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"Doing Business": Defining State Control Over Foreign Corporations

William A. Holby

NOTES

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I. INTRODUCTION

The concept of "doing business" was once characterized as a "general policy adopted by the various states by which they attempt to exclude all outsiders from engaging in commercial activities in their boundaries."[1] Such exclusionary purposes reflected traditional hostility toward and distrust of foreign corporations. With the emergence of nationwide corporate activity, however, some states became interested in finding that corporate activity constituted "doing business" in order to procure control over those corporations. In either case, the definition of "doing business" within a particular state varied depending upon the purpose of the inquiry—the reason the state sought either exclusion or control of the corporation.[2]

1. Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018, 1018 (1925).
2. J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION 307 (4th ed. 1978) [hereinafter cited as HELLERSTEIN].

Three distinct purposes are generally recognized as motivating inquiry into whether a foreign corporation is "doing business": subjecting the corporation to suit and service of process; imposing excise taxes upon the corporation for the privilege of doing business within the state; or subjecting the corporation to regulatory legislation.[3] Implicit in these categories is the assumption that "doing business" for purposes of one category may not constitute "doing business" for purposes of another. Thus, a corporation may be conducting its affairs within a state to a sufficient degree to constitute "doing business" for purposes of service of process, yet may not have sufficient contacts to permit state regulatory control. This anomaly has resulted in considerable judicial confusion. For example, courts often have relied on decisions defining "doing business" in one context to justify state assumption of jurisdiction in another because of the absence of a clearly defined standard in either context.[4] The issue whether a corporation is doing business in a particular context is a factual one to be resolved on a case-by-case basis.

Although it is clear that different degrees of activity within a state are required before a corporation will be deemed to be "doing business" in a particular context, no recent attempt has been made to define each level of activity or to analyze the reasons for the distinctions.[5] This Note will attempt to analyze the present status of the term "doing business" or the substitute terminology used to define that level of activity sufficient to subject a foreign corporation to state control in a particular context.[6] After defining the

3. *Id.* In many instances the final category, amenability to regulatory legislation, is limited to cases in which states seek to license the foreign corporation, or require the corporation to "qualify" to do business. This restriction, however, excludes a significant number of situations in which states attempt to subject the foreign corporations to police power regulations, primarily directed at consumer protection. For discussion of these decisions, *see* notes 89-117 *infra* and accompanying text.

4. For example, in Eli Lilly and Co. v. Sav-On-Drugs, Inc., 366 U.S. 276, 288-92 (1961), Justice Douglas, writing in dissent, contended that the majority had uncritically blended three lines of decisions concerning the power of a state to tax an interstate enterprise, to subject it to local suits, and to license it.

5. Perhaps the most significant study was provided in a 1925 article in which the author concluded:

> The business which must be transacted by a foreign corporation to permit service of process must be such as to warrant the inference that the corporation is *present.* To subject such a corporation to taxation for doing business, the transactions must not only show that the corporation is present but also that it is *active.* In order that qualification be rendered necessary, the corporation must not only be present and active, but its activity must be *continuous.*

Isaacs, *supra* note 1, at 1045.

6. In doing so, a historical analysis of the evolution of the concept in each context is necessary for two reasons. First, since the determination whether certain activities constitute "doing business" in a particular context depends upon the facts of each case, any attempt to

degree of activity necessary to permit the state to exercise control in each context, this Note will analyze the accuracy and utility of using terminology such as "doing business" in describing whether corporate activity within a state is sufficient to permit state exercise of legislative[7] or judicial jurisdiction. This Note concludes by proposing that use of such ambiguous language be discontinued in favor of a single due process "nexus" test to be applied as a threshold requirement for the exercise of any state authority, and that legislative jurisdiction be further subject to the commerce clause requirement that legislative demands made with respect to foreign corporations engaged in interstate commerce must not be excessive in relation to the benefits and protection conferred by the state.

II. JUDICIAL JURISDICTION: AMENABILITY OF FOREIGN CORPORATONS TO SERVICE OF PROCESS

The difficulty of defining whether a foreign corporation is "doing business" within a state to an extent sufficient to subject that corporation to service of process resulted from the conflict between the traditional notion that "[t]he foundation of jurisdiction is physical power"[8] and the conception of corporations as artificial persons existing only within the territorial confines of the sovereignty in which they were incorporated.[9] While due process standards for judicial jurisdiction are now governed by *International Shoe Co. v. Washington,*[10] the evolution of judicial perception of the foreign corporation in this context provides insight into these standards. The following discussion will outline this evolution[11] for purposes of later comparative analysis with the due process treatment of legislative jurisdiction over foreign corporations.

A. Consent and Presence: The Early Decisions

The earliest cases dealing with the amenability of foreign corporations to service of process prohibited any action for the recovery

delineate a single rule for each category is unrealistic. Second, a simple synopsis of the most recent decisions in each area fails to provide the background leading to that present status—whether the requisite amount of activities is increasing or decreasing—and thus provides no insight into the future of the concept.

7. Legislative jurisdiction includes jurisdiction to tax corporations, to license them, and to subject those corporations to other forms of state regulatory authority.

8. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

9. Bank of Augusta v. Earle, 38 U.S. 519, 588, 13 Pet. 443, 505 (1839).

10. 326 U.S. 310 (1945).

11. An exhaustive study of the area will not be attempted, since it would not serve the purposes of this Note and would be unjustified in light of the many existing articles concerning in personam jurisdiction in general.

of a personal demand outside the state in which the corporation was chartered.[12] This exemption from suit in any state other than that of incorporation, however, resulted in significant inconvenience and manifest injustice to those injured by the in-state activities of foreign corporations.[13] As corporate transactions assumed national proportions, state courts were compelled to find grounds upon which jurisdiction could be asserted over foreign corporations. Early cases used a number of different rubrics for what was essentially a purely quantitative analysis of the extent to which the foreign corporation was "doing business" in the forum state—an arbitrary approach that was later condemned.[14]

One line of cases reasoned that because corporate activity in a foreign state required express or implied consent[15] from that state, such consent could be conditioned on the foreign corporation's acceptance of service of process in any litigation arising out of corporate activity in the forum state.[16] These "consent" cases, however, did not sanction assumption of jurisdiction on this ground in the absence of a finding that the corporation was "doing business" within the state. In *Old Wayne Mutual Life Association v. McDonough,*[17] an Indiana insurance company was sued in Pennsylvania for payment on an insurance contract. Although Pennsylvania law established a presumption that a foreign corporation doing business in the state had consented to be sued there, Old Wayne's activities in Pennsylvania were minimal.[18] The Supreme Court, therefore, denied jurisdiction to the Pennsylvania courts, stating that consent to service cannot be implied "where it affirmatively appears, as it does here, that the business was not transacted" in the state.[19] The

12. *See, e.g.,* Peckham v. North Parish in Haverill, 33 Mass. (16 Pick.) 274 (1834); M'Queen v. Middletown Mfg. Co., 16 Johns. 10 (N.Y. Sup. Ct. 1819).

13. St. Clair v. Cox, 106 U.S. 350, 355 (1882).

14. *See* notes 29-30 *infra* and accompanying text.

15. A corporation is not a citizen under the privileges and immunities clause, U.S. CONST. art. IV, § 2. *See* Hess v. Pawloski, 274 U.S. 352, 355-56 (1927).

16. Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).

17. 204 U.S. 8 (1907).

18. Old Wayne's only business offices were in Indiana; its officers resided there; it had never been admitted to do business in Pennsylvania nor did it have an office or agency there; and none of its agents were in Pennsylvania at the date of the suit or anytime thereafter. *Id.* at 14.

19. *Id.* at 22. The Court went on to say:

> While the highest considerations of public policy demand that an insurance corporation, entering a State in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another State, although citizens of the former State may be interested in such business.

Supreme Court later held, however, that the requisite degree of "business" would be deemed present when an agent has been appointed expressly to receive service of process[20] or when solicitation of orders within the state is accompanied by certain additional activities.[21]

A second legal basis on which jurisdiction over foreign corporations was asserted required the "presence" of the corporation within the state. This concept was borrowed from *Pennoyer v. Neff*,[22] which held that the authority of every tribunal is restricted by the territorial limits in which it is established—although every state possesses exclusive jurisdiction and sovereignty over persons and property within its jurisdiction, no state can exercise direct jurisdiction over persons or property outside its limits.[23] Five years after *Pennoyer*, the Court applied this doctrine to personal judgments of state courts against foreign corporations.[24] Recognizing the artificiality of the "presence" concept as applied to corporations rather than natural persons, the Court held that service can be made only upon an agent of that corporation, and that such service must be accompanied by proof that the corporation was doing business in the state.[25] An indication of the amount of business activity within a state sufficient to manifest "presence" was provided in

Id. at 22-23. *See also* Newell v. Great W. Ry. Co., 19 Mich. 336 (1869), in which the Michigan court refused to sanction service on a corporate agent who was only casually in the state, and who was not carrying on corporate business there.

20. Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co., 243 U.S. 93 (1917). The Court distinguished *Old Wayne*, in which the foreign corporation neither appointed an agent for service nor was doing business within the state, holding that service is proper whether or not the business out of which the action arose was local if an agent had been expressly appointed. This distinction between express and implied consent, and the fictional use of implied consent as a jurisdictional basis, proved to be longstanding objections to the consent rationale as a basis for assumption of judicial jurisdiction.

21. If the solicitors were authorized to receive payment, Reynolds v. Missouri, Kan. & Tex. Ry., 224 Mass. 379, 113 N.E. 413 (1916), 228 Mass. 379, 117 N.E. 913 (1917), *aff'd mem.* 255 U.S. 565 (1921), or carried on substantial solicitation on a continuous basis, Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917), the corporations were held to be "doing business" and subject to service of process. *But see* Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530 (1907), in which the Supreme Court held that mere solicitation of orders subject to out-of-state acceptance or rejection did not constitute doing business in the forum state.

22. 95 U.S. 714 (1877).

23. *Id.* at 722. The Court stated:

> To give [proceedings for the protection and enforcement of private rights] any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Id. at 733.

