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State Tolling Statutes and Interstate Commerce: *Bendix Autolite Corporation v. Midwesco Enterprises*

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CASENOTES

STATE TOLLING STATUTES AND INTERSTATE COMMERCE: *BENDIX AUTOLITE CORPORATION V. MIDWESCO ENTERPRISES*

IN 1974, Midwesco Enterprises (an Illinois corporation with its principle place of business in Illinois) contracted with the Bendix Autolite Corporation (a Delaware corporation with its principle place of business in Ohio) to supply and install a coal-fired boiler system at the Bendix facility in Fostoria, Ohio. Once the boiler was in place, Bendix claimed that the system had been improperly installed and failed to produce the quantity of steam specified by the contract. In 1980, six years after entering into the contract, Bendix filed a diversity action against Midwesco for fraud and breach of contract in the United States District Court for the Northern District of Ohio.[1]

Midwesco moved for summary judgment, arguing that Bendix's suit was barred by Ohio's four-year statute of limitations period for actions brought under a fraud or breach of contract claim.[2] In response, Bendix claimed that section 2305.15 of the Ohio Revised Code tolls the running of the statutory period for bringing actions against persons, including private corporations, who are out of state and have not designated an agent for service of process within Ohio.[3] Midwesco argued that the tolling statute

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1. Bendix Autolite Corp. v. Midwesco Enters., 108 S. Ct. 2218, 2219 (1988).

2. Ohio allows a plaintiff four years to bring an action for breach of a contract for the sale of goods, OHIO REV. CODE ANN. § 1302.98(A) (Baldwin 1988), and four years to bring an action for fraud, OHIO REV. CODE ANN. § 2305.09(C) (Baldwin 1984).

3. OHIO REV. CODE ANN. § 2305.15 (Baldwin Supp. 1987) provides:

> (A) When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his ab-

violated both the commerce clause and the due process clause of the Constitution. The district court agreed and granted Midwesco's motion for summary judgment.[4]

The Sixth Circuit Court of Appeals affirmed the district court's decision, ruling that the tolling statute discriminated against foreign corporations by forcing them to choose between appointing a corporate agent within the state, thereby exposing themselves to personal jurisdiction in Ohio's courts, or foregoing a statute of limitations defense to any action brought against them in Ohio.[5] Bendix appealed to the United States Supreme Court, which noted probable jurisdiction to determine the constitutionality of Ohio's tolling statute.[6] The Supreme Court affirmed the court of appeals' decision and held that section 2305.15, as applied to foreign corporations, impermissibly burdens interstate commerce in violation of the commerce clause.

I. BACKGROUND

The Supreme Court, prior to this decision, had not considered the validity of a state tolling statute under the commerce clause. Section 2305.15, however, indirectly invoked the licensing provisions applicable to foreign corporations contained in section 1703.041 of the Ohio Revised Code.[7] The Court had invalidated licensing statutes similar to the one invoked by Ohio's tolling statute. On the other hand, the Court had upheld a challenge to a state tolling statute under the equal protection clause.

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sence or concealment shall not be computed as any part of a period within which the action must be brought.

Ohio courts have construed the term "person," as used in OHIO REV. CODE ANN. § 2305.15, to include private corporations, Moss v. Standard Drug, 159 Ohio St. 464, 469, 112 N.E.2d 542, 544-45 (1953), and have routinely applied it to toll the period of limitations for actions brought against foreign corporations. *See, e.g.*, Seeley v. Expert, Inc., 26 Ohio St. 2d 61, 65, 269 N.E.2d 121, 125 (1971); May v. Leidli, 32 Ohio App. 3d 36, 37, 513 N.E.2d 1347, 1349 (1986); Barile v. University of Virginia, 30 Ohio App. 3d 190, 194-95, 507 N.E.2d 448, 452-53 (1986); Scheer v. Air-Shields, Inc., 61 Ohio App. 2d 205, 206 n.1, 401 N.E.2d 478, 479 n.1 (1979); Durham v. Anka Research Ltd., 60 Ohio App. 2d 239, 242-43, 396 N.E.2d 799, 802-03 (1978).

4. *Bendix Autolite*, 108 S. Ct. at 2220.

