

December 1970

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Wendy W. Davis, *A Critical Evaluation of State Foreign Corporation Laws as a Bar to Federal Diversity Jurisdiction*, 12 Wm. & Mary L. Rev. 416 (1970), <https://scholarship.law.wm.edu/wmlr/vol12/iss2/7>

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A CRITICAL EVALUATION OF STATE FOREIGN CORPORATION LAWS AS A BAR TO FEDERAL DIVERSITY JURISDICTION

All fifty states have statutes requiring foreign corporations to register as a condition to doing business in the state.¹ These statutes generally require designation of an agent to receive service of process, or alternatively allow process to be served on any officer of the corporation found in the state or, if none can be found, on a state official.² In all but four states,³ the penalty for non-compliance is restricted access to the state courts.⁴ The provision of the Model Business Code reflects this approach, and has been used as a prototype by many states: "No foreign corporation transacting business in this State without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this State, until such corporation shall have obtained a certificate of authority."⁵

This note advocates that corporations are entitled to bring suit in federal courts on the basis of the diversity jurisdiction granted by Congress regardless of the apparent bar created by these state registration statutes for foreign corporations. The history and rationale of these laws and their present limited utility are discussed. The rationale of this federal jurisdictional standard, in addition to the recent movement of the Supreme Court in sanctioning the existence of a federal body of non-statutory law, is outlined in support of this proposition. Finally, a few collateral problems resulting from the application of foreign corporation laws are pointed out.

THE HISTORY AND RATIONALE OF FOREIGN CORPORATION LAWS

Foreign corporation laws were adopted during the evolution of the federal constitutional requirements of due process. Historically, the

1. See, e.g., Business Corporation Act, ILL. ANN. STAT. ch. 32, §§ 157.102, 157.109, 157.125 (Smith-Hurd 1949) (no power to sue); MICH. COMP. LAWS ANN. §§ 450.93, 450.95 (1945) (contracts void); N.Y. BUS. CORP. LAW § 1312 (McKinney 1963); VT. STAT. ANN. tit. 11, §§ 691, 764 (1947) (contracts void); WASH. REV. CODE ANN. §§ 23A.32.010, 23A.32.190 (1967) (no power to sue).

2. See, e.g., VA. CODE ANN. § 13.1-119 (Repl. Vol. 1964).

3. Delaware, Georgia, Kansas, and Kentucky.

4. 1 P-H CORP. ¶ 858 (1964).

5. ABA-ALI MODEL BUS. CORP. ACT § 177 (1953) (transacting business without a certificate of authority). See also *id.* § 99 (admission of a foreign corporation).

requirement that original legal process be served within the territorial boundaries of the state was based on the coercive powers of the state over those within its boundaries. This concept had originated in the 1500's with Ulrich Huber's writings. Huber wrote, "The laws of each state have force within the limits of that government and bind all subject to it, but not beyond."⁶ Story imported this idea to America in his commentaries on the Conflict of Laws.⁷ By 1800, the delivery of original process within the state's boundaries was accepted as prerequisite to the assumption of general jurisdiction by the state, or extension of full faith and credit between states,⁸ and was made part of the constitutional requirement of due process in the decision of *Pennoyer v. Neff*.⁹

Jurisdictional limitations regarding corporations were rendered ineffective by early decisions denying corporations legal existence outside the states which had created them. And once it was settled that a state could exclude foreign corporations completely, it was easy to justify conditional entry.¹⁰ This in turn provided the logical basis for foreign corporation laws and their restrictions on a corporation's entry into the state.

As time passed, however, writers began to challenge Huber's theory of the territorial limits of laws and suggest that his maxim be discarded, especially in the face of the modern realities surrounding transportation and communication.¹¹ It was also recognized that although the law of a given state may be enforced only within its boundaries, it still may affect legal relations outside of them.¹² These changes in legal philosophy necessarily affected the rule of *Pennoyer v. Neff*¹³ which was criticized as an oversimplified fusion of two issues: whether there is a sufficient relationship between the defendant and the forum to allow adjudication of the claim against him, and whether the defendant has received sufficient notice.¹⁴ The Supreme Court explained the notice requirement

6. Walker, *Foreign Corporation Laws: The Loss of Reason*, 47 N. C. L. Rev. 1, 2 (1968).

7. *Id.* at 3.