24. St. Clair v. Cox, 106 U.S. 350, 353 (1882).

25. *Id.* at 359.

International Harvester Co. v. Kentucky.[26] Characterizing the case as a "close one," the Court stated:

> Here was a continuous course of business in the solicitation of orders which were sent to another State and in response to which the machines of the Harvester Company were delivered within the State of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts . . . . This course of conduct of authorized agents within the State in our judgment constituted a doing of business there . . . .[27]

The paramount element in both the "consent" and "presence" bases of judicial jurisdiction clearly was whether the foreign corporation was "doing business" in the forum state. Resolution of this issue required a confusing factual compilation of the amount of activity carried on within the state. Because this quantitative approach failed to evaluate the burden on a defendant corporation in defending the suit, however, the courts sought a fairer test for permitting the assumption of jurisdiction. The result was *International Shoe Co. v. Washington.*[28]

B. Minimum Contacts and Fundamental Fairness: The Due Process Standard

Dissatisfied with the imprecise nature of the "presence" and "consent" concepts, and seeking a more practical test for determining jurisdiction, the United States Court of Appeals for the Second Circuit, in *Hutchinson v. Chase and Gilbert, Inc.,*[29] contended that "presence" actually contemplated both a quantitative evaluation of the business done—continuous dealings in the state of the forum—and an estimate of the resulting inconvenience from requiring defense of the lawsuit in a particular forum. Rather than confuse

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26. 234 U.S. 579 (1914).

27. *Id.* at 585-86. The Court distinguished Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530 (1907), as involving "mere solicitation" rather than a continuous course of business. The Court concluded:

> We are satisified that the presence of a corporation within a State necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the State, although the business transacted may be entirely interstate in its character.

234 U.S. at 589. "Presence," however, was found lacking in People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918). Stating the "general rule" that "the business must be of such nature . . . as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State" when service is attempted. The Court determined that the foreign corporation's ownership of stock in a local subsidiary, its continued advertising, and its use of soliciting agents within the state did not amount to the doing of business sufficient to subject the corporation to service of process. *Id.* at 87.

28. 326 U.S. 310 (1945).

29. 45 F.2d 139 (2d Cir. 1930).

these inquiries with such terms as "presence" or "consent," however, the court suggested a new phraseology—whether the extent and continuity of the local corporate activity made *reasonable* the assumption of jurisdiction over the foreign corporation by the state's courts.[30] The court's emphasis on convenience proved to have a significant impact on the Supreme Court.

In 1945, the Court decided *International Shoe.* Defendant, a Delaware corporation with its principal place of business in St. Louis, was sued by the State of Washington for contributions allegedly owed to a state unemployment fund. Although International Shoe maintained no Washington office, made no contracts for sale or purchase of merchandise there, and had no stock of merchandise in the state, it carried on significant solicitation activities in Washington. Approximately twelve salesmen under the control of St. Louis managers resided in Washington, exhibited shoe samples there and solicited orders that subsequently were transmitted to St. Louis. The cost of the display rooms in which these samples were exhibited was reimbursed by International Shoe. Relying on earlier decisions indicating that solicitation plus some additional activities manifested corporate "presence" sufficient to render the corporation amenable to suit,[31] the Washington Supreme Court held that the company was doing business to a sufficient extent to subject itself to process. The United States Supreme Court affirmed, formulating a new standard that allowed defendants not "present" within the forum to be nonetheless subjected to jurisdiction if certain minimum contacts with the forum exist such that maintenance of the suit did not offend " 'traditional notions of fair play and substantial justice.' "[32]

30. *Id.* at 141. The court stated that "the loss and inconvenience to ordinary companies from being sued wherever they may chance to have any dealings whatever, cannot properly be ignored, and may constitute a test of jurisdiction . . . ." *Id.*

31. International Shoe Co. v. Washington, 22 Wash. 2d 146, 154 P.2d 801 (1945). The Washington court relied primarily on People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918), International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), and Frene v. Louisville Cement Co., 134 F.2d 511 (D.C. Cir. 1943), all of which emphasized the sufficiency of solicitation for purposes of judicial jurisdiction when in the context of a regular, continuous, and sustained course of business.

32. 326 U.S. at 316, *quoting* Milliken v. Meyer, 311 U.S. 457, 463 (1940). The Court's rejection of the merely quantitative presence or consent tests was clear:

> It is evident that the criteria by which we mark the boundary line between these activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Whether due process is satisifed must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due

One unanswered question[33] after *International Shoe,* however, was under what circumstances a foreign corporation could be subjected to jurisdiction with respect to a cause of action entirely unrelated to the corporation's activities within the forum. That issue was addressed in *Perkins v. Benguet Consolidated Mining Co.,*[34] in which a mining corporation had been forced to leave the Phillippines during World War II. The corporation set up an office in Ohio where files were kept, correspondence was maintained, salary checks were drawn, secretaries were employed, stock was transferred, directors meetings were held, bank accounts were maintained, and the rehabilitation of the corporation was supervised. The corporation was sued in Ohio for overdue dividends. The Court upheld jurisdiction, relying on a statement in *International Shoe* to the effect that, in some instances, corporate activity within a state may be so substantial and of such a nature as to justify suit against it on a cause of action unrelated to the activities carried on within the forum.

The Supreme Court's expansion[35] of the permissible bases of a state's jurisdiction over foreign corporations—from the early total prohibition, to the artificial restrictions of consent and presence, to the minimum contacts and fundamental fairness analysis of *International Shoe*—was construed for a period as minimizing the need for forum state activities by the foreign corporation when the fundamental fairness element was deemed satisfied. This interpretation reached its zenith in *McGee v. International Life Insurance Co.*[36] In *McGee* a California resident had purchased life insurance from an Arizona insurance company. Several years later a Texas insurance company assumed the Arizona corporation's insurance

process clause to insure.

326 U.S. at 319 (citations omitted).

33. Although focusing on sufficiency of the contacts and fairness to the defendant, the Court failed to define adequately the weight to be given each factor or the balance in which the factors were to be held.

34. 342 U.S. 437 (1952).

35. Recently, the First Circuit, in Seymour v. Parke, Davis & Co., 423 F.2d 584 (1st Cir. 1970), stated that *Perkins* was especially significant in that it went beyond and gave specificity to *International Shoe's* concern with fairness to the corporation by stressing the importance of continuous and systematic forum activities:

> [T]he meaning the Court attributed to these words can be understood only in light of the care it manifested in scrutinizing the defendant's precise activities in the forum before it reached the conclusion that [jurisdiction was proper]. No such articulation would have been needed if any minimal concept of presence, or doing business sufficient to obtain jurisdiction for other types of claims, was thought sufficient for nonrelated causes of action.

Id. at 587 (footnote omitted).

36. 355 U.S. 220 (1957).

obligations. Upon the death of the insured, the Texas corporation refused to pay. The beneficiary received a judgment against the insurer in California, but Texas courts refused to enforce it, holding the judgment void for lack of jurisdiction by the California court over the Texas insurer. The insurer had never maintained an office or agent in California, nor had it ever solicited or done any insurance business in California other than to receive premium payments from this particular insured. Despite these almost nonexistent contacts, the Court stated that because of the increasing nationalization of commerce and the consequent decrease in inconvenience of requiring a party to defend itself in a state in which it engages in economic activity, "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations."[37] The Court thus held that because the contract was delivered in California, the premiums were mailed from there, and the insured was a California resident, the California courts could constitutionally exercise jurisdiction. After *McGee* it appeared that a foreign corporation need be doing *no* business in the forum state to be subject to its courts' jurisdiction.

In *Hanson v. Denckla,*[38] however, the Court retreated from its broad holding in *McGee,* stating that "it is a mistake to assume that this trend [toward expanding jurisdiction] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[39] Whereas *International Shoe* and its progeny were construed as emphasizing the need for fairness to and convenience for defendants as opposed to the earlier quantitative evaluation of defendant-forum contacts, the Court in *Hanson* felt compelled to point out the importance of the latter element. The Court observed that the due process clause, while providing immunity from inconvenient or distant litigation, also places territorial limitations on the power of states: "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with the State that are a prerequisite to its exercise of power over him."[40] The Court thus revived the requirement of "doing business", finding it essential that there be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[41]

37. *Id.* at 222.
38. 357 U.S. 235 (1958).
39. *Id.* at 251.
40. *Id.*
41. *Id.* at 253.

Various circuit court decisions have reiterated this requirement that, although assumption of jurisdiction may not inconvenience a foreign corporate defendant, the corporation must nonetheless be carrying on the requisite amount of business within the forum state. In *Seymour v. Parke, Davis and Co.*[42] a Michigan corporation was sued by the representative of a Massachusetts resident who allegedly died from ingesting a drug manufactured by the corporation. The action was brought in a New Hampshire district court in order to avoid the Massachusetts statute of limitations.[43] Although the defendant's activities[44] were assumed sufficient to constitute minimum contacts, the First Circuit refused to permit adjudication of the claim in the New Hampshire court. Demonstrating the interrelationship between the two factors—the state's sovereign authority to adjudicate and the fundamental fairness to the defendant—the court stated that because the defendant's New Hampshire *activities* consisted only of advertising and employing solicitors, *fairness* would not permit the assumption of jurisdiction.[45] The court thus

42. 423 F.2d 584 (1st Cir. 1970).

43. Parke, Davis was admittedly "doing business" in Massachusetts to such a degree as to be amenable to process there. *Id.* at 585.

44. Parke, Davis did no manufacturing in New Hampshire, maintained no office or salesman, had no bank account, was not registered to do business in New Hampshire, and had no agent to receive process there. A branch manager in Massachusetts, however, had supervision over New Hampshire, and six salesmen, all of whom resided in New Hampshire, worked for the defendant by visiting physicians, hospitals and other potential customers to disseminate product information and to take orders, which were forwarded for acceptance to Massachusetts. *Id.*

45. Although the court "assumed" the requisite minimum contacts, and based its holding on the grounds of unfairness, it nonetheless seemed unsatisfied with the authority of the New Hampshire courts over the parties:

> If the plaintiff has some attachment to the forum, or if the defendant has adopted the state as one of its major places of business, we would have no question of the right of the state to subject the defendant to suit for unconnected causes of action. Nor would we even if the forum were not a major center of defendant's business but were nevertheless a community into whose business life the defendant had significantly entered as determined by the quality, substantiality, continuity, and systematic nature of its activities.