5. Bendix Autolite Corp. v. Midwesco Enters., 820 F.2d 186, 188 (6th Cir. 1987)(citing McKinley v. Combustion Eng'g, 575 F. Supp. 942, 945 (D. Idaho 1983)).

6. Bendix Autolite Corp. v. Midwesco Enters., 108 S. Ct. 283 (1987).

7. OHIO REV. CODE ANN. § 1703.041 (Baldwin 1986). To avoid the consequences of section 2305.15, a foreign corporation must appoint an agent to receive service of process within the state of Ohio as provided by section 1703.041. *See infra* note 47.

A. Commerce Clause Cases

The commerce clause gives Congress the power "to regulate commerce . . . among the several states."[8] This language imposes no express limitation upon Congress' exercise of the commerce power, nor upon the scope of concurrent state regulation. The authority granted by the Constitution, however, vests the commerce power in Congress alone.[9] Therefore, any state regulation in conflict with a federal law passed pursuant to the commerce clause will be struck down under the supremacy clause.[10] Where Congress has enacted no law, however, the courts have determined the permissible scope of state regulation of commerce under the so-called "dormant" commerce clause.[11]

In early cases, courts attempted to draw a bright line between "interstate" and "intrastate" commerce.[12] Commercial activities that called for uniform regulation on a national level were considered to be "interstate," while activities that required regulation keyed to local conditions or practices were considered to be "intrastate."[13] A state law that directly regulated interstate activities

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8. U.S. CONST. art. I, § 8, cl. 3.

9. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193-94 (1824).

10. *Id.* at 210-11. *See, e.g.*, Alaska v. F/V Baranof, 677 P.2d 1245, 1249 (Alaska), *cert. denied*, 469 U.S. 823 (1984).

11. *See generally* 1 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 11.1-.10 (1986); *but see* Redish & Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (arguing that there exists no textual nor legitimate theoretical basis for judical activism under a dormant commerce clause).

12. The distinction derives from Justice Marshall's statement that the language of the commerce clause does not "comprehend commerce which is completely internal . . . and which does not extend to or effect other states." *Gibbons*, 22 U.S. (9 Wheat.) at 194. The propriety of state regulation in the intrastate area has never been seriously challenged.

13. This was the "*Cooley* rule of selective exclusivity," set forth by Justice Curtis in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). The *Cooley* rule stated that:

> Either absolutely to affirm, or deny that the nature of [the commerce] power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

Id. at 319; *see* 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 11, at § 11.4.

Although the *Cooley* rule may have compelled exclusive federal regulation of certain economic activities, it did not necessarily preclude state regulation in areas where Congress had not acted. That position was taken in Welton v. Missouri, 91 U.S. 275 (1875). Justice Field wrote: "The fact that Congress has not seen fit to prescribe any specific rules to govern inter-state commerce does not affect the question. Its inaction on this subject . . . is equivalent to a declaration that inter-state commerce shall be free and untrammelled." *Id.*

would be found invalid per se under the commerce clause.[14] Thus, each case turned on the court's characterization of the underlying transaction as either interstate or intrastate.

A typical case adopting this approach was *Dahnke-Walker Milling Co. v. Bondurant*,[15] where the constitutionality of a Kentucky law requiring foreign corporations to register with the state in order to do business there was at issue. Dahnke-Walker, a Tennessee corporation, contracted with Bondurant, a Kentucky resident, to purchase his wheat crop. Delivery was to occur in Kentucky at the local depot of a common carrier from which Dahnke-Walker intended to ship the wheat to its mill in Tennessee. When Bondurant refused to deliver, Dahnke-Walker brought an action for breach of contract in Kentucky state court. Bondurant alleged that Dahnke-Walker had not registered to do business in the state, thereby rendering the sales contract unenforceable. The Kentucky court agreed with Bondurant.[16] The Supreme Court, however, concluded that even though the parties entered into the contract in Kentucky and agreed to performance in Kentucky, Dahnke-Walker ultimately intended to ship the grain to Tennessee, making the sale a matter of interstate rather than intrastate commerce. The Court announced the rule 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.[17]

The Kentucky law was found to impermissibly burden interstate trade, and was declared void as applied to the transaction at issue.[18]

In more modern decisions, courts have developed a more flex-

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at 282. The Court continues to embrace this interpretation of congressional inactivity as an advocation of free trade and to strike down state attempts to regulate commerce. *See* Redish & Nugent, *supra* note 11, at 577-80.

