lopez, 514 U.S. 549, 559–60 (1995)).

243. *Compare* FED. R. CIV. P. 12(b)(2) (permitting motions to dismiss on the basis of a lack of personal jurisdiction), *with* Estate of Perry v. Wenzel, 872 F.3d 439, 460 (7th Cir. 2017) (citing Washington v. Haupert, 481 F.3d 543, 547 (7th Cir. 2007)) (describing qualified immunity in circumstances where the law is not clearly established as "a bar to suit").

244. *See generally Estate of Perry*, 872 F.3d at 460 (explaining that qualified immunity can prevent a defendant from being brought into court under certain circumstances).

245. *See Davis*, 262 U.S. at 315. Justice Brandeis seems to agree with this point even though he does not say so explicitly, acknowledging that businesses will need to send witnesses to the plaintiff's state. *See id.* The lawsuit imposes the burden, not a state's imposition of personal jurisdiction, even if the latter is a necessary prerequisite to a successful suit.

Additionally, the legal costs argument suffers from a speculation problem, which *Tennessee Wine* all but confirmed sinks the Dormant Commerce Clause ship.[246] Even in *Bendix Autolite*, which Professor Preis cites favorably in his 2016 article, Justice Scalia heavily criticized the notion that a state's exercise of personal jurisdiction really amounts to impermissible interference with interstate commerce:

> I cannot confidently assess whether the Court's evaluation and balancing of interests in this case is right or wrong. Although the Court labels the effect of exposure to the general jurisdiction of Ohio's courts "a significant burden" on commerce, I am not sure why that is. In precise terms, it is the burden of defending in Ohio (rather than some other forum) any lawsuit having all of the following features: (1) the plaintiff desires to bring it in Ohio, (2) it has so little connection to Ohio that service could not otherwise be made under Ohio's long-arm statute, and (3) it has a great enough connection to Ohio that it is not subject to dismissal on *forum non conveniens* grounds. The record before us supplies no indication as to how many suits fit this description (even the present suit is not an example since appellee Midwesco Enterprises was subject to long-arm service), and frankly I have no idea how one would go about estimating the number. It may well be "significant," but for all we know it is "negligible."[247]

If the lawsuit were not to blame for the economic burden on businesses, then what would be the limiting principle of *Davis*'s logic?[248] Procedural statutes, like "virtually all state laws[,] create ripple effects beyond their borders."[249] Even if state long-arm statutes pave a road for lawsuits to travel on, they are ultimately just a tool.[250] If a court thought that the use of a long-

246. *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2474 (2019) (disclaiming state interests based on unsupported allegations); *see also* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 896 (1988) (Scalia, J., concurring) ("[I]t seems to me we can do no more than speculate.").

247. *Bendix Autolite Corp.*, 486 U.S. at 895–96 (Scalia, J., concurring) (cross-references omitted).

248. *Cf.* United States v. Lopez, 514 U.S. 549, 564 (1995) (explaining that the government's proposed regulatory justifications left the Court "hard pressed to posit any activity by an individual that Congress is without power to regulate").

249. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1165 (2023).

250. *Cf. Bendix Autolite*, 486 U.S. at 896 (Scalia, J., concurring)

> A person or firm that takes the other alternative, by declining to appoint a general agent for service, will remain theoretically subject to suit in Ohio (as the Court

arm statute was unfair under the circumstances, *International Shoe* protects the out-of-state defendant by operation of prevailing personal jurisdiction doctrine.

The thought that companies might prefer to take their case to trial and seek a reasonable jury verdict seems antiquated.[251] It reflects the age-old *Pennoyer* mentality that if a company is tagged by its business, it is essentially held hostage by the plaintiff.[252] But this is not really the case, certainly at least not since *International Shoe* was decided in 1945. *Mallory* stands for the basic premise that a company seeking to fight the plaintiff's claims at trial can simply consent to personal jurisdiction regardless of the existence of jurisdiction-via-registration statutes.[253] Meanwhile, if a foreign corporation believes it should not have to wait on an empaneled jury of its peers to decide its fate, the Federal Rules allow it to challenge personal jurisdiction on Due Process grounds.[254] *International Shoe* ended the *Pennoyer* hostage situation; *Davis* is still stuck in that bygone era.[255]

Even older cases also provide an interesting foil to *Davis*. For example, Kansas's business registration statute was also at issue in *International Textbook Company v. Pigg*.[256] There, a company founded in Pennsylvania (where else) objected to Kansas's business registration statute which demanded a foreign company consent to service of process "as a condition

> says) "in perpetuity"—at least as far as the statute of limitations is concerned. But again, I do not know how we assess how significant a burden this is, unless anything that is theoretically perpetual must be significant . . . . [I]t does not seem terribly plausible that any real-world deterrent effect on interstate transactions will be produced by the incremental cost of having to defend a *delayed* suit rather than a *timely* suit.