8. *Id.* at 5.

9. 95 U.S. 714 (1877).

10. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839).

11. See generally Walker, *supra* note 6, at 4.

12. *Id.*

13. 95 U.S. 714 (1877).

14. Walker, *supra* note 6, at 24.

further in *MacDonald v. Mabee*¹⁵ by holding that substituted service may be wholly adequate to meet the requirements of due process if it is reasonably likely to reach the defendant. *Pennoyer v. Neff* was, in effect, superseded in the *International Shoe* case,¹⁶ when the Court stated that certain minimum contacts create a relationship with the forum to such an extent that requiring the corporation to defend “. . . does not offend traditional notions of fair play and substantial justice.”¹⁷ These cases validated the use of long arm statutes, which to date have been enacted in forty-four states.¹⁸ In those states, if the “minimum contacts” are present, service of process can be made on non-residents outside the state in various ways with no need for local agents. In addition, the widespread passage of state laws restricting the defense of *ultra vires*, which heretofore could vitiate corporate liability if it were shown that the corporation lacked legal capacity to act, removed any other ostensible base of support for foreign corporation laws. Thus, it is apparent that the foreign corporations laws have been rendered obsolete with the initial reasons behind their passage no longer applicable.

A FEDERAL JURISDICTIONAL STANDARD FOR CORPORATIONS

The basic constitutional right of a non-resident litigant to an independent federal forum dates from the origins of the Constitution itself.¹⁹ There was a general belief which still persists, that a non-resident would be subject to discrimination in state courts. State courts and judges had been considered by some inferior to their federal counterparts in the quality of justice dispensed.²⁰ Such belief may not have been altogether unjustified, since state judges are often subjected to strong local political pressure. “Federal procedures are relatively enlightened; and the life tenure, independence, respectable salary and prestige of the federal bench have attracted . . . judges of relatively high caliber.”²¹ Moreover, there is often no specific requirement of legal training or experience prerequisite to state judgeships, much less the scholarly erudition not

15. 243 U.S. 90 (1917).

16. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

17. *Id.* at 316.

18. The following states apparently have no statutory long-arm provision: Arizona, Colorado, Delaware, North Dakota, Ohio and Wyoming.

19. U.S. CONST. art. III, § 2.

20. AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE & FEDERAL COURTS* 99-104 (1969).

21. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 3 (1968).

uncommon among federal judges.²² For these reasons, it is a maxim of our legal system that a non-resident is entitled to an independent federal system in which to adjudicate his rights within the framework of state law.

In two recent cases, a debate occurred about the existence of a federal jurisdictional standard in diversity cases. Judge Clark argued in *Jaftex*²³ that Rule Four of the Federal Rules of Civil Procedure, dealing with service of process, sheds light on amenability to service. He argues that the federal jurisdictional standard was historically created by statute²⁴ which treated service of process and venue as a unit. When revised, in the interests of clarity and logic, the service of process rules were separated from the venue provisions,²⁵ but this does not negate the existence of the federal standard. Judge Friendly's view, that although Congress has the constitutional power to create a federal jurisdictional standard, it has not yet done so, prevailed in *Arrowsmith v. United Press International*²⁶ and is the accepted view today. However, the logic of Judge Friendly's argument fails when applied to a corporation, a fictitious legal entity. Any jurisdictional right to sue possessed by a corporation must be specifically granted, for there is no such inherent corporate right.

This proposition is apparent when examining the debate over the proposed rules for restructuring jurisdiction in the federal courts formulated by the American Law Institute.²⁷ Clarity is the criterion used; the ends sought include the avoidance of extensive preliminary litigation and the reduction of friction between the state and federal courts.²⁸ Present federal statutes provide that a corporation is a citizen of both the state of incorporation and the state where it has its principal place of business.²⁹ Proposed section 1302 further limits utilization of diversity jurisdiction by a corporation, by providing that an enterprise may not invoke diversity jurisdiction in a state where it has maintained a business establishment for two years. Clearly Congress could completely

22. For a comprehensive discussion of this topic, see Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

23. *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960).