14. See, e.g., Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887) and subsequent decisions. A partial listing of the Supreme Court decisions reaching this result appears in Memphis Steam Laundry Cleaners v. Stone, 342 U.S. 389, 392 n.7 (1952).

15. 257 U.S. 282 (1921).

16. *Id.* at 286-87.

17. *Id.* at 291 (citations omitted). *See also* Sioux Remedy Co. v. Cope, 235 U.S. 197, 203-04 (1914); International Textbook Co. v. Pigg, 217 U.S. 91, 112 (1910); Western Union Tel. Co. v. Kansas, 216 U.S. 1, 27 (1910); Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

18. *Dahnke-Walker*, 257 U.S. at 290-91.

ible approach to these cases.[19] The analysis has remained fact-specific, but courts now look to the national and state interests affected by the state regulation rather than to the nature of the underlying transaction. In determining the scope of permissible state regulation, the courts attempt to balance these competing federal and state interests.[20] Where the burden on interstate commerce outweighs the legitimate state interest advanced by the regulation, the statute is invalid;[21] but where the burden imposed by the regulation is incidental, and does not fall exclusively on interstate commerce, some interference with interstate commerce will be tolerated.[22]

In *Eli Lilly & Co. v. Sav-On-Drugs*,[23] the Supreme Court examined a New Jersey registration statute similar to the one struck down in *Dahnke-Walker*. Eli Lilly, an Indiana corporation, sought to enjoin Sav-On-Drugs, a New Jersey corporation, from selling Lilly's products below a fixed minimum retail price. In addition to selling to New Jersey wholesalers, Eli Lilly maintained a sales office in New Jersey that promoted the sale of Lilly's prod-

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19. This flexible approach has its origins in the expansive interpretation of "interstate commerce" that underlaid judicial acceptance of New Deal legislation. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 120 (1942); United States v. Darby, 312 U.S. 100, 115 (1941). After these cases, the distinction between "interstate" and "intrastate" commercial activity that underlaid prior commerce clause jurisprudence became meaningless. In its place, the Court sought to distinguish between the local and national interests at issue under any state regulation of commercial activity. *See, e.g.*, Southern Pac. R.R. Co. v. Arizona, 325 U.S. 761, 768-71 (1945); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 (1938). In *Southern Pacific*, Chief Justice Stone, writing for the majority, embraced Professor Dowling's theory that the proper role for the Court, in the absence of express congressional action, was to balance the national and local interests affected by the challenged statute. *See* Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

20. The mechanics of this balancing test have been conveniently summarized by Justice Stewart as follows:

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

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

21. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Raymond Motor Transp. v. Rice, 434 U.S. 429 (1978).

22. *See, e.g.*, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1976).

23. 366 U.S. 276 (1961).

ucts and occasionally solicited orders from New Jersey hospitals and physicians. Sav-on-Drugs moved to dismiss the suit, claiming that Eli Lilly had failed to obtain a certificate authorizing it to do business within the state as required by New Jersey law. The Supreme Court ruled that, although the transactions on which Eli Lilly brought suit were interstate in nature, the business conducted by its New Jersey office gave it sufficient contacts within the state to be considered as "doing business" there for the purposes of its licensing statute.[24] The Court found that New Jersey's interests in regulating strictly local activity outweighed any federal interest in preserving Eli Lilly's interstate activity.[25] Therefore, the Court held that New Jersey could properly require Eli Lilly to obtain a certificate before availing itself of that state's courts.[26]

The Supreme Court, however, has not entirely abandoned analyzing the characteristics of an underlying transaction in order to distinguish between interstate and intrastate commerce. In *Allenberg Cotton Co. v. Pittman*,[27] the Court looked to the nature of the transaction between Allenberg Cotton, a Tennessee cotton broker, and Pittman, a Mississippi farmer, to determine whether Mississippi could properly bar Allenberg from suing on a contract. Pittman arranged, through an independent agent acting on Allenberg's behalf, to deliver his cotton crop to a local Mississippi warehouse for resale on the national market. Allenberg maintained no contacts within the state of Mississippi other than through its independent contractor. The Court found the cotton market to be national in scale and therefore interstate in nature.[28] Following the "underlying transaction" analysis of *Dahnke-Walker*, the Supreme Court found the state licensing statute invalid as applied to Allenberg and similarly situated corporations.[29]

In each of these cases, the state licensing statute under scru-

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24. *Id.* at 280-81.