Id.

251. *See Davis*, 262 U.S. at 315 (discussing what motivated companies to go to trial in the 1900's).

252. *See* Daimler AG v. Bauman, 571 U.S. 117, 130 n.8 (2014) (citing Goodyear Dunlop Tires Operations v. Brown, 564 U.S. 915, 928 (2011)).

253. *See* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2045 (2023) (Jackson, J., concurring) (citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982)); *see also* Preis, *supra* note 12, at 129 (discussing defendant's ability to consent to personal jurisdiction).

254. *See* FED. R. CIV. P. 12(b)(2).

255. Whether or not *Mallory*'s business registration statute situation effectively recaptures foreign corporations in a manner offensive to the unconstitutional conditions doctrine is outside the scope of this Article. Justice Gorsuch and his plurality would say no because registration is a manifestation of consent. *See Mallory*, 143 S. Ct. at 2044 (2023); *see also id.* at 2045 (Jackson, J., concurring); *see also id.* at 2047–49 (Alito, J., concurring). But if that consent was unconstitutionally obtained, then maybe the plurality's decision rests on a wobbly stool. *See id.* at 2063 (Barrett, J., dissenting) ("The only innovation of Pennsylvania's statute is to make 'doing business' synonymous with 'consent.' If *Pennsylvania Fire* endorses that trick, then *Pennsylvania Fire* is no longer good law.").

256. *See generally* 217 U.S. 91 (1910).

precedent to obtaining authority to transact business" there.[257] This statute undoubtedly targets "economic endeavors,"[258] unlike modern jurisdiction-via-registration statutes, by effectively limiting which corporations could enter a market to transact business in the first place and erecting a "trade barrier[]" repugnant to the Commerce Clause.[259] Under modern Dormant Commerce Clause analyses, the statute at issue in *Pigg* would certainly violate the anti-discrimination principle.[260]

This brings the discussion full circle, back to the original grievances of the founding fathers and the entire purpose of the Commerce Clause. Article One, Section Eight was designed to prevent states from fighting with their neighbors by statute and engaging in economic protectionism.[261] Though a state might disagree with another state's decision to exercise personal jurisdiction in a particular case, these concerns are more appropriately characterized as ones about due process guarantees or traditions concerning interstate comity.[262] In the more limited context of the Dormant Commerce Clause, however, a personal jurisdiction statute does not seem to equate to a trade barrier that harms the sovereign prerogatives of sister states, and that provides all the more reason to not treat these statutes harshly under the guise of the Dormant Commerce Clause.[263]

If it is true that the Dormant Commerce Clause is meant to operate in circumstances that are contradistinguished from the Commerce Clause, i.e., a state regulating what Congress has specifically chosen not to regulate, then a court should decide the question of whether personal jurisdiction statutes that turn upon corporate registration actually have an economic impact. Based on the reasoning offered in cases like *Davis* and its progeny, statutes unlike the one in *Pigg* do not appear to unduly infringe interstate commerce. Based on that conclusion alone, a district court examining a facial challenge

257. *Id.* at 102 (citing KAN. STAT. ANN. § 1261 (1901)).

258. United States v. Morrison, 529 U.S. 598, 611 (2000) (citing United States v. Lopez, 514 U.S. 549, 559–60 (1995)).

259. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2460 (2019).

260. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153 (2023).

261. Goodson, *supra* note 35, at 761 (first citing C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994); then quoting THE FEDERALIST NO. 22, at 143–45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); and then citing 2 JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES, THE WRITINGS OF JAMES MADISON 362–63 (Gaillard Hunt ed., 1901)).

262. Virginia along with several other states, for example, filed an amicus brief in *Mallory* presenting similar arguments. *See generally* Brief of Virginia et al. as *Amici Curiae* in Support of Respondent, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (No. 21-1168)). Although these states do not wrestle with the Dormant Commerce Clause question presented by Norfolk Southern and other amici, they did assert that allowing states like Pennsylvania to exercise "[g]eneral jurisdiction over foreign corporations would intrude on state sovereignty and have far-reaching adverse consequences." *Id.* at 23.

