Missouri Law Review

Volume 76
Issue 2 *Spring 2011*

Article 3

Spring 2011

Can the Tolling of Statutes of Limitations Based on the Defendant's Absence from the State Ever Be Consistent with the Commerce Clause

Walter W. Heiser

Can the Tolling of Statutes of Limitations Based on the Defendant's Absence from the State Ever Be Consistent with the Commerce Clause?

*Walter W. Heiser**

Most states have legislation that tolls applicable statutes of limitations during the time a defendant is absent from the state.[1] In 1988, the United States Supreme Court held in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* that such tolling provisions violated the Commerce Clause when applied to nonresident corporations.[2] Since then, courts in several jurisdictions have considered the constitutionality of these statutes with respect to other categories of defendants. In some states, courts narrowly defined the statutory term "absence" to exclude individual defendants who, although physically absent from the state, are amenable to service of process under the laws of the forum state.[3] This limiting construction largely eliminates tolling applications that may run afoul of the Commerce Clause.[4]

However, courts in other jurisdictions have construed the tolling provisions in their state statutes to apply whenever the defendant is physically absent from the forum state, regardless of whether that defendant is still amenable to service of process.[5] These courts also conclude that such tolling provi-

---

* Professor of Law, University of San Diego School of Law. B.A., 1968, University of Michigan; J.D., 1971, University of Wisconsin; LL.M., 1978, Harvard Law School. The author would like to thank Brent R. Avery for his assistance in the preparation of this Article.

1. *E.g.*, ALASKA STAT. § 09.10.130 (2011); CAL. CIV. PROC. CODE § 351 (Deering 2011); IDAHO CODE ANN. § 5-229 (2011); ME. REV. STAT. ANN. tit. 14, § 866 (Supp. 2010); MISS. CODE ANN. § 15-1-63 (2010); MO. REV. STAT. § 516.200 (2000); NEB. REV. STAT. § 25-214 (2010); N.J. STAT. ANN. § 2A:14-22 (West 2010); N.D. CENT. CODE § 28-01-32 (2010); OHIO REV. CODE ANN. § 2305.15(A) (LexisNexis 2011); OR. REV. STAT. § 12.150 (2010); S.C. CODE ANN. § 15-3-30 (2009); TENN. CODE ANN. § 28-1-111 (2010); TEX. CIV. PRAC. & REM. CODE ANN. § 16.063 (Vernon 2008); UTAH CODE ANN. § 78B-2-104 (2011); WASH. REV. CODE ANN. § 4.16.180 (2011); WYO. STAT. ANN. § 1-3-116 (2011).

2. 486 U.S. 888, 889 (1988).

3. *See infra* note 114 and accompanying text.

4. *See infra* notes 115-16 and accompanying text.

5. *E.g.*, Dew v. Appleberry, 591 P.2d 509, 510 (Cal. 1979) (California tolling statute); Poling v. Moitra, 717 S.W.2d 520, 522 (Mo. 1986) (en banc) (Missouri tolling statute), *overruled on other grounds by* State *ex rel.* Bloomquist v. Schneider, 244 S.W.3d 139, 144 (Mo. 2008) (en banc); Brown v. Lavery, 622 N.E.2d 1179, 1180-81 (Ohio Ct. App. 1993) (Ohio tolling statute); Olseth v. Larson, 158 P.3d 532, 533 (Utah 2007) (pre-2009 Utah tolling statute).

sions violate the Commerce Clause when applied to nonresident individuals,[6] as well as to resident individuals whose absence from the forum state was for business reasons.[7] Under the reasoning employed by these courts, the applicable statutes of limitations will not be tolled during the time the defendant temporarily leaves the forum state for a non-business purpose, such as for a vacation in another state or country.[8]

This Article discusses the propriety of these Commerce Clause decisions with respect to individual defendants. More precisely, this Article examines two questions. The first is whether the Supreme Court's holding in *Bendix* was properly extended to *individual* resident and nonresident defendants. The other, and more difficult, issue concerns the proper application of the Commerce Clause to state statutes that toll the statute of limitations during the time a resident defendant is temporarily absent from the state. The Article focuses on whether such provisions violate the Commerce Clause regardless of the reason for the absence.

Part I of this Article examines the nature and operation of state statutes that toll statutes of limitations during a defendant's absence, as well as the reasons why many states enacted such legislation. Part II discusses dormant Commerce Clause jurisprudence generally, and its application to tolling provisions based on absence from the state. This Part summarizes both the Supreme Court's decision in *Bendix*, which invalidated certain absence-based tolling provisions when applied to nonresident corporations, and state and lower federal court decisions that extended *Bendix* to individual defendants.[9] Part III addresses the two issues identified in the previous paragraph and concludes that the extension of *Bendix* to individual defendants is clearly appropriate. This Part also explains why absence-based tolling violates the Commerce Clause when applied to a resident defendant who temporarily leaves the state, regardless of the purpose of the out-of-state travel. Finally, this Article concludes that absence-based tolling survives Commerce Clause scrutiny only in very limited circumstances.[10]

---

6. *See infra* notes 120-69 and accompanying text.