25. Justice Harlan stated, "I am not prepared [to invalidate the New Jersey statute] at the expense of state power to regulate the promotion of sales of goods owned and located within the State when the countervailing federal considerations are as thin as they seem to me to be here . . . ." *Id.* at 297 (J. Harlan, concurring).

26. "[I]t is equally well-settled that if Lilly is engaged in intrastate as well as interstate aspects of the New Jersey drug business, the State can require it to get a certificate of authority to do business [within the state]." *Id.* at 279 (citing Railway Express Agency v. Virginia, 282 U.S. 440 (1930)).

27. 419 U.S. 20 (1974).

28. *Id.* at 33.

29. *Id.* at 34.

tiny discriminated against out-of-state corporations on its face. Where the facts indicated that the corporation was adversely affected by the statute and was engaged solely in interstate commerce within the host state, the Court struck down the statute as invalid per se under the dormant commerce clause.[30]

B. Equal Protection Clause Cases

The Ohio tolling statute only affects interstate commerce indirectly by prodding foreign corporations to appoint a statutory agent within the state.[31] The Court recently entertained a challenge to a New Jersey tolling statute, similar to section 2305.15, under the equal protection clause.

G.D. Searle & Co. v. Cohn[32] began as a personal injury action brought by Cohn against Searle, a national manufacturer of pharmaceutical products, in a New Jersey state court. The case was removed to federal court, and Searle subsequently moved for summary judgment under New Jersey's two-year statute of limitations. Cohn contended that the period of limitations had tolled under section 2A:14-22 of the New Jersey Revised Statutes. Searle contended that the New Jersey statute violated the equal protection clause.[33]

The district court ruled that since the tolling provision only preserved actions against foreign corporations not amenable to personal service in New Jersey, and since Searle was amenable to service under New Jersey's long-arm statute, there was no reasonable justification for the tolling statute's differential treatment of

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30. The Court implied that a rule of virtual per se invalidity would be applied where the regulation at issue discriminated against interstate commerce on its face. *See* Edgar v. MITE Corp., 457 U.S. 624, 640-43 (1982); City of Philadelphia v. New Jersey, 437 U.S. 617, 625-28 (1978).

More recently, the Court attempted to graft this per se analysis onto its standard balancing test by first attempting to detemine whether the state law directly discriminates against interstate commerce. *See* Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 578-79 (1986). Yet, the Court admitted in that same opinion that:

> [T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Id. at 579.

31. *See supra* note 3 and accompanying text.

32. 455 U.S. 404 (1981).

33. *Id.* at 406.

foreign corporations.[34] Before the court of appeals could hear Cohn's appeal, however, the New Jersey Supreme Court upheld section 2A:14-22 against an identical challenge, on the grounds that the difficulty in serving out-of-state defendants provided a rational basis for tolling the statute of limitations in a suit brought against a foreign corporation unrepresented within the state.[35] Therefore, the court of appeals duly reversed the district court and upheld the validity of the New Jersey statute.[36]

The Supreme Court, on review, adopted the reasoning of the New Jersey Supreme Court:

> [T]he unrepresented foreign corporation remains potentially difficult to locate. Long-arm jurisdiction does not alleviate this problem, since a New Jersey plaintiff must find the unrepresented foreign corporation before it can be served. . . . It is true, of course, that respondents had little or no trouble locating this particular, well-known defendant-petitioner, but the tolling statute is premised on a reasonable assumption that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve.[37]

Searle also raised the arguments that section 2A:14-22 violated the due process and commerce clauses. The Court, however, rejected the due process argument as not properly before it,[38] and declined to consider the commerce clause argument due to the "opaque" nature of the New Jersey Supreme Court's only comment on the issue.[39] The Supreme Court therefore remanded the case to the district court for further consideration of the com-

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34. *Id.* at 406-07.