263. *See Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2460; Bane, *supra* note 31, at 122.

to a jurisdiction-via-registration statute could safely deny a request to invalidate the challenged statute.

B. Modern Statutes Look Nothing Like the Statute in Davis

Even if a court disagreed, concluding that there is some observable impact to interstate commerce that arises from a state's decision to exercise personal jurisdiction over an out-of-state defendant, the court should not automatically yield to *Davis* as a purported silver bullet to jurisdiction-via-registration statutes. Rather, the district court should examine the statute's text to determine whether it discriminates on its face.[264]

Despite citing Professor Preis's 2016 law review article in his concurrence, Justice Alito omitted one of Preis's key observations: "jurisdiction-via-registration [statutes] do not facially discriminate . . . . They generally apply to all companies that desire to do business in the state, regardless of whether the companies also claim that state as their home."[265] None of the jurisdiction-via-registration statutes cited by the *Mallory* plurality purport to impact only foreign corporations.[266] Rather, as *Mallory* points out, they allow out-of-state corporations to "receive the full range of benefits enjoyed by in-state corporations."[267]

Consider the text of Pennsylvania's law. The statute governs the exercise of jurisdiction "between a person and this Commonwealth" based on their "relationship[]" to the forum state.[268] The statute's text expressly targets three types of "[c]orporations": (1) those incorporated in Pennsylvania, (2) those who consent to jurisdiction in Pennsylvania, and (3) those who "carry[] on . . . continuous and systematic part[s] of its general business" in Pennsylvania.[269] The text unambiguously addresses personal jurisdiction in a universal sense, not just as applied to out-of-state corporations as was true in cases like *Pigg*.

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264. *See Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2461 (citing Dept. of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008)).

265. Preis, *supra* note 12, at 138 (citing Benish, *supra* note 14, at 1647–61). Rather, Justice Alito writes, "Pennsylvania's law seems to discriminate" because it "increase[s] [out-of-state companies'] exposure to suits on all claims . . . while Pennsylvania companies generally face no reciprocal burden for expanding operations into another State." Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2053 n.7 (2023) (Alito, J., concurring in part).

266. *See Mallory*, 143 S. Ct. at 2035 (collecting statutes).

267. *Id.*

268. 42 PA. CONS. STAT. § 5301(a) (2023).

269. *Id.* at § 5301(a)(2)(i–iii). The partnerships component of Pennsylvania's statute is laid out the same way. *See id.* § 5301(a)(3).

In this sense, Pennsylvania's statute deals with foreign corporations "even-handedly" for the sake of Pennsylvania's legitimate governmental interest in protecting its domiciliaries, which is addressed in Part IV.[270] True, *Davis* came before *Pike* balancing was created by the Supreme Court. But the nature of Pennsylvania's jurisdiction-via-registration statute fits the basic blueprint of a statute designed for *Pike* balancing.[271]

C. Preserving State Sovereignty and Legislative Autonomy

Even if a district court felt that the exercise of personal jurisdiction might unduly interfere with interstate commerce, *Pike* balancing exists to resolve those concerns by engaging in a balancing test. It is worth noting that not even Professor Preis goes as far as to invalidate these statutes across the board. Even though he argues that these statutes *sometimes* pose discriminatory practical effects on out-of-state companies under cases like *Hunt v. Washington Apple Advertising Commission*, he still concludes that these statutes can pass muster in most typical circumstances.[272]

If a district court disagrees, it would risk creating several downstream public policy consequences that *Pike* balancing seeks to avoid. After all, "there is no such thing as a '*de minimis*' defense" to the Dormant Commerce Clause.[273] *International Shoe* motivated states to enact legislation that would maximize their courts' reach and protect their domiciliaries.[274] Every state has a long-arm statute and, more importantly, *wants* one.[275] Congress, the

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270. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citing Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)).

271. *See id.* (explaining that balancing is best suited for statutes that "regulate[] even-handedly" as opposed to statutes that facially discriminate).

272. Preis, *supra* note 12, at 143.

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

Id.

273. *Id.* at 136, 136 n.82 (first quoting Fulton Corp. v. Faulkner, 516 U.S. 325, 333 n.3 (1996); then citing Associated Indus. of Mo. V. Lohman, 511 U.S. 641, 650 (1994); and then citing Maryland v. Louisiana 451 U.S. 725, 760 (1981)); *but see* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1165 (2023).