24. Judicature Act § 11, 1 Stat. 78 (1789).

25. 28 U.S.C. § 1391 (1964) (venue); FED. R. CIV. P. 4(f) (service of process).

26. 320 F.2d 219 (2d Cir. 1963).

27. AMERICAN LAW INSTITUTE, *supra* note 20, §§ 1302, 1304.

28. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 187 (1969).

29. 28 U.S.C. § 1332(c) (1964).

abolish diversity jurisdiction in the case of corporations, as has been suggested. This power and the statutes' use of the terms "invoke diversity jurisdiction" create an inference of a federal jurisdictional standard separate from that created by the incorporating state. If a corporation can sue in a diversity case in a federal court, it has a power created by federal law, not arising from any inherent nature of a corporation.³⁰

There are persuasive considerations why Congress should have intended to make such a positive grant of jurisdiction to corporations. Without access to federal courts, corporations might be apprehensive about the uncertainties of the courts of a foreign state. By removing this apprehension, commerce is fostered. Moreover, corporate officers are aware of the universal opinion that the procedures available in the federal courts are superior to those of the state courts. The federal courts are the ideal forum for the construction of the uniform statutes regulating commercial law, as well as for uniform development of conflict of laws rules. Such uniformity and procedural advantages would have the obvious result of fostering commerce throughout the country, thus embodying a historic federal interest and justifying a specific grant of federal jurisdiction to corporations in diversity cases.

THE DEVELOPMENT OF THE ERIE DOCTRINE AND THE STATUS OF
Woods v. Interstate Realty Co. TODAY

Recent modifications of the Erie doctrine indicate that the Supreme Court is creating a body federal common law consistent with the federal jurisdictional standard herein advocated. These developments represent a return to ideas held in the early years of our country, when the proposition that a "higher" or "natural" law existed was an accepted philosophy. The Rules of Decision Act of 1789 was interpreted in light of this philosophy in *Swift v. Tyson*.³¹ The act required application of state law by federal courts in diversity cases. The Court held that "state law" meant positive local statutes, not decisions of the states' highest courts, which were construed as merely evidence of law. The result was that federal courts were given power to overrule state courts on matters of policy.³² A non-resident could, therefore, choose the court whose law was the most favorable to his cause, making forum-shopping a tool

30. Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1447 (1964).

31. 41 U.S. (16 Pet.) 1 (1842).

32. Note, *The Operation of Federalism in Diversity: Erie's Constitutional Basis*, 40 IND. L.J. 512, 514-16 (1965).

in the lawyer's bag of tricks. Acceptance of the idea of a higher common law by federal courts was perhaps understandable at the time in light of the primitive condition of many state courts, the dearth of written reports, and the fact that American legal thinking was a direct outgrowth of its English counterpart. As state governments became more respected and communications improved, the abuses arising from the doctrine of *Swift v. Tyson* became increasingly intolerable.³³

The *Erie* case held that the law to be applied except in matters governed by the Constitution or acts of Congress was the states' statutory and decisional law.³⁴ It was treated as axiomatic that there was no federal common law and that, absent an express grant of federal authority, any infringement on the substantive rights of a citizen was an unconstitutional violation of the states' authority as reserved by the Tenth Amendment.³⁵ In diversity cases, the federal court came to be regarded as simply another court of the state providing uniformity of treatment for the litigants. Uniformity of treatment in turn abrogated the reasons for forum shopping and thereby eliminated it.

The first of the *Erie* progeny of cases struggling to distinguish substantive from procedural law was *Guaranty Trust Co. v. York*,³⁶ which required the federal court to apply state law when the application of federal law would "significantly affect the result of litigation."³⁷ This became known as the outcome-determinative test. *Guaranty Trust* has been criticized as being too mechanical. For under *Erie*, when examining the substance-procedure distinction, the courts had looked at the state law as the embodiment of state policy. However, *Guaranty Trust* begged the issue by ignoring policy in favor of result. The real question in *Guaranty Trust* should have been directed at the meaning of "substantive" in terms of valid state interest.³⁸ "It is not a proper assumption that state interest is inexorably manifested by the result of a given lawsuit. . . . [P]olicy is found in the source of law rather than the outcome of a particular litigation."³⁹

This area involves the most sensitive problems of federalism and must

33. *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532 (1928) (Holmes, J., dissenting).

34. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

35. Note, *Seaboard Finance Co. v. Davis, a New Approach to the Application of Erie*, 2 JOHN MARSHALL J. PRAC. & PROC. 189, 191 (1968).

36. 326 U.S. 99 (1945).

37. *Id.* at 109.

38. Note, *The Operation of Federalism in Diversity*, *supra* note 32, at 528.

39. *Id.* at 528-29.

be met in a flexible manner by recognizing conflicts in policy. Professor Hart stated:

Thus far the Supreme Court's decisions on these matters seem to be founded on no higher principle than that of eliminating every possible reason for a litigant to prefer a federal to a state court. The principle having no readily apparent stopping place, the reach of the decision is unclear. What is more important is the triviality of the principle. The more faithfully it is carried out the more completely the constitutional and statutory grants of diversity jurisdiction are emptied of intelligible meaning. The principle passes over the essential rationale of the *Erie* opinion—the need of recognizing the state courts as organs of coordinate authority with other branches of the state government in the discharge of the constitutional functions of the state—and most of the battery of considerations marshalled by Brandeis as reasons for respecting the constitutional plan.⁴⁰

Apparently persuaded by these arguments, the Supreme Court began whittling exceptions out of the *Guaranty* outcome determinative test.

*Byrd v. Blue Ridge Rural Elec. Coop.*⁴¹ created an exception to the outcome-determinative test when there was an overriding federal consideration. In the *Byrd* case the Seventh Amendment right to a jury trial was involved.

The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction The policy of uniform enforcement of state created rights and obligations . . . cannot in every case enact compliance with a state rule . . . which disrupts the federal system of allocating functions between judge and jury.⁴²

Byrd suggests that even if the state rule reflects substantive rights, a strong countervailing federal policy might prevail.⁴³ The courts must balance the federal policy against that of the state.

In 1965, the Supreme Court again was asked to apply the *Byrd* test.

40. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512 (1954).

41. 356 U.S. 525 (1958).

42. *Id.* at 537-38.

43. Note, *Corporate Amenability to Process in the Federal Courts: State or Federal Jurisdictional Standards*, 48 MINN. L. REV. 1131, 1145 (1964).

The question was: When federal procedural rules affect substantive state rights, should the federal interest to be furthered by application of federal procedural rules outweigh the state interest in having its substantive policy carried out? The Court in *Hanna v. Plumer*⁴⁴ avoided the issue by refusing to test the Federal Rules of Civil Procedure by the *Erie* doctrine. Instead, it held that the Rules Enabling Act of 1934 gave Congress the power to make rules with the sole exception being that the rules so promulgated "shall neither abridge, enlarge, nor modify the substantive rights of any litigant." The Federal Rules which were within the uncertain area between substance and procedure, and rationally capable of classification either way, should be applied in diversity cases. A rule's tendency to promote forum shopping, the evil thought to be vitiated by *Erie*, was irrelevant.

Justice Harlan's concurring opinion in *Hanna* suggested that the proper inquiry was whether the statute, although nominally procedural, conflicts with the state's substantive regulation of the primary conduct and activity of its citizens. Justice Harlan's reference to primary, private activity has been taken up by the commentators as the proper criteria by which to apply the *Erie* doctrine. It has been suggested that a substantive rule is one that influences the primary behavior of a citizen in his everyday life, while a procedural rule affects only judicial house-keeping regulating the fair disposition of cases in court.⁴⁵

Professor Stason has attacked the *Byrd* and *Hanna* decisions as promoting "alteration of the intended nature of the federal union."⁴⁶ His criticism includes the statement that "the Tenth Amendment implicitly denies any force to federal policy as a standard by which to determine whether rights created under powers reserved to the states in that amendment may properly be infringed. . . . Federal policy considerations are constitutionally irrelevant."⁴⁷ However, mitigating against this view are recent civil rights decisions where Southern school segregation policies have yielded to policy considerations rooted in the Constitution itself. As Professor Anderson said, "A major established national policy

44. 380 U.S. 460 (1965).