35. Velmohos v. Maren Eng'g Corp., 83 N.J. 282, 295-97, 416 A.2d 372, 381 (1980).

36. The decision of the court of appeals was consolidated with Hopkins v. Kelsey-Hayes, Inc., 463 F. Supp. 539 (D.N.J. 1978), *aff'd*, 628 F.2d 801 (3d Cir. 1980). In Hopkins, a different federal district judge ruled that § 2A:14-22 was consistent with the equal protection and due process clauses. *Id.* at 542.

37. *Searle*, 455 U.S. at 410 (citations omitted).

38. *Id.* at 413 n.7.

39. The Court stated that:

> The dispute over the Commerce Clause centers in what seems to us to be an opaque footnote in the New Jersey Supreme Court's majority opinion in *Velmohos* . . . . "We note that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the state." . . .
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> [This] lone sentence in the *Velmohos* footnote by itself does not clearly demonstrate the correctness of either [party's] view or lucidly inform us as to what the state law is.

Id. at 413-14.

merce clause claim.[40]

Before the district court could hear the case, the New Jersey Supreme Court again intervened. That court struck down section 2A:14-22 on the grounds that it discriminated against interstate commerce on its face by "forc[ing] licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense."[41] The federal district court followed suit, and accordingly granted Searle's motion for summary judgment on the grounds that, in the absence of section 2A:14-22, the statute of limitations had expired.[42]

The Supreme Court's decision in *Searle* precluded the equal protection avenue of attack which Midwesco may otherwise have followed in *Bendix Autolite*. More importantly, however, the district court's decision on remand set the stage for the commerce clause attack on the Ohio tolling statute that Midwesco did undertake.

II. *Bendix Autolite Corp. v. Midwesco Enterprises*

The Supreme Court invalidated section 2305.15 of the Ohio Revised Code in an eight to one decision, with Justice Kennedy writing for the majority. Justice Scalia concurred in a separate opinion, and Chief Justice Rehnquist dissented.

A. Opinion of the Court

The majority began by noting that the Court could have analyzed Ohio's tolling statute under either of two approaches. Since the tolling provision of section 2305.15 applied to persons outside the state of Ohio and not to persons within the state, the statute was discriminatory on its face and could therefore be declared invalid "without extended inquiry."[43] The Court instead chose "to weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed [was] a rea-

40. *Id.* at 414.

41. Coons v. American Honda Motor Co., 94 N.J. 307, 318-19, 463 A.2d 921, 927 (1983), *cert. denied*, 469 U.S. 1123 (1985).

42. Cohn v. G.D. Searle & Co., 598 F. Supp. 965, 969 (D.N.J. 1984).

43. Bendix Autolite Corp. v. Midwesco Enters., 108 S. Ct. 2218, 2220 (1988). This is the "*per se* invalid" approach followed in Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 291 (1921), and Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 34 (1974).

sonable one."[44]

The majority concluded that the burden the tolling provision placed upon foreign corporations was "significant." Ordinarily, Midwesco would not be subject to the general jurisdiction of Ohio courts,[45] but only to the more limited jurisdiction available under the Ohio long-arm statute.[46] Midwesco could only escape the consequences of section 2305.15, however, by appointing an agent to receive service of process within the state.[47] That appointment would allow Ohio to establish personal jurisdiction over Midwesco for any action brought in an Ohio court,[48] regardless of the origin

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44. *Bendix Autolite*, 108 S. Ct. at 2220. This is the more traditional "balancing" approach. *See supra* note 20.

45. Midwesco did not maintain an office in Ohio, it was not registered to do business there, nor had it appointed a corporate agent for service of process within the state. *Bendix Autolite*, 108 S. Ct. at 2221. Without more, Midwesco would lack the minimum contacts with Ohio necessary for a state court to establish personal jurisdiction over the company. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

46. OHIO REV. CODE ANN. § 2307.382 (Baldwin 1984) provides in pertinent part:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
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> (1) Transacting any business in this state;
>
> (2) Contracting to supply services or goods in this state;
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> (3) Causing tortious injury by an act or omission in this state;
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> . . . .
>
> (B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

47. Bendix argued that Midwesco could have avoided section 2305.15 without formally registering to do business in Ohio by either designating an agent to receive service within the state in its contract with Bendix, or by giving notice to the secretary of state. The Court rejected both assertions as without statutory foundation. *Bendix Autolite*, 108 S. Ct. at 2222.