7. *E.g.*, Pratali v. Gates, 5 Cal. Rptr. 2d 733, 740 (Cal. Ct. App. 1992); *cf.* Johnson v. Rhodes, 733 N.E.2d 1132, 1134 (Ohio 2000) (holding Ohio's tolling statute does not violate the Commerce Clause statute as applied to an individual who temporarily leaves the state for "non-business reasons").

8. *See* cases cited *supra* note 7.

9. *See infra* Part II.B.

10. *See infra* Part III.B.

I. TOLLING BASED ON ABSENCE FROM THE STATE

As mentioned previously, most states have legislation that tolls statutes of limitations during a defendant's absence from the state.[11] For example, the California statute, which is typical of many of these tolling provisions, provides:

> If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.[12]

Most of these statutes originally were enacted in the 1800s, at a time when service on an absent defendant was generally unavailable in an *in personam* action.[13] According to the Supreme Court in *Pennoyer v. Neff*, the newly adopted Due Process Clause of the Fourteenth Amendment embodied a restriction on personal jurisdiction based on state sovereignty.[14] "[E]very state possesses exclusive jurisdiction and sovereignty over persons and property within its territory," the *Pennoyer* court reasoned, and, correspondingly, "no State can exercise direct jurisdiction and authority over persons or property without its territory."[15] Therefore, a state court's power to exercise personal jurisdiction was limited to persons or property present within that state, unless the defendant appeared voluntarily.[16]

---

11. *See* authorities cited *supra* note 1.

12. CAL. CIV. PROC. CODE § 351 (Deering 2011). Some statutes provide additional grounds for tolling, such as during the time the defendant "absconds" or "conceals himself." *E.g.*, ALASKA STAT. § 09.10.130 (2011); NEB. REV. STAT. § 25-214 (2010); OHIO REV. CODE ANN. § 2305.15 (LexisNexis 2011).

13. *See, e.g.*, Juzwin v. Asbestos Corp., 900 F.2d 686, 691 n.7 (3d Cir. 1990) (noting that "origins of the New Jersey tolling statute date back to 1820"); Dew v. Appleberry, 591 P.2d 509, 511-14 (Cal. 1979) (noting that the California tolling statute was enacted in 1872 to prevent hardships encountered by plaintiffs when suing nonresident defendants); Meyer v. Paschal, 498 S.E.2d 635, 637 (S.C. 1998) (explaining that South Carolina's tolling provision was enacted "in 1870 in order to protect its residents from defendants who were not amenable to service of process because they were out of the State"); Kerlin v. Sauceda, 263 S.W.3d 920, 928 (Tex. 2008) (Brister, J., concurring) (observing that the Texas tolling provision was adopted in 1841, "long before minimum-contacts analysis").

14. 95 U.S. 714, 722-24, 733 (1878), *overruled by* Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (1977).

15. *Id.* at 722.

16. *Id.* at 720-27.

Pennoyer also restrained service of process according to the constitutional limitations on personal jurisdiction.[17] In an *in personam* case, the Court held that the Due Process Clause required personal service on the defendant.[18] However, based on the exclusive sovereignty principle, service of process from the courts of one state could not run into another state: "no tribunal [of one state] can extend its process beyond that territory so as to subject either persons or property to its decisions."[19] As a consequence, a defendant could be personally served only by a court in the state where that defendant resided or was found.[20]

The *Pennoyer* rules were less clear with respect to a defendant who was temporarily absent from the forum state, but personal service was constitutionally appropriate only when the defendant returned. Constructive service by publication was constitutionally inadequate unless the defendant had property within the forum state, and even then only if the property was attached at the outset of the litigation.[21] In other words, service by publication was proper in *in rem* and *quasi-in rem* actions, but not in *in personam* actions.[22] The only exception was for cases determining status, such as dissolution of marriage cases, where service by publication on nonresidents was deemed constitutionally permissible.[23]

In summary, under *Pennoyer*, a forum state could not exercise personal jurisdiction over a nonresident defendant in an *in personam* action and could not authorize personal service on that defendant while he was absent from the state. If a defendant was not found within the forum state, he could not be sued there. This meant a plaintiff could sue and serve a defendant only in the state of the defendant's residence, unless the nonresident defendant had an agent to accept service within the forum state.[24] These rules also had choice-of-law ramifications. A court located in the state of the defendant's residence would likely apply its own choice-of-law doctrine, which means the court could apply its own substantive law and statute of limitations.[25]

---

17. *Id.* at 726-27.
18. *Id.* at 733-34.
19. *Id.* at 722.
20. *Id.* at 727, 733.
21. *Id.* at 726-27.
22. *Id.* at 727.
23. *Id.* at 734-35.
24. *Id.* at 735.
25. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (upholding the constitutionality of a traditional rule which permits a forum state to apply its own statute of limitations even though the substantive claims are governed by the law of a different state); *see also* Margaret Rosso Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 ARIZ. ST. L.J. 1, 3-19 (discussing the traditional conflicts doctrine); Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683, 691-700 (discussing traditional conflicts view under which most courts apply their own state's statutes of limitations).