274. Van Detta & Kapoor, *supra* note 20, at 345.

275. *See id.* at 343–45; *cf. Nat'l Pork Producers Council*, 143 S. Ct. at 1160 (first citing Moorman Mfg. Co. v. Bair, 437 U.S. 267, 279 (1978); and then citing Lochner v. New York, 198 U.S. 45, 75 (1905)).

intended beneficiary of Article One, Section Eight, has not adopted any contrary statute regulating the exercise of personal jurisdiction. If it had, cases like *Cooley* suggest that the Supremacy Clause would easily end the jurisdiction-via-registration inquiry.[276]

Federalism works both ways. If the interests of federalism are served when a state cannot *clearly* and *intentionally* impede upon Congress's national prerogatives, these interests are also served by judicial abstention in uncertain cases that could reap unintended consequences.[277] As Justice Gorsuch said in *Ross*, "[p]reventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'"[278]

I do not believe that such a clear infraction of the Dormant Commerce Clause necessarily occurs when a state obtains jurisdiction over an out-of-state defendant by virtue of its registration to do business within that state's borders. In fact, the Court's most recent cases including *Wayfair* and *Ross* counsel against ruling that a jurisdiction-via-registration statute violates the Dormant Commerce Clause simply because it has extraterritorial effects.[279] Perhaps that would be enough to trigger Dormant Commerce Clause analysis *if* the National Pork Producers Council had been successful in pushing their extraterritoriality theory at the Court.[280] But it was not. Ultimately, a court would be tasked with deciding whether an intentional, due process-compliant exercise of personal jurisdiction wholly compromises the aims of the Commerce Clause in such a way that jurisdiction-via-registration statutes qualify as substantially affecting interstate commerce. If the Court made the aggressive decision of saying such an exercise of jurisdiction does violate the Dormant Commerce Clause, then it would lurch the United States back to the

> In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant . . . costs and benefits for themselves . . . . Judges cannot displace the cost-benefit analyses embodied in democratically adopted legislation guided by nothing more than their own faith in "Mr. Herbert Spencer's Social Statics."

Id. (citation omitted).

276. *See* Cooley v. Bd. of Warden, 53 U.S. 299, 311, 316, 320 (1852); *see also* U.S. CONST. art. VI, cl. 2.

277. *See Nat'l Pork Producers Council*, 143 S. Ct. at 1165 (citing Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292, 302 (1944) (Black, J., concurring)) (describing the need for "extreme caution" when the court uses the implied authority of the Dormant Commerce Clause).

278. *Id.* (quoting Conway v. Taylor's Ex'r, 66 U.S. (1 Black) 603, 634 (1862)).

279. *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2099 (2018); *Nat'l Pork Producers Council*, 143 S. Ct. at 1164–65.

280. *See Nat'l Pork Producers Council*, 143 S. Ct. at 1164–65 (discussing Petitioner's failure to claim that extraterritorial effects alone were enough to trigger the Dormant Commerce Clause).

days of *Pennoyer* where the only appropriate personal jurisdiction was local personal jurisdiction.[281]

In sum, the Dormant Commerce Clause should not be used to dismantle jurisdiction-via-registration statutes on their face. As Part IV explores, there is an easily administrable alternative framework for ruling these statutes unconstitutional on an as-applied basis. As a threshold matter, there is an argument that jurisdiction-via-registration statutes do not affect interstate commerce in a cognizable way. But even if they do, *Davis* and its progeny are either outdated or based on outlier statutes that truly create trade barriers, unlike Pennsylvania's jurisdiction-via-registration statute.

IV. INSTEAD, COURTS SHOULD USE *PIKE* BALANCING TO ACHIEVE QUALITY OUTCOMES

Fortunately in this instance, the Court sits on the outside looking into the well like the Goat at the beginning of *Aesop's Fable*.[282] Though Pennsylvania's unorthodox statute may not facially discriminate against out-of-state corporations in a manner offensive to the Dormant Commerce Clause, that does not mean there will not be instances, perhaps like *Mallory*, where a jurisdiction-via-registration statute is worthy of invalidation on an as-applied basis.