48. OHIO REV. CODE ANN. § 1703.041 (Baldwin 1986) provides in pertinent part:

> (A) Every foreign corporation for profit that is licensed to transact business in this state, and every foreign nonprofit corporation that is licensed to exercise its corporate privileges in this state, shall have and maintain an agent, sometimes referred to as the "designated agent," upon whom process against such corporation may be served within this state. . . .
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> . . . .
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> (H) Process may be served upon a foreign corporation by delivering a copy of it to its designated agent, if a natural person, or by delivering a copy of it at the address of its agent in this state, as such address appears upon the record in the office of the secretary of state.
>
> (I) This section does not limit or affect the right to serve process upon a foreign corporation in any other manner permitted by law.

In part to avoid the result in *Dahnke-Walker* and *Allenberg*, OHIO REV. CODE ANN. § 1703.02 (Baldwin 1986) exempts foreign corporations engaged solely in interstate commerce from the requirement of registering to do business in Ohio. This section does not, however, remove foreign corporations from the reach of section 2305.15.

of the underlying claim. "Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden."[49]

Ohio's interest in enacting section 2305.15 was to facilitate service of process upon defendants outside the state, who might otherwise be difficult to locate, by prodding them into designating a statutory agent within the state.[50] While the Court noted that such an interest was "important," Midwesco had been subject to service under Ohio's long-arm statute throughout the four-year period of limitation.[51] Thus, section 2305.15 offered no additional protection to Ohio residents injured by the actions of a foreign corporation. Rather, that section conditioned the availability of a statute of limitations defense on the waiver of rights that Midwesco would otherwise retain.[52] Although one does not have a fundamental right to a statute of limitations defense,[53] the Court stated that such a defense is "an integral part of the legal system and [is] relied upon to project [sic] the liabilities of persons and corporations active in the commercial sphere."[54] By depriving Midwesco of that defense without substantially advancing the interests of the state, the majority concluded that section 2305.15 placed an unreasonable burden on interstate commerce.[55]

B. Concurring Opinion

Justice Scalia, concurring separately, criticized the analytical approach taken by the majority as entirely too speculative. He ob-

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49. *Bendix Autolite*, 108 S. Ct. at 2221.

50. *Id.* at 2222.

51. Both parties conceded that Midwesco could have been served under Ohio Revised Code section 2307.382 throughout the four-year period of limitation. *Bendix Autolite*, 108 S. Ct. at 2222.

52. *Bendix Autolite*, 108 S. Ct. at 2221.

53. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

> [Statutes of limitation] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id.

54. *Bendix Autolite*, 108 S. Ct. at 2221.

55. *Id.* at 2222.

jected that the labelling of the competing state and private interests as "important" and "significant" was meaningless, and that the majority's final weighing of those interests was a comparison of apples to oranges.[56] Indeed, Scalia would abandon the "balancing" approach in dormant commerce clause cases as an area better left to Congress.[57] In its place he advocates a return to the narrower, per se analysis: "[A] state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose."[58] Since section 2305.15 was discriminatory on its face, and there were no valid state interests advanced to justify that discrimination, Justice Scalia also found the tolling statute to be in violation of the commerce clause.[59]

C. Dissenting Opinion

Chief Justice Rehnquist, dissenting, accepted the analysis of the majority but rejected its result. While Midwesco was engaged in interstate commerce when it contracted to sell one of its boiler

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56. Justice Scalia stated:

> I cannot confidently assess whether the Court's evaluation and balancing of interests in this case is right or wrong. Although the Court labels the effect of exposure to the general jurisdiction of Ohio's courts "a significant burden" on commerce, I am not sure why that is. . . .
>
> . . . .
>
> On the other side of the scale, the Court considers the benefit of the Ohio scheme to local interests. . . . We have no way of knowing how often these ends are in fact achieved, and the Court thus says little about them except to call them "an important factor to consider."
>
> Having evaluated the interests on both sides as roughly as this, the Court then proceeds to judge which is more important. This process is ordinarily called "balancing," but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy. All I am really persuaded of by the Court's opinion is that the burdens the Court labels "significant" are more determinative of its decision than the benefits it labels "important."