Id. at 587.

The Third Circuit provided a clear explanation of the dual nature of *International Shoe* in Jonnet v. Dollar Savings Bank, 530 F.2d 1123 (3d Cir. 1976):

> *International Shoe* posited twin limitations upon the scope of state judicial power. First, out of respect for values of federalism, the due process clause was held to forbid a state to exercise its adjudicatory authority in a manner that would encroach upon the sovereignty of a sister state. . . .
>
> The second jurisdictional limitation interposed by the due process clause focuses upon the parties and the burdens associated with litigating in a particular forum. This limitation upon judicial power prevents a state of a plaintiff's choosing from coercing defense of a suit in a forum which, because of its remoteness from defendant's residence and from witnesses and proof, would be fundamentally unfair. . . .
>
> These two limitations interact conjunctively. Thus a state may exercise its jurisdic-

seemed to regard the elements of contacts—the extent to which the defendant is "doing business"—and fairness in a cumulative sense; the more inconvenience to the defendant, the greater the amount of business done in the forum state must be, and vice versa.

While a foreign corporation thus must be doing *some* business in the forum state in order to be subject to that state's jurisdiction, the issue whether corporate activities constitute the requisite "minimum contacts" must be decided on a case-by-case basis. In *Empire Abrasive Equipment Corp. v. H.H. Watson, Inc.*[46] the court noted that although due process defines a rather low threshold of state interest sufficient to justify exercise of a state's sovereign decisional authority, that threshold "is nonetheless real."[47] In *Empire*, a Pennsylvania corporation conditioned the sale of goods to the defendant Rhode Island corporation[48] upon receipt of a letter of credit from defendant Rhode Island bank. When the buyer later cancelled the order, the seller sued in Pennsylvania court to recover from the buyer for breach of contract and from the bank for failing to honor its letter of credit. The Third Circuit apparently found that the bank had sufficient contacts with Pennsylvania to permit exercise of jurisdiction,[49] but nevertheless denied jurisdiction on grounds of fairness, stating that the bank, by issuing its letter of credit, could hardly have contemplated the resolution of any disputes anywhere but in Rhode Island.[50] As to the Rhode Island buyer, the court stated that the Pennsylvania corporation could not circulate mail order catalogues to distant states and then insist that individual customers respond in Pennsylvania to suits based on catalogue orders.[51]

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tion in a manner consistent with values of federalism, but if that exercise would nevertheless be fundamentally unfair to the defendant, the power is void. Similarly, it may not be unfair to subject a defendant to suit in a particular state, but if that state lacks the requisite contacts with the parties or the subject matter, its assumption of jurisdiction would impermissibly intrude upon another sovereign's right to have its courts adjudicate disputes of interest to it.

Id. at 1140. The Third Circuit therefore reversed a Pennsylvania court's assertion of jurisdiction over property of a party having no contacts with the state, stating that jurisdiction could not be defended simply because "Pennsylvania's proximity to New York does not make defense there by a wealthy bank fundamentally unfair." *Id.* at 1142.

46. 567 F.2d 554 (3d Cir. 1977).

47. *Id.* at 557.

48. The Rhode Island corporation had ordered the goods by telephone from Rhode Island. *Id.* at 556.

49. "[I]t cannot be said that Pennsylvania's interest is so insubstantial that its exercise of decisional authority would impermissibly intrude on Rhode Island's right to have its courts adjudicate." *Id.* at 558.

50. *Id.*

51. Because the two corporations allegedly had more contacts than mere isolated mail-order transactions, however, the court remanded for consideration whether those additional contacts were sufficient to support Pennsylvania jurisdiction. *Id.* at 558-59.

Shaffer v. Heitner[52] provided additional support for the substantive reading given the *International Shoe* requirement of minimum contacts. In applying this analysis to a quasi in rem action,[53] the Court held that mere presence of property within the forum state is not a sufficient contact if the cause of action is completely unrelated to that property. Although the consequences of this holding may be more doctrinal than practical,[54] *Shaffer* demonstrates the Court's desire to restrict to some degree the adjudicatory authority of state courts—in other words, foreign corporations must be doing a greater amount of business than previously thought necessary in order to be amenable to service of process.

The foregoing historical analysis of the extent to which a foreign corporation must be "doing business" in a state in order to be subject to that state's adjudicatory authority is instructive in that it demonstrates two clear trends. From the rigid quantitative analysis applied to foreign corporations in *St. Clair v. Cox,* to the rather minimal requirement of convenience for the defendant suggested in *McGee,* the element of "doing business" became almost nonexistent. Cases since *McGee,* however, have restored the substance of the requirement and thus required the cause of action to be based either on a specific act of the foreign corporation in the forum or on the corporation's engagement in a course of activity sufficiently continuous to manifest an affirmative decision by the corporation to avail itself of the benefits and protection of the forum state. While the facts of each case are determinative, each court will probably evaluate whether the defendant could reasonably have expected under the circumstances to be served with process in the forum. The term "minimum contacts," which previously appeared to be little more than formalistic verbiage, now defines a threshold that, according to the *Shaffer* Court and recent circuit court decisions,[55] is significant.

52. 433 U.S. 186 (1977).

53. Quasi in rem jurisdiction involves the exercise of jurisdiction by a state over property located within that state in order to satisfy personal claims against the property owner if the owner is not subject to the court's personal jurisdiction.

54. *See The Supreme Court, 1976 Term,* 91 HARV. L. REV. 71, 160 (1977) (noting that while the mere presence of the defendant or his property in the forum state is probably insufficient to support jurisdiction over claims unrelated to forum activities, "the presence of either the defendant's person or his property will often signal other relationships with the forum and the controversy that are adequate to support jurisdiction").

55. The circuit courts have noted this aspect of *Shaffer.* The Fifth Circuit read the *Shaffer* decision as suggesting that the liberal construction of the *International Shoe* analysis "may be evolving into a more conservative one, requiring, perhaps, even more contacts than those present in *McGee.*" Smith v. Lloyd's of London, 568 F.2d 1115, 1118 n.7 (5th Cir. 1978). The Eighth Circuit reiterated the Court's holding in *Shaffer,* stating that when the claim sued upon is unrelated to the defendant's forum activities, personal jurisdiction cannot be main-

III. AMENABILITY OF FOREIGN CORPORATIONS TO STATE LEGISLATIVE JURISDICTION[56]

A. *Regulatory Legislation*

Analysis of the validity of state regulatory control over foreign corporations, whether in the form of qualification statutes or police power measures designed for consumer safety, suffers more than that of any other area of state jurisdiction from the lack of a definitive standard.[57] Due process analysis of regulatory legislation, unlike that of tax legislation, is fairly minimal.[58] The crucial issue is whether the control sought to be exercised, or the consequences thereof, results in an unconstitutional burden on interstate commerce. The commerce clause analysis of regulation of foreign corporations, however, is imprecise in defining the point at which the regulation becomes too burdensome. The following discussion will demonstrate this imprecision.

1. The Qualification Requirement for Foreign Corporations

Courts confronted with allegations that a foreign corporation was doing business without having qualified[59] have been hesitant to find that business was done because of the severe consequences of

tained because the defendant has " 'no reason to expect to be haled before [the forum state's] court[s]' " for litigation other than that arising out of its forum related activities. Toro Co. v. Ballas Liquidating Co., 572 F.2d 1267, 1271 (8th Cir. 1978), *quoting* Shaffer v. Heitner, 433 U.S. at 216. It is doubtful that this decision intends to suggest that the holding in *Perkins, see* notes 34-35 *supra* and accompanying text, is no longer valid. Rather, it more likely holds that in order for jurisdiction to be maintained over a cause of action unrelated to the defendant's forum activities, the forum activities must be continuous and systematic, such that defendant could reasonably expect to be subject to service of process in that forum. For cases noting the significance of the minimum contacts/doing business aspect of state court jurisdiction, see Pickens v. Hess, 573 F.2d 380 (6th Cir. 1978) and Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017 (2d Cir. 1978).

56. This term includes taxation, consumer protection and qualification statutes. While this Note maintains the various subcategories of legislative jurisdiction for purposes of the following discussion of their historical development, the general heading of "legislative jurisdiction" will be used to encompass all three for purposes of the proposed analysis, under which all legislative jurisdiction over foreign corporations would be evaluated under the same standard.

57. State legislative jurisdiction is limited by both the commerce and due process clauses, as distinguished from judicial jurisdiction, which is subject only to due process restrictions.

58. Tax legislation must first be justified under a more substantial due process nexus with the subject of the taxation before addressing the question whether the tax imposed unduly burdens interstate commerce. *See* notes 119-35 *infra* and accompanying text.

59. "Qualification" to do business may involve a number of requirements, depending upon the particular state statute. A typical qualification statute may require the filing of an application to do business within the state, payment of fees, consent to service of process within the state, the filing of the corporation's certificate of incorporation, charter, or bylaws, and numerous other formalities.

such a finding. Most often such a finding results in denial of the corporation's right to resort to the state courts. Additionally, fines may be imposed upon the corporation, contracts made by the corporation during the period of noncompliance may be declared void, and in some instances the officers may be held individually liable on corporate obligations incurred in the state while the corporation was not qualified to do business. Early decisions therefore required a high degree of in-state activity before holding a corporation subject to what became referred to as "door-closing" statutes.

The leading case of *International Textbook Co. v. Pigg*[60] demonstrates this judicial reluctance to hold foreign corporations subject to qualification statutes. In *Pigg* a Pennsylvania corporation prepared and published textbooks and other instructional materials for use in correspondence courses, and employed agents to solicit students for the course and to collect payment from those students. The company maintained no office in Kansas, although its agent there procured an office at his own expense. When a Kansas student failed to make payment, the corporation brought a breach of contract action in Kansas. The student contended that the failure of the corporation to comply with the Kansas qualification statute precluded maintenance of the action. The defendant argued that such requirements constituted an impermissible burden on interstate commerce. Although the Supreme Court initially stated that the company's Kansas activities "were not single or casual transactions, such as might be deemed incidental to its general business as a foreign corporation, but were parts of its regular business continuously conducted,"[61] it ultimately held that the corporation was doing business only in interstate commerce. Thus, to the extent the Kansas statute required qualification by corporations engaged in such commerce, it was found to violate the commerce clause.