In the face of a case as arguably absurd as *Mallory*, it is understandable that there might be a strong temptation to admonish forum shopping generally. Mallory's counsel would never admit to forum shopping, yet could not articulate a clear reason why Pennsylvania serves as an appropriate forum.[283] The case is so attenuated that the counsel and justices spent much of their time distinguishing between edgy adjectival modifiers like "foreign squared" and "foreign cubed."[284] However, giving into that temptation by facially invalidating an otherwise due process-compliant personal jurisdiction statute is not the answer. Rather, as Professor Preis suggests, *Pike* balancing is the most appropriate approach to utilize in making context-specific rulings.[285] Under the *Pike* balancing framework, all of the reasons articulated by Justice Brandeis in *Davis* that could not be considered for

281. *See* Burnham v. Superior Ct., 495 U.S. 604, 628 (1990); *see also* Peterson, *supra* note 119, at 665–67 (citing St. Louis Sw. Ry. Co. v. Alexander, 227 U.S. 218, 226–27 (1913)).

282. Æsop, *supra* note 1.

283. Transcript of Oral Argument, *supra* note 147, at 49.

284. *Id.* at 5, 15, 17, 28, 35, 65, 110, 117.

285. *See* Preis, *supra* note 12, at 144. However, outside of the bizarre circumstances of a case like *Mallory*, these statutes should generally be presumed constitutional.

definitional purposes in Part III can come back to the forefront as potential burdens on interstate commerce under the facts of a particular case.[286]

Consider *Rodriguez v. Ford Motor Company*, which represents an example of this kind of analysis in practice.[287] There, the New Mexico Court of Appeals wrestled with a products liability action against Ford Motor Company brought by the estate of a deceased domiciliary motorist.[288] The estate cited New Mexico's long-arm statute, allowing for service on the company's personal representative in the state, as the basis for personal jurisdiction.[289] The Court had tremendous foresight, concluding much like the United States Supreme Court did in *Mallory* that *Pennsylvania Fire* allowed for the assertion of general personal jurisdiction-via-registration.[290] But Ford also raised a Dormant Commerce Clause challenge to New Mexico's law.[291] Though the Court assumed for the sake of argument that the statute burdened interstate commerce, it nonetheless found it constitutional as applied to the facts of that case because the plaintiff was a New Mexico domiciliary.[292]

Pike balancing provided an appropriate, constitutional answer to the question presented by Ford in *Rodriguez*.[293] It stands to reason too that *Pike* balancing could have also supplied a valid answer if the deceased plaintiff had been a Virginia domiciliary, but it just would have flipped the outcome of the case.[294] The *Pike* analysis is straightforward and the outcome is usually quite predictable. If a state law "regulates even-handedly" in the furtherance of "a legitimate . . . public interest," then that law is presumptively constitutional "unless the burden imposed on such commerce is *clearly* excessive in relation to the putative local benefits."[295] When a plaintiff is a state domiciliary or an injury occurs within a state's borders, the local interests are clear.

Jurisdiction-via-registration statutes also serve important institutional interests for the states that enact them, namely promoting their own state's

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286. *See supra* text accompanying n. 200-04.

287. 458 P.3d 569, 579 (N.M. Ct. App. 2018), *overruled on other grounds by* Chavez v. Bridgestone Ams. Tire Operations, LLC, 503 P.3d 332 (N.M. 2021).

288. *See id.* at 572.

289. *See id.*

290. *See id.* at 577–78; *accord* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2032 (2023) (plurality opinion).

291. *See Rodriguez*, 458 P.3d at 578–79.

292. *See id.* at 580.

293. *See id.* at 579 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

294. *See id.* at 579 ("Decedent was a New Mexico resident. Moreover, he suffered injury in this state. New Mexico has an interest in providing a forum for its residents and those injured here.").

295. *Pike*, 397 U.S. at 142 (1970) (emphasis added), *aff'd*, South Dakota v. Wayfair, 138 S. Ct. 2080, 2091 (2019).

sovereignty, maximizing recoveries for their domiciliaries, increasing uniformity in local practice,[296] and, arguably, proliferating litigation consistent with the Constitution.[297] Concerning the final of those reasons, Mallory's counsel argued to the Court that "sovereigns often thought that they had a very compelling interest in opening the doors to their courthouse for anyone, resident or foreigner, and they would mete out justice if they saw a wrong and attempt to right it."[298] All of these reasons and more could, if the Court believes them to be meritorious, line up on the state's side of the ledger. Then a court would balance those interests against those concerns raised by the Supreme Court's older cases, Professor Preis, and Justice Alito, among others, and make a reasoned conclusion.[299]