Id. at 2223 (citations omitted).

57. *Id.* at 2224.

58. *Id.*

59. Justice Scalia argued that:

> A tolling statute that operated only against persons beyond the reach of Ohio's long-arm statute, or against all persons that could not be found for mail service, would be narrowly tailored to advance the legitimate purpose of preserving claims; but the present statute extends the time for suit even against corporations which (like [Midwesco]) are fully suable within Ohio, and readily reachable through the mails.

Id.

systems to Bendix, he contended that the company was engaged in intrastate commerce when it contracted to install that system.[60] Since a state may properly regulate intrastate commerce, Ohio could properly require Midwesco to register to do business within the state.[61] Rehnquist concluded that section 2305.15 did no more than require registration and placed no greater burden on Midwesco than it could properly place on any other entity doing business in Ohio. He concluded that the Ohio tolling statute was valid.[62]

III. ANALYSIS

In light of previous holdings, the decision in *Bendix Autolite* appears to be an easy one. The burdens imposed by section 2305.15 fall disproportionately upon businesses incorporated outside Ohio that actually do business within the state, and the practice of invalidating such regulations under the dormant commerce clause is well-established.[63] Yet, Justice Scalia and Chief Justice Rehnquist both mounted attacks on the majority's decision that merit closer examination.

A. Balancing National and Local Interests

By holding section 2305.15 unconstitutional, the majority expressly chose to balance the competing interests affected by the statute, even though Justice Kennedy remarked that the Court could have found the statute invalid per se.[64] Traditional balancing under the dormant commerce clause involves a weighing of interests — the national interest in unfettered trade between the states against the local interest in regulation. Yet, these national interests have not been articulated by Congress and are merely presumed by the Court.[65] Therefore, when the Court finds that

60. *Id.* at 2225.
61. *Id.* (citing to Eli Lilly & Co. v. Sav-on-Drugs, 366 U.S. 276, 276 (1961)).
62. *Id.*
63. *See supra* note 19.
64. *Bendix Autolite*, 108 S. Ct. at 2220-21.
65. Hood & Sons v. DuMond, 336 U.S. 525, 534-35 (1949).
The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word,

the local interest is unduly burdensome on interstate commerce and invalidates the state law at issue, as it did in the *Bendix* case, it is imposing its own values upon the states.[66]

As Justice Scalia caustically remarked, the judicial branch is ill-suited to make policy judgments in this area, a task specifically delegated to Congress under the commerce clause.[67] This is particularly true when the Court attempts to interpret congressional silence under the dormant commerce clause. Under the current standard, the greater the importance of the national interest at stake and the greater the burden that the state regulation places on that interest the greater the likelihood that the Court will invalidate the regulation. But these are the very situations most likely to induce an administrative agency or Congress itself to act.[68] Since the political response is more desirable from an institutional point of view, and the only response expressly provided in the text of the Constitution, the Court arguably oversteps its authority when it engages in balancing under the dormant commerce clause.[69]

Justice Scalia would avoid making policy judgments in this area by limiting judicial analysis to a determination of whether the means employed by the regulation being challenged are tailored to match the ends sought by the state.[70] This is essentially a return to the rule of per se invalidity followed in the *Dahnke-Walker* and *Allenberg* cases. State efforts to discriminate against non-residents for the sole purpose of securing commercial advantages for state residents would necessarily be an illegitimate end. The Court has repeatedly held that a corporation of one state may lawfully enter into another state for the purpose of engaging in interstate trade free from any regulation which that state may properly impose on resident corporations.[71] Section 2305.15,

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this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.

Id.

66. *See* Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 429-35 (1982); Redish & Nugent, *supra* note 11, at 588-90.

67. *Bendix Autolite*, 108 S. Ct. at 223-24; CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1652 (1987)(Scalia, J., concurring in part and dissenting in part).