Such characterization of local activities as only an aspect of an overall interstate business became a typical device used by the Court to avoid finding that a foreign corporation was doing business for purposes of state qualification statutes. When the defendant in *Buck Stove and Range Co. v. Vickers*[62] interposed the plaintiff's failure to qualify as a defense to maintenance of the action, the Court stated, "It is the established doctrine of this Court that a State may not . . . directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another State, lawfully engaged in interstate commerce, is required,

60. 217 U.S. 91 (1909).
61. *Id.* at 104.
62. 226 U.S. 205 (1912).

as a condition of its right to prosecute its business" in a foreign state, to comply with qualification statutes.[63] Similarly, in *Dahnke-Walker Milling Co. v. Bondurant,*[64] a Tennessee corporation purchased grain in Kentucky for shipment to Tennessee. When the corporation later brought suit in Kentucky against the Kentucky seller for failure to deliver the grain, the seller contended that a Kentucky door-closing statute not only precluded maintenance of the suit but invalidated the contract itself. The Court, however, again demonstrated the difficulty of proving that a foreign corporation is doing business for purposes of qualification statutes, stating that interstate commerce includes not only transportation from one state to another, but all commercial intercourse between different states and all the component parts of that intercourse.[65] Therefore, although the contract was made in Kentucky, and was to be wholly performed in Kentucky, the Court determined that because the grain was to be shipped from Kentucky to Tennessee, the actual purchase was only one aspect of an interstate transaction.[66]

The question whether a foreign corporation could ever be engaged in local business to an extent sufficient to permit a state to require the corporation to qualify was answered affirmatively, however, in two later Supreme Court decisions. In *Union Brokerage Co. v. Jensen,*[67] a North Dakota corporation conducted a customhouse brokerage business[68] in Minnesota dealing with the movement of goods into and out of the country. When the corporation brought suit in Minnesota against its former president for breach of fiduciary obligations, the officer interposed in defense the disability of Union to resort to Minnesota's courts for want of compliance with its qualification statute. The Court sustained the defense, holding that Union's business was localized in Minnesota because the corporation purchased materials and services from people in that state and entered into various other business relationships wholly outside of the arrangements it made with importers or exporters.[69] The Court

63. *Id.* at 216.

64. 257 U.S. 282 (1921).

65. *Id.* at 290. The Court went on to say that:

> A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause.

Id. at 291.

66. *Id.* at 292.

67. 322 U.S. 202 (1944).

68. The primary duty of a customhouse broker is to declare the contents and value of goods being shipped into the country, permitting consignees of imported merchandise to "make entry".

69. *Id.* at 208. The Court went on to say that "while the business of Union is that of a

concluded that Minnesota's qualification requirement was valid against Union because it merely sought to regularize the corporation's local activity.[70]

The Supreme Court again upheld application of a qualification statute to a foreign corporation in *Eli Lilly and Co. v. Sav-On-Drugs, Inc.*[71] Lilly, an Indiana corporation, brought suit in New Jersey to enjoin the defendant from selling Lilly products below established minimum prices. The defendant moved to dismiss on the basis of Lilly's failure to qualify. Lilly's New Jersey contacts were substantial—an office was maintained there, a salaried secretary was employed, and eighteen salaried detail men resided in New Jersey, whose duties included visiting pharmacists, physicians, and hospitals to encourage use of Lilly products; taking orders from these retailers for transmittal to New Jersey wholesalers of Lilly goods; examining the inventory of retailers and recommending the supplies needed; and providing free advertising for retail druggists. Citing the New Jersey trial court, the Court stated that " 'to hold under the facts above recited that plaintiff is not doing business in New Jersey is to completely ignore reality.' "[72] In distinguishing between Lilly's interstate and local activities, the majority placed heavy emphasis on Lilly's "domestic business" of inducing one group of local merchants, the retailers, to buy supplies from another group, the wholesalers of Lilly products.[73]

The dissent[74] argued that although Lilly's activities possibly may have constituted "doing business" for purposes of taxation or service of process, this case "falls in neither of those two categories." The apparent basis of Douglas' dissent was that the activities involved were actually nothing more than solicitation, which "has up to this day been on the same basis as doing an interstate business, so far as the protection of the Commerce Clause is concerned."[75] Thus, the majority's distinction between "inducing" sales, a local

customhouse broker, its activities are not confined to its services at the port of entry. It has localized its business, and to function effectively it must have a wide variety of dealings with the people in the community." *Id.* at 210.

70. *Id.* at 211.

71. 366 U.S. 276 (1961).

72. *Id.* at 280, *quoting* Eli Lilly & Co. v. Sav-On-Drugs, Inc., 57 N.J. Super. 291, 300, 154 A.2d 650, 655 (1959).

73. 366 U.S. at 285. Here Justice Harlan, in a concurring opinion, stated that the systematic promotion of Lilly's products among those who could only purchase such products from New Jersey wholesalers did not constitute interstate business that necessarily must be unburdened.

74. *Id.* at 288-92. Justice Douglas was joined in his dissent by Justices Frankfurter, Whittaker, and Stewart.

75. *Id.* at 290.

activity, and "soliciting" sales, which was clearly interstate, was unacceptable to the dissenters.

Subsequent lower court decisions, however, have shown no intent to loosen the "doing business" requirement in qualification statutes, either by distinguishing between "promoting" or "inducing" and mere soliciting or otherwise. The Fifth Circuit rejected the defense of plaintiff's failure to qualify under a door-closing statute even though the plaintiff had utilized salesmen extensively in the state, holding that if such salesmen are sent only to promote interstate business, the foreign corporation is immune from such regulation.[76] The Sixth Circuit denied a similar defense when a Wisconsin corporation sued a Delaware corporation in Michigan for breach of a contract that called for performance entirely within Michigan.[77] The court held that since the contract was actually entered into in Wisconsin, the entire transaction was interstate in character.[78] A recent district court decision[79] demonstrated not only the ambiguity of the term "doing business" for purposes of qualification statutes, but also distinguished such usage from the service of process context.[80] Nevertheless, after defining the rather minimal contacts necessary to confer personal judicial jurisdiction, the court failed to elaborate on the apparently more substantial activities necessary to require qualification.[81]

The Supreme Court again addressed this question in *Allenberg Cotton Co. v. Pittman.*[82] Allenberg, a cotton merchant, maintained its principal office in Memphis. A substantial amount of its business was conducted by sending purchase contracts to an independent

76. Norman M. Morris Corp. v. Weinstein, 466 F.2d 137, 142 (5th Cir. 1972).

77. Alexander Mechanical Contractors Co. v. Owens-Corning Fiberglas Corp., 472 F.2d 834 (6th Cir. 1972). Owens-Corning was to supply labor and materials at a construction project being performed by the plaintiff in Michigan.

78. *Id.* at 836-37; *accord,* Fred Hale Mach., Inc. v. Laurel Hill Lumber Co., 483 F.2d 58 (5th Cir. 1973). Plaintiff, a Louisiana corporation, sued a Mississippi corporation in Mississippi for the balance due on a contract under which defendant had purchased certain equipment from the plaintiff. In rejecting the defense of failure to qualify, the Fifth Circuit noted that negotiations on the contract were conducted in both Louisiana and Mississippi and the plaintiff had arranged to supply components for the equipment from Mississippi and Georgia and had sent employees from Louisiana to Mississippi to assemble the equipment. These additional factors transformed the contract into an interstate transaction that could not be burdened by Mississippi qualification regulations.

79. Rose's Mobile Homes, Inc. v. Rex Financial Corp., 383 F. Supp. 937 (W.D. Ark. 1974).

80. The court noted that " 'doing business' for personal jurisdiction is completely different from 'doing business' under the [qualification statute]." *Id.* at 944.

81. Rather, the court merely stated that because the contract sued upon was not entered into in Arkansas, the Arkansas qualification statute did not apply to the transaction. *Id.* at 944-45.

82. 419 U.S. 20 (1974).

broker in Mississippi, who then would locate cotton farmers to complete the contracts and sell their cotton to Allenberg. When one such contracting farmer failed to deliver the cotton, Allenberg sued in Mississippi and a door-closing statute was raised in defense. The Mississippi Supreme Court upheld the defense, rejecting a commerce clause challenge on the ground that this contract was wholly intrastate in character. The court deemed irrelevant the fact that the purchased cotton was to be immediately shipped in interstate commerce. The Supreme Court reversed,[83] stressing that Allenberg had no Mississippi office, operated no warehouse there, and employed no solicitors in the state, but instead arranged all its contracts through an independent broker. What the Mississippi court had characterized as Allenberg's "perpetual inventory" in the state was held by the Supreme Court to be nothing more than "cotton which is awaiting necessary sorting and classification as a prerequisite to its shipment in interstate commerce."[84]

The lower federal courts have, understandably, not yet discerned the Supreme Court's distinction between business that is purely interstate and that which is sufficiently local to support application of qualification requirements. For example, in *Sar Manufacturing Co. v. Dumas Brothers Manufacturing Co.*,[85] the plaintiff manufactured a product in Texas, Georgia, and Mississippi that was subsequently sold in substantial amounts to the defendant in Alabama. Plaintiff leased a warehouse in Alabama to receive, store, and process the product, and in addition employed several full or part-time employees there. When the plaintiff sued on a note executed by the defendant in Alabama in payment of the product, plaintiff's failure to qualify was raised as a defense. Citing *Lilly*, the Fifth Circuit held that the plaintiff's business had both interstate and intrastate aspects and that its marketing and supply functions were sufficiently localized to require the corporation to comply with

83. In doing so, the Court distinguished *Jensen* and *Lilly* on their facts. *Id.* at 32-33.

84. 419 U.S. at 33. The Court's concluding comments further demonstrate the comparatively great amount of contacts a foreign corporation must have with a state before being subject to its qualification requirements:

> In short, appellant's contacts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a State seeks to require a foreign corporation to qualify to do business. Whether there were local *tax* incidents of those contacts which could be reached is a different question . . . . Whether the course of dealing would subject appellant to *suits* in Mississippi is likewise a different question . . . . We hold only that Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause.