45. Note, *Seaboard Finance Co.*, *supra* note 35, at 200; Note, *Erie, Forum Non Conveniens and Choice of Law in Diversity Cases*, 53 VA. L. REV. 380, 393-94 (1967); Note, *Choice of Procedure in Diversity Cases*, 75 YALE L.J. 477, 482-85 (1966).

46. Stason, *Choice of Law Within the Federal System: Erie versus Hanna*, 52 CORNELL L.Q. 377, 382 (1967). Professor Stason's article contains a spirited defense of *Guaranty Trust Co. v. York* as well as a compelling argument that *Hanna v. Plumer* violates the spirit of the Tenth Amendment by infringing on the states' reserved powers.

47. *Id.* at 393-94.

of social morality cannot exist side-by-side with a conflicting state practice."⁴⁸ In discussing this problem of federalism, it is well not to overlook the fact that when a federal and state rule conflict, the reason may be failure by the state legislature to keep up with modern legal thinking. The conflict results not from substantive policy, but rather from legislative inaction.⁴⁹

The issues of federalism can never be divorced from the basic axioms underlying our judicial system. American jurisprudence was originally premised upon the existence of a higher law. As legal thinking evolved, this idea was repudiated and *Guaranty Trust* marked the zenith of reverence for states' rights. Since then, the pendulum seems to be returning to a concept of a federal body of law. Legal thinking favors federal forums where commerce, conflicts of laws, and international law are concerned. Moreover, the victory for the Federal Rules of Civil Procedure in *Hanna* underlined the Supreme Court's desire to give the federal courts maximum independence from state influence even in diversity cases. As discussed previously, the *Erie* case and its progeny are based on a repudiation of the existence of a federal body of common law, which amounted to an acceptance of a philosophy by the legal authorities of the time analogous to a moral judgment on the status of the law. However, today there are areas such as commercial law and conflicts of law in which the federal interest in development of uniformity is gaining acceptance which overrides any justification for applying state law.⁵⁰ This trend is based on a moral balancing of the best interests of the country in light of social and economic conditions. If there is a federal common law, then the *Erie* doctrine no longer has any basis. Such a return of the ghost of *Swift v. Tyson* would probably be favorably received by corporations.

As was said in response to the attempt of *Guaranty Trust* to create an objective test, "The justice who wants to tell the world how he decides cases . . . must say: 'This is what I believe is important in our civilization and I shall do all I can to preserve it. . . . If this is too shocking . . . then society must take away the Court's power. There is no

48. Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203, 1209 (1965).

49. Note, *A.L.J. Proposals to Expand Federal Diversity Jurisdiction: Solution to Multiparty, Multistate Controversies?*, 48 MINN. L. REV. 1109, 1125 (1964).

50. See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640 (9th Cir. 1961).

middle ground.'"⁵¹ Judge Clark also commented that "it is an attempt to avoid the unavoidable . . . to ask judges not to judge, not to exercise their judicial capacity or the power of their minds, even though Congress and the Constitution have given them jurisdiction over the case."⁵² A liberal eye should be kept on these trends, for the relationships of federalism will be judged by the ethical predilections of our civilization, rather than by a rigid application of rules which have lost their philosophical basis. Law should reflect society's values, rather than society be a slave to law. It must also be remembered that all so-called procedural rules upon examination will reveal some substantive essence at their core. The judicial process was designed to ascertain the truth and to work justice; the rules of the game insofar as they help accomplish these ends are part of the individual's substantive rights. If carried to its logical conclusion, this proposition would result in all diversity cases applying state procedures. However, in *Hanna*, the Supreme Court underlined the distinction between substance and procedure, recognizing that only by retaining the applicability of the Federal Rules will the federal judiciary retain its independence and its concomitant function in diversity cases.