In the vast majority of cases, most importantly those involving state domiciliaries, jurisdiction-via-registration and long-arm statutes generally should be upheld under *Pike* balancing. The states' policy motivations are legitimate, the statutes do not erect trade barriers, and allowing interstate litigation to proceed does not inherently offend the Dormant Commerce Clause. But, in the rare case like *Mallory* where no state domiciliary is involved, and no act occurred within the four corners of the state, a court could feel comfortable denying personal jurisdiction on that basis. Courts that choose this path preserve the longevity of otherwise valid long-arm statutes while staving off "the *true* forum shopper—the plaintiff who has selected a forum that has no relevance to the suit, save its comparative likelihood to favor the plaintiff."[300]

CONCLUSION

Perhaps it is appropriate to look back at the Fox's actions in *Aesop's Fable* with scorn. Its sneaky strategy to entice the Goat to enter the well screams of bad faith, and that does not sit well with most reasonable readers. But the Fox had a point—there was water at the bottom of the well. The moral of the story remains unchanged, and the same would be true even if it had blatantly lied to the Goat about the existence of water at all. In the end, the message is that escape plans are always valuable.

Justice Alito rightly points out that there is water at the bottom of the well sitting at the intersection of personal jurisdiction and the Dormant

296. *See* Van Detta & Kapoor, *supra* note 20, at 343–48.

297. *See* Transcript of Oral Argument, *supra* note 147, at 42–43.

298. *Id.*

299. Given the aforementioned criticisms of some of those alleged burdens though, I would argue they do not provide much support to a challenger.

300. Preis, *supra* note 12, at 133.

Commerce Clause. *Davis* and related cases provide historical support for the proposition that jurisdiction-via-registration statutes *could* be subjected to some type of analysis under the Dormant Commerce Clause, no matter how antiquated those cases may seem.

That's the reason for this Article. Unlike how consent works under *Pennsylvania Fire*, things have changed in the Dormant Commerce Clause framework in the century since *Davis* was decided by the Court. *Pike* balancing now exists, providing courts with an avenue to make context-specific decisions rather than harsh pronouncements.[301] The Court had time to dramatically expand its Commerce Clause limits[302] *and* substantially retract its scope all within that time.[303] *International Shoe* reshaped personal jurisdiction entirely, and every state in the Union adopted something approximating the Court's holding.[304] And that's not to mention the substantial "changes in the technology of transportation and communication" brought about by the march of industry.[305] The Dormant Commerce Clause is not like consent; it has not had an unwavering character over time. So, mimicking the approach that Justice Gorsuch and the plurality took in *Mallory* and dragging *Davis* 100 years into the future is not really appropriate.

Even if the Court does not find it prudent to abandon the *Davis* line, those cases were all decided prior to the proliferation of state long-arm statutes.[306] Unlike those at issue in *Davis*, *Pigg*, and other cases, modern jurisdiction-via-registration statutes do not facially discriminate[307] nor do they act as trade barriers.[308] The fact that foreign corporations are not domiciliaries and a statute impacts them does not mean that the statute

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

302. *See* Mark, III, *supra* note 35, at 728 (first citing Graglia, *supra* note 66, at 729; and then citing United States v. Morrison, 529 U.S. 598, 640–45 (2000) (Souter, J., dissenting)).

303. *See* Schapiro & Buzbee, *supra* note 47, at 1229; *see also* Mark, III, *supra* note 35, at 684–87.

304. *See* Van Detta & Kapoor, *supra* note 20, at 343–45.

305. Daimler AG v. Bauman, 571 U.S. 117, 126 (2014) (quoting Burnham v. Superior Ct. of Cal., 495 U.S. 604, 617 (1990)).

306. *See generally* Peterson, *supra* note 120; Van Detta & Kapoor, *supra* note 20, at 343–45.

307. *See* Preis, *supra* note 12, at 138 (discussing jurisdiction-via-registration laws lack of discrimination).

308. *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2460 (2019) ("[R]emoving state trade barriers was a principal reason for the adoption of the Constitution.").

necessarily violates the Dormant Commerce Clause;[309] rather, it begs the balancing question.[310]

If the Court takes the Dormant Commerce Clause path and transforms personal jurisdiction doctrine once again, doing so tactfully will provide it with a good escape plan and way out of the Dormant Commerce Clause well. On one side of the spectrum are cases like *Mallory*. Exercising personal jurisdiction in those cases might interfere with interstate commerce because there truly is no forum connection. As Professor Preis suggests, *Pike* balancing can weed those cases out. However, this is the exception, not the norm. The vast majority of cases should proceed more like *Rodriguez v. Ford Motor Company*, allowing a state to permissively exercise jurisdiction pursuant to a validly enacted long-arm statute.

309. *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2096 (2018) ("[T]here is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection.").

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