Id. at 33-34.

85. 526 F.2d 1283 (5th Cir. 1976).

Alabama qualification statutes.[86] Yet a 1977 district court decision[87] defined interstate commerce in the qualification statute context in such a way as to provide foreign corporations with almost total immunity, stating that importation into one state from another is the indispensable element of interstate commerce, and that every negotiation, contract, trade, or dealing between citizens of different states that contemplates and causes such importation is a transaction of interstate commerce.[88]

Defining "doing business" for purposes of amenability to qualification statutes on the basis of lower federal and Supreme Court decisions is an elusive task, primarily because of the failure of the Court to provide a clear due process and commerce clause analysis of the facts of each case. Although stating that "doing business" is different for purposes of qualification and service of process, the courts fail to clarify the constitutional reason for the difference. The only fair conclusion that can be drawn from the cases, therefore, is that, based on a rather nebulous conception of interstate commerce as immune from state control—an interpretation of the commerce clause that in most contexts has been abandoned—the courts remain extremely reluctant to subject foreign corporations to the severe consequences that result from finding that the corporation has engaged in local business without having qualified.

2. Amenability to Police Power Regulations

While most courts and commentators subdivide legislative jurisdiction over foreign corporations into the broad categories of taxing and qualification statutes, the latter fails to account for a broad variety of other legislation that is designed for consumer protection. The "licensing" label, a description that more fully covers some of these statutes, is also inadequate because consumer protection statutes do not always require the licensing or qualification of the foreign corporation sought to be regulated. Furthermore, the activities that constitute "doing business" for purposes of these statutes are often considerably less significant than those required before a foreign corporation must qualify. Therefore, while the following discussion of police power regulations may appear in some instances to overlap with the qualification context, the distinction is drawn on the basis of the somewhat broader latitude given the legislatures in

86. *Id.* at 1285-86.

87. Unlaub Co. v. Sexton, 427 F. Supp. 1360 (W.D. Ark. 1977).

88. *Id.* at 1365-66, *citing* Furst & Thomas v. Brewster, 282 U.S. 493 (1931). The court went on to say that interstate commerce comprehends all the component parts of commercial intercourse between different states. *Id.* at 1366.

promulgating such statutes.

The basis for permitting legislative control over foreign corporations engaging in what is admittedly interstate commerce is rooted in the longstanding rule that the commerce clause, in conferring on Congress power to regulate commerce, did not entirely withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power.[89] The clarity of this holding was disrupted temporarily in *Di Santo v. Pennsylvania*,[90] in which a Pennsylvania statute requiring that sellers of steamship tickets be licensed was ruled unconstitutional as a "direct burden" on interstate commerce. The case is perhaps most noteworthy because of the dissenting opinion of Justice Stone, who stated:

> The recognition of the power of the states to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to state regulation and which, because of their local character, as well as their number and diversity, can never be adequately dealt with by Congress.[91]

Stone criticized the traditional test of the limit of state action—whether the alleged interference with commerce is direct or indirect—and concluded that "indirect" simply described a conclusion that, based on a consideration of the nature of the regulation, its function, the character of the business involved, and the actual effect on the flow of commerce, the challenged regulation concerns peculiarly local interests and does not infringe the national interest in maintaining the freedom of interstate commerce.[92]

Justice Stone's position prevailed in *California v. Thompson*,[93] in which he wrote the majority opinion. In *Thompson* the Court deemed valid a California statute requiring licensure of transportation agents,[94] noting that the statute was neither a revenue measure nor an attempt to increase the cost of transportation. Rather, the

89. *E.g.*, Cooley v. Board of Wardens, 53 U.S. 299, 12 How. 298 (1851); Willson v. Blackbird Creek Marsh Co., 27 U.S. 245, 2 Pet. 152 (1829).

90. 273 U.S. 34 (1927). *See also* Shaffer v. Farmers Grain Co., 268 U.S. 189 (1925), in which the Supreme Court invalidated a North Dakota law that regulated the marketing of wheat because approximately 90% of the wheat purchased was shipped in interstate commerce.

91. 273 U.S. at 44. *DiSanto* was subsequently overruled in California v. Thompson, 313 U.S. 109 (1941). *See* notes 93-96 *infra* and accompanying text.

92. 273 U.S. at 44. Stone's objections to the artificial concept of direct versus indirect arose, perhaps more prominently, in the context of tax legislation. *See, e.g.*, notes 136-61 *infra* and accompanying text.

93. 313 U.S. 109 (1941).

94. A transportation agent was defined in the statute as one who "sells or offers to sell or negotiate for" transportation over the public highways of the state. *Id.* at 111.

statute was simply an attempt "to safeguard the members of the public desiring to secure transportation by motor vehicle, who are peculiarly unable to protect themselves from fraud and overreaching . . . ."[95] Such a regulation, though unavoidably affecting interstate commerce, was held to deal primarily with a matter of local concern that was a proper subject of state control.[96]

The Court has made clear, however, that a state may not legislate under the guise of its police powers to promote the economic welfare of its citizens or to guard them against price competition from interstate rivals. In *Baldwin v. G.A.F. Seelig, Inc.*[97] the New York Milk Control Act set minimum prices to be paid to producers of milk consumed within the state. Justice Cardozo rejected the argument that the regulation was intended to provide sanitary security rather than to provide economic protection for local producers, stating that "[e]conomic welfare is always related to health, for there can be no health if men are starving."[98] Holding that commerce is unduly burdened when one state indirectly regulates the price to be paid to producers in another, the Court commented that "one state . . . may not place itself in a position of economic isolation."[99]

Travelers Health Association v. Virginia[100] provided a rare instance in which the due process clause was raised as a restraint on state regulatory authority. Plaintiff, a mail-order insurance busi-

95. *Id.* at 112-13.

96. Stone provided an exhaustive list of decisions in which the Court had upheld the following state regulations:

> A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. It may define the size of crews manning interstate trains, and prescribe regulations for payment of their wages. It may require interstate passenger cars to be heated and guard posts to be placed on bridges of an interstate railroad. It may limit the speed of interstate trains within city limits. It may require an interstate railroad to eliminate grade crossings. It may pass local quarantine laws applicable to merchandise moving in interstate commerce, as a means of protecting local health. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. It may regulate pilots and pilotage in its harbors. Where, as here, Congress has not entered the field, a state may pass inspection laws and regulations, applicable to articles of interstate commerce, designed to safeguard the inhabitants of the state from fraud, provided only that the regulation neither discriminates against nor substantially obstructs the commerce.

Id. at 113-14 (citations omitted).

97. 294 U.S. 511 (1935).

98. *Id.* at 523.

99. *Id.* at 527. *See also* Schwegmann Bros. Giant Super Markets v. Louisiana Milk Comm'n, 365 F. Supp. 1144 (M.D. La. 1973). In *Schwegmann Bros.* the court similarly differentiated between regulations intended to provide economic benefit and those regulating for the welfare of its citizens.

100. 339 U.S. 643 (1950).

ness incorporated in Nebraska, had approximately 800 Virginia members receiving health benefits. Virginia sought to subject this organization to its Blue Sky Law in order to protect its citizens from "unfairness, imposition or fraud" in the sale of insurance certificates. Measuring plaintiff's contacts and ties with Virginia in accordance with *International Shoe,* the Court held that subjection of the corporation to state regulatory jurisdiction was consistent with "fair play and substantial justice" and thus not offensive to the due process clause.[101] Justice Douglas, although concurring in the result, argued that the due process clause set different nexus standards for regulatory and judicial jurisdiction, stating that "what is necessary to sustain a tax or to maintain a suit . . . is not in my view determinitive when the state seeks to regulate solicitation within its borders."[102] While this is no doubt true, the logical explanation lies not in a varying due process standard for each, but from a determination under the commerce clause that, with respect to state legislation, the state interest in exercising the control does not outweigh the burdens imposed on interstate commerce.

Two recent related circuit court decisions not only upheld the broad authority of a state to regulate pursuant to its police power, but analyzed the relatively limited relationship between the state and the foreign corporation necessary for the state to regulate consistently with due process. In *Aldens, Inc. v. Packel*[103] Pennsylvania sought to subject an Illinois corporation operating a mail-order business to regulation that would have cost the corporation approximately $800,000 per year, primarily consisting of lost finance charges resulting from Pennsylvania's interest limits. Plaintiff argued that due process prohibited Pennsylvania's regulation of plaintiff's transactions because the state lacked the requisite minimum interest.[104] The court, noting that the contours of the due process limitation had been defined primarily in service of process cases, held that Pennsylvania's interest in the finance charges paid by its citizens was substantial enough to satisfy the due process objection to the regulation.[105] Aldens, however, argued that the more rigid due process standard applied to tax legislation was applicable

101. *Id.* at 648-49.

102. *Id.* at 653.

103. 524 F.2d 38 (3d Cir. 1975).

104. Aldens had no tangible property in Pennsylvania, employed no agents, salesmen, canvassers, or solicitors there, and advertised in Pennsylvania only through mail-order catalogues. *Id.* at 41.