The sum of *Erie* and its progeny is that when state and federal rules conflict, and application of the federal rule would affect a variance in the outcome, the court will apply the state rule unless there is a counter-vailing federal consideration, except that the Federal Rules of Civil Procedure will always be applied in diversity cases. It may well occur that the *Erie* doctrine will continue to be limited as the federal government becomes the only instrumentality capable of handling many of our problems.

In *Woods v. Interstate Realty Co.*,⁵³ the Supreme Court held that the Mississippi statute that closed the door of the state courts to nonqualifying foreign corporate plaintiffs applies also to the federal courts of the state. The Court relied heavily on *Guaranty Trust Co. v. York*,⁵⁴ which required a federal court in a diversity case to apply state law if application of a conflicting federal rule would "significantly affect the result of litigation."⁵⁵ Since the Mississippi door-closing statute was obviously

51. Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 594 (1948).

52. Clark, *Federal Procedural Reform and States' Rights: To a More Perfect Union*, 40 TEXAS L. REV. 211, 224 (1961).

53. 337 U.S. 535 (1949).

54. 326 U.S. 99 (1945).

55. *Id.* at 109.

outcome-determinative, it must govern the case even in the federal courts. The substantive policy that was embodied by the Mississippi statute was never stated.⁵⁶ In evaluating the *Woods* case, it appears that subsequent decisions eroding the significance of the outcome-determinative test, have also limited the force of the decision, and state door-closing statutes will no longer be automatically honored by federal courts. Under *Byrd v. Blue Ridge Elec. Co-op*,⁵⁷ a federal court could assume jurisdiction if the federal interest outweighed the substantive policy of the state. Since long-arm statutes have made the foreign corporation laws useless, it is impossible to find any substantive state policy. Clearly, a federal court can take jurisdiction if there is no substantive policy behind the denial of jurisdiction.⁵⁸ The fact that the state court is closed is a reflection of prejudice against the foreign corporation, and amelioration of such local prejudice is the basic purpose of diversity jurisdiction. As was stated by the Supreme Court itself, "There is sound historical reason for believing that one of the purposes of the diversity clause was to afford a federal court remedy when, for at least some reasons of state policy, none would be available in state courts."⁵⁹

Prior to the *Woods* case, there was a line of cases dealing with foreign corporation laws which were considered by the Court to be "obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie Railroad v. Tompkins* . . ." ⁶⁰ This is an enigmatic statement indeed, shedding no light on the reason why the Court suddenly decided to deviate from these cases. Up until *Woods*, the cases turned on the two different types of foreign corporation law. Where the law made local contracts of non-complying foreign corporations void, the statute was honored by the federal courts,⁶¹ but only in enforcement of the contracts, never as a bar to diversity jurisdiction. Where the laws closed local courts to the non-complying foreign corporation, the federal courts refused to allow a state statute to control access to federal courts.⁶² Moreover, the *Erie* decision overruled *Swift v. Tyson*⁶³ specifically insofar as it allowed the federal courts to ignore

56. See Note, *Corporate Amenability to Process*, *supra* note 43, at 1137; Note, *Erie*, *supra* note 45, at 391.

57. 356 U.S. 525 (1958).

58. Note, *Corporate Amenability to Process*, *supra* note 43, at 1146.

59. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 558 (1949).

60. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

61. *Diamond Glue Co. v. United States Glue Co.*, 187 U.S. 611 (1903).

62. *David Lupton's Sons v. Automobile Club of Am.*, 225 U.S. 489 (1912).

63. 41 U.S. (16 Pet.) 1 (1842).

the "unwritten law of the State as declared by its highest court"⁶⁴ but did not affect federal treatment of state statutes. Professor Walker, in a masterful analysis, argues that the prior treatment of foreign corporation law was perfectly consistent with *Erie*, as well as with the outcome-determinative test of *Guaranty Trust* and should never have been considered overruled.⁶⁵ If *Woods* were decided today, in the light of the development of the *Erie* doctrine, the Mississippi foreign corporation law would not have bound the federal court which would have applied the pre-*Erie* law on the point. As the federal courts increasingly ignore these laws, *Woods*, which cast an unwarranted light of legitimacy on door closing statutes, should be overturned, along with the statutes themselves. If not outright victims of repeal, the statutes will molder on the books, historical relics of interest only as illustrations of a search for supremacy of states' rights, in a time and place where the function of the states is merely to serve the interest of society.