68. Eule, *supra* note 66, at 433-34.

69. *Id.* at 429-35; Redish & Nugent, *supra* note 11, at 591-99.

70. *Bendix Autolite*, 108 S. Ct. at 2224.

71. *See* Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 33 (1974); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290 (1921); Sioux Remedy Co. v. Cope, 235 U.S. 197, 203-04 (1914); International Textbook Co. v. Pigg, 217 U.S. 91, 112 (1910); Western

which preserved actions against certain corporations solely on the basis of their failure to reside or appoint a resident agent within Ohio, falls into this category. Justice Scalia would therefore invalidate section 2305.15 because it does not advance any legitimate state purpose.[72]

B. Permissible Scope of State Regulation

The majority implicitly concluded that Midwesco's dealings with Bendix were wholly interstate in nature. Under the dormant commerce clause, a state law may not interfere or unduly burden transactions of this type. Clearly, the arena in which a state may properly regulate commerce is a small one, and even within those walls it may only act when the outside repercussions are insignificant.

Chief Justice Rehnquist wished to expand the parameters within which the states could permissibly operate. He argued that at least one aspect of Midwesco's dealings with Bendix — the installation of the boiler at Bendix's Fostoria plant — was intrastate in nature.[73] Relying on *Eli Lilly*, Rehnquist would argue that state regulation of a foreign corporation engaged in business conducted wholly within the regulating state is permissible.[74] Rehnquist's reading of the facts placed Midwesco's activities within Ohio outside the scope of the commerce clause.

In essence, Rehnquist would make the permissible reach of a

Union Tel. Co. v. Kansas, 216 U.S. 1, 27 (1910); Crutcher v. Kentucky, 141 U.S. 47, 57 (1890).

72. *Bendix Autolite*, 108 S. Ct. at 2224.

73. *Id.* at 2224-25.

74. The result in *Eli Lilly* might be better explained as an extension of New Jersey's political power rather than of its judicial power. One theory of commerce clause jurisprudence subjects foreign corporations to the laws of states in which they have a political voice rather than where they do business. In essence, "intrastate" commerce would be defined as transactions between parties represented in the legislative assembly of the state in which the transaction occurred. *See, e.g.*, South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938)("when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state"). For a more detailed presentation of this process-based theory, see Eule, *supra* note 66; Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125. Eli Lilly & Co. had a presence within the state sufficient to give it a voice in the political process that enacted the New Jersey registration statute. Therefore, requiring Eli Lilly to comply with that statute does not amount to discrimination against interstate commerce. This argument, however, cuts against Rehnquist's broader-based theory.

state's ability to regulate commerce coextensive with the permissible reach of its courts. Yet, such an interpretation is overly broad. The Ohio courts exercised jurisdiction over the Bendix-Midwesco contract dispute under that state's long-arm statute.[75] In its absence, Midwesco would have lacked sufficient contacts with Ohio for Ohio courts to establish personal jurisdiction over the company's commercial activities.[76] Rehnquist's scheme would allow a state to regulate any and all business taking place within its borders. There is no precedent for this position; indeed, the commerce clause was included in the Constitution as a limitation on the states' ability to regulate commerce.[77] Even *Eli Lilly*, the case upon which Rehnquist relies, only allows state regulation of foreign corporations over which it could assert personal jurisdiction without recourse to a long-arm statute.[78] As a result of this position, it appears that Rehnquist would do away with the dormant commerce clause entirely.

CONCLUSION

In *Bendix Autolite*, the Court sent a clear signal that it will continue to strike down state legislation that unduly burdens interstate trade and business under the dormant commerce clause. Moreover, the Court will continue to balance the national interest in free trade among the states against an individual state's interest in a particular regulation in order to determine whether the regulation is unduly burdensome. Recent scholarship sharply criticizing this approach appears to have, for the most part, fallen upon deaf ears. Only Justice Scalia has questioned the role taken by the Court in this area. A solid seven-member majority supports the continued viability of traditional commerce clause jurisprudence.

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75. *Bendix Autolite*, 108 S. Ct. at 2222.
76. *See supra* note 45.
77. *See generally* Redish & Nugent, *supra* note 11.
78. *See supra* note 74.