105. *Id.* at 44.

rather than the low threshold of state interest defined in the service of process cases.[106] The court rejected this contention, stating:

> Tax cases . . . come in for special due process scrutiny. No state interest rates so high in the state scale of values as the state sovereign's fisc. At the same time no extraterritorial manifestation of sovereignty . . . is quite so offensive to common notions of its territorial limits . . . . There is simply no reason why in weighing the significance of that interest for due process purposes we should impose on Pennsylvania the higher burden it would have to meet in a tax collection case.[107]

The Third Circuit pointed out in its discussion of Aldens' commerce clause challenge the analytical inadequacy of previous decisions, stating that judicial reasoning was more influenced by the political philosophy of the court with respect to the commerce clause than in any other area of constitutional law.[108] The court nevertheless felt compelled to attempt an analytical framework to avoid "the even more futile exercise of color-matching the stipulated facts in this case to the commerce clause cases which appear to glow with the most nearly similar hue."[109] The court suggested that the commerce clause limited state exercise of legislative control with respect to interstate commerce whenever (1) Congress has already legislated, or (2) Congress has not legislated but (a) the subject matter of the legislation requires a uniform national rule, or (b) the state legislation discriminates against interstate commerce, or (c) the state legislation burdens interstate commerce in excess of any value attaching to the state's interest in imposing its regulation.[110] The court then rejected Aldens' argument that the facts of a tax case[111] and a qualification case[112] most nearly "color-matched" the facts of this police power case, holding that tax and qualification statutes are paradigms of category 2(c), while police power regulations are justified since the state interest in regulating outweighs the relatively slight burden resulting on interstate commerce.[113]

Aldens made similar due process and commerce clause chal-

106. The plaintiff placed reliance on the due process standard announced in National Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967), and Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940), which required that the state give something for which it can ask return before taxation would be consistent with the due process clause. 524 F.2d at 43.

107. *Id.* at 43-44.

108. Characterizing an attempt to classify the Supreme Court's commerce clause adjudications for purposes of analytical application "an exercise in futility", the Third Circuit stated that "an opinion from one era may reflect an evaluation of the relative weight to be given to local versus national interests that a later court has rendered obsolete." *Id.* at 45.

109. *Id.*

110. *Id.* at 45-46.

111. National Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1966).

112. Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).

113. 524 F.2d at 49-50.

lenges against the Wisconsin Consumer Act in *Aldens, Inc. v. LaFollette.*[114] Addressing the due process claim, the Seventh Circuit acknowledged the existence of a threshold nexus between a state and the subjects of that state's legislative efforts that must be met in order to support legislative control. The court suggested, however, that "the connection between a state and the regulated person must be of a more substantial character than the 'minimum contacts' needed to support judicial process."[115] Despite application of the more rigid standard, the Seventh Circuit nevertheless found Wisconsin's interest in protecting its own citizens from usurious credit terms sufficient to meet due process minimums.[116]

The court's analysis of the commerce clause question was equally confused. Although properly drawing distinctions between tax, qualification, and police power statutes, the court incorrectly stated that application of tax and qualification statutes to purely interstate traders is per se an undue burden, while the validity of police power legislation depends upon a balancing of the effects on interstate commerce in relation to local benefits. Such a holding contravenes the commerce clause language in *Complete Auto Transit, Inc. v. Brady,*[117] which was cited by the court and which permitted state taxation of the in-state aspects of purely interstate commerce.

Despite the confusion in the Seventh Circuit's decision, most cases consistently indicate that due process limitations on state regulatory authority are based on the same concerns for fundamental fairness that exist in service of process cases. Additionally, the commerce clause requires that the regulation be justified in light of its burdens on interstate commerce. Unlike the qualification cases, in which this balancing seldom resulted in upholding application of the statute, police power regulations invariably are deemed justified.

B. Tax Legislation

State taxation of foreign corporations is similarly restricted by both the due process and commerce clauses. The former defines an initial threshold of interrelationship—a nexus—that the state must

114. 552 F.2d 745 (7th Cir. 1977).

115. *Id.* at 751. For this proposition, the court cited Justice Douglas' concurrence in *Travelers Health* without reference to the contrary position of the majority. *See* text accompanying notes 100-02 *supra.*

116. In a footnote, the court remarked that exercise of the police power requires less of a nexus than a state's power to tax, thus establishing yet a third level of "minimum contacts" for due process purposes. 552 F.2d at 751 n.12.

117. 430 U.S. 274 (1977); *see* text accompanying notes 159-62 *infra.*

have with the foreign corporation before it constitutionally may demand that the corporation bear its fair share of state costs. Once this "nexus" is established, the commerce clause serves to insure that the state exaction roughly approximates the benefits resulting to the corporation from its relationship with the taxing state. The following discussion will develop the controversial evolution that recently culminated in *Complete Auto Transit, Inc. v. Brady,*[118] in which the Court dispelled any remaining doubts that foreign corporations engaged in either local or interstate commerce may be subject to the state power to tax.

1. Due Process Clause Restrictions

Prior to the adoption of the fourteenth amendment, the Supreme Court recognized the limiting requirement that state taxing authority was conditioned on its jurisdiction over the subject of the tax. In *Hays v. Pacific Mail Steamship Co.*[119] a shipping company incorporated in New York sought to recover taxes paid to California for use of the ports of that state. The Court sustained plaintiff's challenge on grounds remarkably similar to the "doing business" language of later due process rulings: "We are satisifed that the state of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits . . .; they were there but temporarily, engaged in lawful trade and commerce with their situs at the home [New York] port . . . ."[120] Even subsequent to adoption of the fourteenth amendment, natural-law conceptions of "jurisdiction" and "situs" served to limit state taxation of nonresidents. In an 1868 decision[121] the Court denied Pennsylvania the right to tax bonds, payment of which was secured by a railroad line running between Maryland and Pennsylvania, on the ground that to sustain the tax would give effect to acts of the Pennsylvania legislature "upon property and interests lying beyond her jurisdiction."[122] Not until *Louisville and Jeffersonville Ferry Co. v. Kentucky*[123] was the due process clause proffered as a limit on the state taxing power. In *Louisville and Jeffersonville Ferry Co.* a tax levied by Kentucky on a corporation engaged in the business of ferrying between Indiana and Kentucky was held unconstitutional as a deprivation of property without due process of law

118. 430 U.S. 274 (1977).
119. 58 U.S. 596, 17 How. 625 (1854).
120. *Id.* at 599-600, 17 How. at 628-29.
121. Railroad Co. v. Jackson, 74 U.S. (7 Wall.) 262 (1868).
122. *Id.* at 268.
123. 188 U.S. 385 (1903).

because the tax was not related to a subject within the jurisdiction of the taxing government.[124]

The first major upheaval concerning due process limitations on state taxing power occurred in 1930, when the Court in *Farmers Loan and Trust Co. v. Minnesota*[125] held that only one state could have a sufficient nexus with any intangible to permit taxation. As a result of this due process prohibition of "double taxation," the Court was forced to act as arbiter of competing state attempts to tax corporations, their interstate transactions, and their intangible property.[126] This role was short-lived, however, as the prohibition of double taxation ended in *Curry v. McCanless*.[127] With his characteristic disdain for legal fictions, Justice Stone noted that state taxation jurisdiction simply depended upon whether that state conferred benefits and protection upon the owner of the subject of the tax that enabled the owner to enjoy the fruits of his ownership. Such protection and benefits are not always conferred by a single state; for example, "taxation of a corporation by a state where it does business . . . does not preclude the state of incorporaton from imposing a tax."[128] Justice Stone thus held that the fourteenth amendment did not compel the mechanical location of a single situs for every taxing subject; such a requirement would infringe upon powers that had not been withdrawn from the states.[129]

The *Curry* test—whether the taxing state furnished protection to or exercised control over the subject of its tax—was expanded in *Wisconsin v. J.C. Penney Co.*[130] In upholding the constitutionality of a Wisconsin tax on the privilege of declaring and receiving dividends out of income derived from property located and business transacted in Wisconsin,[131] Justice Frankfurter stated that a state is free to pursue its own fiscal policies without interference from the due process clause if by the practical operation of the tax the state has exerted its power in relation to opportunities it has given, to protection it has afforded, and to benefits it has conferred by the fact of being an orderly, civilized society.[132] The Court characterized such terms as "taxable event", "jurisdiction to tax," "business

124. *Id.* at 398.

125. 280 U.S. 204 (1930).

126. This role as arbiter required the fixing of a single and exclusive locus for the taxation of each type of intangible. *See* HELLERSTEIN, *supra* note 2, at 693.

127. 307 U.S. 357 (1939).

128. *Id.* at 368.

129. *See also* Graves v. Elliott, 307 U.S. 383 (1939).

130. 311 U.S. 435 (1940).

131. The Court remanded for a determination on the application of the statute to the specific dividends involved. *Id.* at 446.

132. *Id.* at 444.

situs," and "extraterritoriality" as "compendious ways of implying the impotence of state power because state power has nothing on which to operate."[133]

Curry and *J.C. Penney* represent the current doctrine with respect to due process limitations on state authority to tax foreign corporations. Some disputes remain, however, with regard to whether "doing business" for purposes of amenability to state taxation is a physical or an economic concept. For example, may a state tax a foreign corporation that seeks to exploit the consumer market in that state by engaging in extensive advertising through either the broadcast or printed media in the absence of any corporate offices or agents within the state?[134] Apart from these issues, however, the judicial evolution of due process restraints on state taxation has seen the refinement of the original concepts of "jurisdiction" and "situs" as the basis for the power to tax by the introduction of notions of "protection" and "control". Because modern taxing statutes invariably apportion the subject of the tax in an attempt to levy only upon that aspect of the foreign corporation's business upon which the state has conferred the protection of its laws, due process challenges typically argue that the tax is so excessive as to constitute a tax on property that is not within the state's jurisdiction. With but one exception,[135] this challenge has been rejected. Nevertheless, due process clearly defines a more rigid standard for evaluation of tax legislation than for service of process cases, a distressing fact in light of the room left for ad hoc judgments as to the social desirability of particular taxing statutes.

2. Commerce Clause Restrictions

Upon determining that the taxing state has a sufficient "nexus" with the foreign corporation to permit taxation consistent with due process, the validity of the tax under the commerce clause must be ascertained. Resolution of this question historically has required a balancing of the revenue needs of the states against the requirements of a unified, national economy. This balancing has been a dynamic process, changing in pace with the rapid expansion into an interstate economy and the increased revenue needs of the states.

133. *Id.*

134. *See, e.g.*, National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977); National Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967).

135. *See* Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931), in which a North Carolina apportionment formula resulted in a tax being levied on 80% of the corporation's net income, despite proof that only 17% of Hans Rees' income was truly attributable to North Carolina. Thus the Supreme Court held the tax violative of the due process clause. *But see* Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).