OTHER PROBLEMS ARISING FROM FOREIGN CORPORATION LAWS

Application of foreign corporation laws has resulted in annoying inconsistencies, as well as the imposition of unwise and impractical burdens on interstate commerce.⁶⁶ While some cases have resulted in windfalls for local defendants,⁶⁷ a different example of the problem involved dissatisfied shareholders of a Pennsylvania corporation who organized an Illinois corporation under the same name. They expected to carry on business protected from an unfair competition suit because the Pennsylvania corporation could not sue in Illinois until it qualified, and could not qualify because of the conflict in names. The court refused to tolerate this fraud and the scheme failed.⁶⁸

At least one court has refused to follow *Woods*, because it disagreed with it.⁶⁹ Courts generally won't follow the *Woods* ruling where the suit involves an interstate transaction.⁷⁰ Other courts have avoided the

64. *Erie R.R. v. Tompkins*, 304 U.S. 64, 71 (1938).

65. Walker, *Foreign Corporation Laws: Re-examining Woods v. Interstate Realty Co. and Reopening the Federal Courts*, 48 N. C. L. Rev. 56, 59-67 (1969).

66. *Id.* at 67-69.

67. *Hicks Body Co. v. Ward Body Works, Inc.*, 233 F.2d 481 (8th Cir. 1956); *Paisley Products, Inc. v. Trojan Luggage Co.*, 293 F. Supp. 397 (W.D. Tenn. 1968).

68. *Hulburt Oil & Grease Co. v. Hulburt Oil & Grease Co.*, 371 F.2d 251 (7th Cir. 1966).

69. *Emulsol Corp. v. Rubenstein & Son Produce, Inc.*, 111 F. Supp. 410 (N.D. Tex. 1953).

70. *Waggener Paint Co. v. Paint Distributors, Inc.*, 228 F.2d 111 (5th Cir. 1955).

Woods result by stating that there was not an adequate showing that the nonregistered foreign corporation was doing business in the state.⁷¹ Foreign corporation laws have also encouraged inappropriate expansions of jurisdiction to cases where the only contact the forum had with the case was that one of the parties had qualified to do business there.⁷²

It has been convincingly argued that foreign corporation laws are an unconstitutional burden on interstate commerce.⁷³ The Supreme Court has mechanically applied a distinction between interstate and intrastate, allowing a state to validly regulate the latter,⁷⁴ ignoring the Commerce Clause. A more rational test would be to weigh the extent of the burden on interstate commerce against the state's interest in the regulation.⁷⁵ The decision which upheld the Minnesota foreign corporation statute as not constituting an undue burden on interstate commerce⁷⁶ has been criticized for its failure to look to any valid state policy underlying the law.⁷⁷ The only apparent justification for the law is that it made it unnecessary for the resident plaintiff to prove "minimum contacts" as a basis for service of process on the non-resident corporate defendant.

In the face of the limited utility of foreign corporation laws stands the considerable financial burden placed upon the economy of the nation by them. Professor Walker outlines the vast array of technicalities required for registration and qualification and the vast expense involved in fulfilling them.⁷⁸ An industry of service corporations has developed specifically to register corporations in compliance with the local laws. These companies do such things as fill out forms, maintain local agents, file annual reports, file charter amendments, and so on. The fees paid to these companies and to the states add up to a vast tax on doing interstate business, which is totally regressive, costing the small corporation the same fee as the large one. By eliminating the useless restrictions on trade contained in foreign corporation laws, the national economy will run more efficiently and contribute more to the national well-being.

WENDY W. DAVIS

71. *E.g.*, *Rock-Ola Manufacturing Corp. v. Wirtz*, 249 F.2d 813 (4th Cir. 1957).

72. Walker, *Foreign Corporation Laws: A Current Account*, 47 N. C. L. REV. 733, 734-38 (1969).

73. *Id.* at 750-56.

74. *Eli Lilly Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961).

75. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

76. *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944).

77. Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 IND. L.J. 358, 367 (1958).

78. Walker, *supra* note 72, at 757-59.