Initially courts resolved the commerce clause balance entirely in favor of the national interest in free trade. Unlike application of the commerce clause to state regulatory legislation, which permitted the regulation of foreign corporations when the local interest therein was deemed superior to the need for a unified national economy, courts applying the commerce clause to state or local taxation flatly prohibited any tax affecting interstate commerce. In *Robbins v. Shelby County Taxing District,*[136] Tennessee sought to tax a sales representative of an Ohio corporation who was engaged in solicitation in Memphis. The Court noted a number of different permissible means by which state regulations could affect interstate commerce,[137] but held that a state could not impose taxes upon persons temporarily within the state. Until recently, the Court has adhered to this "free trade"[138] treatment of commerce clause restrictions on state taxation: "no state has the right to lay a tax on interstate commerce in any form, . . . and the reason is that such taxation is a burden on that commerce."[139]

Within this broad prohibition of "taxes affecting interstate commerce," however, the Court drew a formalistic distinction between taxes having "direct" as opposed to "indirect" effects. While the cases prohibiting direct taxation established an area of trade free of state and local license, franchise, and privilege taxes,[140] property taxes and taxes in lieu of property taxes were upheld as indirect levies as applied to all businesses.[141] The ambiguity of this artificial verbalization of the conclusion that the taxing state was warranted in levying its tax proved to be the ultimate downfall of the "free

136. 120 U.S. 489 (1887).

137. A state may provide "for the security of lives, limbs, health, and comfort of persons and the protection of property"; it may regulate highways, railroads, and other commercial facilities despite the incidental affect on commerce; it may pass inspection laws to secure the "quality and measure of products"; it may pass "laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community"; it may impose taxes upon "persons residing within the state or belonging to its population, and upon avocations and employment pursued therein, not directly connected with foreign or interstate commerce"; it may impose taxes on property within its borders. *Id.* at 493.

138. [I]n the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce . . . is so firmly established that it is unnecessary to enlarge further upon the subject.

Id. at 494.

139. Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

140. *See, e.g.,* Cheney Bros. Co. v. Massachusetts, 246 U.S. 147 (1918); Leloup v. Port of Mobile, 127 U.S. 640 (1888); Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887).

141. *See, e.g.,* Adams Express Co. v. Ohio, 165 U.S. 194 (1897); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

trade" approach, when it was later attacked by Justices Stone and Rutledge.

As businesses expanded their geographic scope in the twentieth century, "state lines lost much of their economic importance."[142] Concurrently, the constantly increasing demands upon the states for schools, roads, relief, and other social services forced them to seek out every available source of revenue.[143] Recognizing these realities, the Supreme Court briefly broke from the traditional view of the immunity of interstate commerce from state taxation in *Western Live Stock v. Bureau of Revenue.*[144] Sustaining a state privilege tax levied on the gross receipts of a publication located in that state but distributed nationwide, Justice Stone issued his pragmatic view that "it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. 'Even interstate business must pay its way.' "[145] According to Stone, the commerce clause was intended to protect interstate commerce from the risk of cumulative burdens not borne by local commerce.[146] Thus, multiple taxation was the consequence sought to be prevented; in its absence, taxation of foreign corporations did not create the trade barriers between states that the commerce clause was designed to eliminate.[147]

The multiple taxation doctrine was repudiated eight years later in *Freeman v. Hewit.*[148] Acknowledging that the commerce clause permitted police power regulation of local aspects of interstate commerce because of the state need to safeguard vital local interests, the Court nevertheless distinguished the power to tax. "Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regula-

142. HELLERSTEIN, *supra* note 2, at 237.

143. Hartman, *State Taxation of Corporate Income from a Multistate Business,* 13 VAND. L. REV. 21 (1959).

144. 303 U.S. 250 (1938).

145. *Id.* at 254.

146. *Id.* at 256.

147. The Court provided further support for this approach in McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940), noting that although the particular tax in question had some effect on interstate commerce, the Court was forced to reconcile competing constitutional demands—that commerce between the states not be unduly impeded by state action, and that the power to lay taxes for the support of state government not be unduly curtailed—and did so in favor of the state's right to tax.

148. 329 U.S. 249 (1946).

tions . . . ."[149] The Court thus refused to find any support for the notion that a state may exact even "one single-tax-worth" of direct interference with the free flow of commerce.[150] The Court's reimplementation of the "free trade" doctrine was attended by restoration of the formalistic distinction between direct and incidental effects on commerce. This formalism was most apparent in *Spector Motor Service, Inc. v. O'Connor,*[151] which involved a commerce clause challenge to a state tax imposed upon a foreign corporation for the privilege of doing business within the state, measured by that part of corporate net income reasonably attributable to the corporation's in-state activities. Although the measure of the tax was not challenged as an unreasonable approximation of income derived from those activities,[152] the Court found it unconstitutional because of the "all-important 'operating incidence' of the tax"[153]—the tax was levied on the privilege of doing interstate business, a direct rather than incidental burden on interstate commerce. The dissent,[154] however, articulated the artificial nature of the decision:

> [T]he tax is declared invalid simply because the State has verbally characterized it as a levy on the privilege of doing business within its borders . . . . [Had it been described] as one for the use of highways or in lieu of an *ad valorem* property tax, Spector would have had to pay the same amount, calculated in the same way, as is sought to be collected here.[155]

The reversion to the tax-free-haven philosophy of commerce clause limitations on state taxing powers finally ended in the companion cases of *Northwestern States Portland Cement Co. v. Minnesota* and *Williams v. Stockham Valves and Fittings, Inc.*[156]

149. *Id.* at 253.

150. *Id.* at 256.

151. 340 U.S. 602 (1951).

152. The tax in fact was assumed to be nondiscriminatory, fairly apportioned, and not an undue burden on interstate commerce.

153. *Id.* at 605-06.

154. The dissent was delivered by Justice Clark, joined by Justices Black and Douglas. *Id.* at 610-15.

155. *Id.* at 611. The dissent went on to say that Spector's tax immunity would continue only until Connecticut "renames or reshuffles its tax." The dissent was proven correct by the two *Railway Express Agency* decisions. Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959) (*REA II*); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954) (*REA I*). In *REA I,* the Court struck down a Virginia license tax levied annually on the privilege of doing business in Virginia, measured by gross receipts. Five years later in *REA II,* however, the Court upheld Virginia's reworded version of the statute, which altered the all-important operating incidents by placing the tax on the intangible property of the foreign corporation in the form of its "going concern" value as measured by gross receipts. Speaking for the majority, Justice Clark acknowledged that "magic words or labels" could "disable an otherwise constitutional levy." 358 U.S. at 441.

156. 358 U.S. 450 (1959). Both cases involved net income taxes levied on foreign corporations doing business in the taxing state.

Although adhering to the view that the privilege of doing interstate business could not be taxed,[157] the Court held that a state could exact a fair demand for that aspect of the interstate commerce to which it bore a special relation. Such a result was achieved by an apportionment formula that was devised to ascertain the amount of the corporation's net income attributable to its activities within the taxing state. The Court, however, laid down certain requirements for constitutional validity. The due process limitation, which required that the tax exacted roughly approximate the benefits and protections conferred, provided the threshold restriction. To then withstand the commerce clause challenge, the tax must not discriminate against interstate commerce in favor of local business. This requirement was achieved by restoring a modified version of Justice Stone's cumulative burdens test. The *Northwestern Cement* decision, however, required invalidation of the tax only if *actual* multiple burdens existed, rather than on the *risk* of such burdensome taxation, in order to avoid conferring a tax advantage on interstate commerce not shared by local businesses.[158]

An interesting aspect of this evolution of commerce clause restrictions on state taxing power is the similarity between the commerce clause and the due process standards of validity. Due process requires something more than minimum contacts for service of process; the tax demanded must roughly approximate the protection conferred or the control exercised by the taxing state. Similarly, validity of tax measures under the commerce clause depends upon proper apportionment of the subject of the tax such that there is no opportunity for multiple taxation. Under both standards, the ultimate limitation appears to be that the state can tax only what is justly attributable to it.

This similarity became identity in *Complete Auto Transit, Inc. v. Brady*,[159] in which the Court put an end to commerce clause restrictions based on statutory form rather than effect. Mississippi had levied a tax on the privilege of doing business within the state measured by a fraction of Complete Auto Transit's gross income. Plaintiff did not allege that the taxed activity did not have a sufficient nexus with Mississippi, that the tax discriminated against interstate commerce, that the tax was unfairly apportioned, or that the tax was unrelated to services provided by Mississippi.[160] Rather,

157. The Court distinguished *Spector Motor Service*. *Id.* at 463-64.

158. *Id.* at 463. The Court stated: "There is nothing to show that multiple taxation is present."

159. 430 U.S. 274 (1977).

160. *Id.* at 277-78.

based entirely on *Spector Motor Service* and *Freeman v. Hewit,* the plaintiff simply claimed that a tax on the *privilege* of engaging in an activity in the state is unconstitutional when that activity is part of interstate commerce. The Court refused to invalidate the tax based solely on the formal phrasing of the statute, announcing instead that such legislation should be judged by its economic effects.[161] Overruling *Spector Motor Service,* the Court departed at last from the formalistic distinctions between taxing statutes that, although nominally distinguishable, had identical effects. In implementing the benefit principle—that the tax exacted must be fairly related to the services provided by the state—the Court has developed a fairness test that is essentially the same under both the commerce and due process clauses.

IV. Evaluation and Analysis

A. *The Varying Degrees of "Doing Business"*

As the preceding discussions illustrate, state jurisdiction over foreign corporations continues to vary in breadth according to the nature of the control desired. Judicial jurisdiction—the authority to serve process on a foreign corporation—still demands the least substantial degree of relationship between the forum state and the defendant to permit its exercise. Although the requirement of "minimum contacts" briefly appeared to have been replaced by the notion that service is valid when a defendant is not inconvenienced by subjection to the state's jurisdiction,[162] subsequent decisions have demonstrated that the due process threshold is real and significant. The foreign corporation must be conducting its activities within the state on a continuous basis; casual, isolated transactions will not suffice.

Amenability of foreign corporations to legislative jurisdiction requires a more substantial relationship, although the precise scope of such jurisdiction is seldom clear. The degree of activity necessary to constitute "doing business," essentially a due process issue, varies with the nature of the legislation. For due process purposes the state may apply police power regulations designed to protect the health, safety, and welfare of the citizenry of the regulating state on the basis of no more substantial a relationship with the foreign corporation than is required for service of process.[163] The validity of

161. The Court relied heavily on the concurring opinion of Justice Rutledge in Freeman v. Hewit, 329 U.S. 249, 259 (1946).

162. *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957); *see* notes 36-39 *supra* and accompanying text.

163. *See* notes 114-17 *supra* and accompanying text. *But see* Aldens, Inc. v. LaFollette,

the regulation, however, is not established by so minimal a test. The commerce clause requires that legislation not excessively burden interstate commerce in relation to the local benefits conferred on the corporation by the state. Because of the powerful state interest in the proper exercise of its police power, however, this balancing of benefits and burdens typically is resolved by requiring compliance with the regulation.

Tax legislation must overcome a more significant due process hurdle. No state may exact a tax that is disproportionate to the control exercised over, or the protection conferred on, that foreign corporation by the taxing state. This issue arises in the context of the taxation of a corporation that is "doing business" in several states. While all may tax the corporation consistent with the due process clause, the taxes must be apportioned in such a way that the exaction roughly approximates the amount of business done within the particular state. Although this standard is considerably more complex than that applied in service of process cases, few states promulgate tax legislation that is so arbitrary as to violate the standard.[164] Resolution of a commerce clause challenge to the application of tax legislation to foreign corporations involves a similar analysis—the tax must be fairly apportioned so as not to subject the corporation to multiple burdens. Thus underlying both standards is essentially the same concern that states receive only those revenues that are justly attributable to in-state activity.

Amenability of foreign corporations to qualification statutes receives, for some reason, distinct treatment from other forms of legislative control. Although courts engage in lengthy "doing business" analysis in which they delineate and evaluate all in-state corporate activity, there is no hint that the purpose is to establish a due process nexus between corporation and state. Rather, conclusions, based entirely on the commerce clause, typically hold that the corporation was *not* "doing business" to a sufficient extent to require compliance with the qualification statute. In this context, in which statutes are construed most strictly in favor of the foreign corporation, clear constitutional analysis is most deficient.

B. Doing Away with "Doing Business"

The concept of "doing business" was an artificial device created in the 1800's for determining the circumstances under which a state other than the state of incorporation could subject a corporation to

552 F.2d 745 (7th Cir. 1977).

164. *See* note 135 *supra*. *But see* Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931).

its sovereign control, either judicial or legislative. Since its creation the fourteenth amendment has been adopted and the commerce clause has undergone immense judicial transformation. Yet although these flexible constitutional provisions should provide a single mode of analysis of any state attempt to exercise jurisdiction over foreign corporations, the outdated "doing business" concepts prevent such consistent, logical analysis.

The historical development of state control over foreign corporations outlined in the foregoing discussions demonstrates the basis for present difficulties. Early courts attempted to define state control in a physical or territorial sense. In order to do so, those litigating the "doing business" issue were required to show, on one side, every conceivable connection the foreign corporation had with the state, and, on the other side, the many factors demonstrating the lack of localization. Courts would then engage in some sort of weighing to determine whether, in light of the evidence, the corporation was "doing business." The inadequacy of this analysis forced modification, however, when the courts recognized the unfairness of simply "color-matching"[165] the facts of "doing business" cases without regard to the context in which the issues arose. As a result, three distinct standards developed for evaluating the validity of state authority—judicial, taxing, and regulatory—over foreign corporations, all of which were labeled "doing business."

The inevitable confusion these standards created could have been avoided if the courts had evaluated state jurisdiction over foreign corporations in terms of due process deprivation and interference with commerce rather than relied on the ambiguous concept of "doing business." Unfortunately, the courts have felt compelled to continue varying the impact of the analysis, now a constitutional one, depending upon the context of the analysis. Where before there had been three different definitions of "doing business," there now are different levels of due process—activity sufficient to constitute a nexus for purposes of service of process is not necessarily sufficient to permit taxation of the same foreign corporation. Similarly, in those cases in which the courts actually apply a commerce clause analysis rather than a quantitative "doing business" approach, the various contexts of state legislative control are distinguished. Their discussions imply that the differing conclusions are attributable to a commerce clause standard of varying stringency instead of recognizing that a balancing of the burdens on the corporation's interstate business against the benefits and protection received by the

165. *See* text accompanying note 109 *supra.*

corporation from the state and the state interest in promulgating the legislation has simply produced a different result. As a consequence, not only have the applicable constitutional standards been confused, but the decisions of the courts in one context still have little precedential value in another. This confusion is manifested in cases such as *Lilly,* in which the majority was criticized for applying tax and service of process cases in the qualification context,[166] and *Aldens, Inc. v. Lafollette,* in which the Seventh Circuit misconstrued both constitutional standards in attempting to define the varying degrees under each.[167]

Consistency could be restored to the constitutional analysis of state control over foreign corporations, while retaining legitimate distinctions among the contexts in which such control is exercised, if the courts would eliminate the problems inherent in the "doing business" analysis and apply a single, undifferentiated standard for both the due process and commerce clauses in all contexts. Analysis of the validity of state jurisdiction over foreign corporations would thus proceed as follows. The threshold issue is whether certain minimum contacts, as defined in *International Shoe,* exist to a sufficient extent that control can be exercised consistent with due process. Use of the due process standard developed in service of process cases, and arguably applicable in cases involving regulatory legislation, would require a substantial reduction in the nexus required to support state taxation of foreign corporations. The more rigid due process standard, however, hardly is justified. One commentator noted that there is "quite as much difficulty in finding warrant in the Constitution for the present due process restrictions on State taxation as there was for the now rejected prohibition of double taxation."[168] Another critic of the Court's present nexus requirement remarked that the territorial conception of due process applied in tax cases, "which has been rejected with respect to adjudicatory jurisdiction, is too formulaic to allow for fair results in all cases" and suggested that instead "some connection less than actual presence in the jurisdiction should be sufficient."[169] Although advocates of the present nexus standard will argue that the "minimum contacts" approach will permit harmfully extensive taxation of foreign corporations, such issues are properly dealt with in the context of the commerce clause.[170] Thus judicial jurisdiction analysis need proceed

166. *See* text accompanying notes 71-75 *supra.*
167. *See* notes 114-17 *supra* and accompanying text.
168. HELLERSTEIN, *supra* note 2, at 697.
169. *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 71, 82 (1977).
170. "There are adequate constitutional resources which can be utilized to cope with

no further than a determination that the state has established a sufficient nexus with the foreign corporation to justify assumption of such jurisdiction.

For purposes of legislative jurisdiction, however, the statute must withstand the commerce clause challenge. Previous adjudications of this issue in the context of tax, police power, and qualification statutes suffered not so much from an explicit attempt to provide varying degrees of commerce clause protection as from an overall failure of the courts to define the standard being applied. This failure is understandable in light of the frequent changes in the Court's political philosophy of the basic commerce clause dilemma: whether the state need for legislative control and revenues outweighs the national need for a thriving economy, unaffected by state lines.

The Court's recent decision in *Complete Auto Transit,* however, demonstrates an awareness of the need for unified treatment of interstate commerce. While state *regulatory* authority over purely interstate commerce had long been recognized, the Court in *Complete Auto Transit* for the first time held that a state could *tax* even the privilege of engaging in interstate commerce to the extent such commerce was conducted within the taxing state. The Court's approach in that case provides a good foundation for developing a single commerce clause standard for testing the validity of *all* state legislation affecting foreign corporations. Under such a standard, state legislation would be valid to the extent, first, that it is reasonable in relation to the foreign corporation's local activities and to the benefits and protections conferred by the state upon those activities and, second, that the burden of compliance is outweighed by the state interest in promulgating such legislation. Utilizing a single standard should not alter the result in most cases. For example, requiring compliance with a qualification statute may still be deemed unconstitutional because prohibiting access to the courts of a state or refusing to enforce a contract may be an unreasonable burden if the corporation's local activities are rather minimal. No longer, however, should courts reject the application of qualification statutes to foreign corporations on the ground that the corporation was engaged in purely interstate commerce. Not only is such a "free trade" approach no longer consistent with the realities of a commercial society in which it is difficult to find transactions that do not have interstate aspects, but there is simply no reliable test of

the problem [of cumulative taxes], without reading into the Due Process Clause a restriction on taxing power which the provision does not justify." HELLERSTEIN, *supra* note 2, at 697.

"purely interstate commerce." Similarly, the substantial state interest in protecting its citizenry through police power regulations may often outweigh the burdens of compliance, just as it does now. This proposed approach not only provides clarity of analysis, but reduces any need for differentiation among the cases—the same due process nexus requirement and commerce clause balancing approach is applied to every case.

V. CONCLUSION

Through discussions of the historical judicial treatment of state attempts to exercise control over foreign corporations, this Note demonstrates the basis of the confusion that still exists in ascertaining the limits on the exercise of such jurisdiction. Although considerable strides have been made away from the problematic concept of "doing business" that dominated early decisions, judicial analysis is still permeated by the notion originating in "doing business" cases that the same standard must define different tests for the different types of state jurisdiction.

This Note proposes that the due process clause and commerce clause should each define a single standard by which the validity of the exercise of state authority should be measured. Such an analysis does not ignore the fact that some state attempts to exercise jurisdiction over foreign corporations are less justified than others. The analysis, however, is based on the presumption that states should have a right to control and receive revenues from corporations that take advantage of the resources of the state, a right that depends upon the existence of a state-corporation relationship defined by the due process clause. In those instances in which the prosperity of foreign corporations, and thus our national economy, is jeopardized by such state jurisdiction, the commerce clause should provide the countervailing, protective influence. Such an analysis assures a consistency that at present is lacking.

WILLIAM ARTHUR HOLBY