In response to *Pennoyer*'s due process restrictions on personal jurisdiction and service of process, many states enacted legislation that tolled statutes of limitations while the defendant was absent from the state.[26] These provisions were intended to alleviate the difficulties confronting resident plaintiffs when commencing an action against nonresident defendants.[27] They served the then-important purpose of "prevent[ing] a claim from being barred simply because the defendant, being outside the state, could not be served with a summons and complaint."[28] Likewise, these statutes alleviated hardships that resulted when *Pennoyer*'s personal jurisdiction and service restrictions compelled a plaintiff to pursue the defendant out of state in order to commence an action within the limitations period.[29] Because the applicable statute of limitations was tolled during a defendant's absence, a plaintiff did not need to file suit until the defendant was present in the state of the plaintiff's residence, when service was available and practical.[30]

However, in the mid-1900s, the Supreme Court dramatically altered the nature of the due process limitations on personal jurisdiction and service of process. In *International Shoe Co. v. Washington*, the Court replaced *Pennoyer*'s territorial "presence" restrictions with a new "minimum contacts" requirement.[31] With respect to a nonresident defendant who could not be served within the territory of the forum state, due process requires only that the defendant have sufficient "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[32] So long as the defendant purposely engaged in activities within the forum, he need not be physically present and served within the forum in order to be subject to personal jurisdiction.[33] *International Shoe* rejected *Pennoyer*'s mutually exclusive sovereignty of the states

---

26. *See, e.g.*, Gregory J. Livingston, Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?*, 23 PAC. L.J. 1639, 1643-45 (1992) (discussing the purposes behind California's tolling statute); *see also* cases cited *infra* notes 27-28.

27. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 893-94 (1988) (examining justifications for Ohio's tolling statute); Kuk v. Nalley, 166 P.3d 47, 51, 53 (Alaska 2007) (discussing the purposes of the tolling provisions enacted by Alaska and several other states); Shin v. McLaughlin, 967 P.2d 1059, 1062-63 (Haw. 1998) (determining the purposes of Hawaii's tolling statute by looking to construction of similar statutes in other jurisdictions).

28. *See, e.g.*, Dew v. Appleberry, 591 P.2d 509, 511 (Cal. 1979); *accord* Doyle v. Shubs, 717 F. Supp. 946, 950 (D. Mass. 1989); *Kuk*, 166 P.3d at 53; Meyer v. Paschal, 498 S.E.2d 635, 637 (S.C. 1998).

29. *Dew*, 591 P.2d at 513-14.

30. *See* cases cited *supra* notes 27-28.

31. 326 U.S. 310, 316 (1945).

32. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

33. *Id.* Indeed, under the "minimum contacts" approach, personal jurisdiction may be proper even though the defendant has *never* physically entered the forum state. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479-80 (1985).

as the basis for due process limitations, at least in *in personam* actions.[34] Subsequently, the Supreme Court extended the "minimum contacts" approach to all assertions of personal jurisdiction, whether denominated *in personam*, *in rem*, or *quasi in rem*.[35]

Five years after *International Shoe*, the Supreme Court turned its attention to *Pennoyer*'s formalistic restrictions on service of process. In *Mullane v. Central Hanover Bank & Trust Co.*, the Court set forth the modern standard for determining whether a particular manner of service complies with due process.[36] Rejecting the relevance of historical distinctions between *in personam* and *in rem* actions, this time in the context of the power of the state to resort to constructive service by publication, the Court ruled that due process instead requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[37]

Most importantly for purposes of this Article, *Mullane*'s new due process standard eliminated the territorial restrictions on service of process previously imposed by *Pennoyer*.[38] The *Mullane* Court endorsed service by mail across state lines when such service was the best notice practicable under the circumstances of the case.[39] Likewise, the Court approved service by publication on defendants, whether residents or nonresidents, whose names and addresses could not be ascertained through reasonable diligence.[40] The Court even suggested that in some circumstances due process may permit, or even require, personal service in another state.[41]

Taken together, *International Shoe* and *Mullane* drastically changed the nature of the constitutional limitations on the exercise of state court jurisdiction over absent defendants.[42] Regardless of the nature of the action, due process no longer prevents a court from exercising personal jurisdiction over an out-of-state defendant, so long as that defendant had sufficient contacts with the forum state.[43] Moreover, service of process is no longer confined to

34. *See Int'l Shoe*, 326 U.S. at 320-21. This rejection was made explicit in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982), where the Court ruled that the due process limitation on personal jurisdiction recognizes and protects an individual liberty interest possessed by the defendant and is not a restriction on judicial power as a matter of state sovereignty.

35. *See* Shaffer v. Heitner, 433 U.S. 186, 211-12 (1977).

36. 339 U.S. 306, 314-16 (1950).

37. *Id.* at 312, 314.

38. *See id.* at 314-15.

39. *Id.* at 318.

40. *Id.* at 317.

41. *See id.* at 318-20.

42. *See* Livingston, *supra* note 26, at 1646-49 (discussing the significance of *International Shoe* with respect to state tolling statutes).

43. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

the territory of the forum state.[44] The new due process standard permits service on a defendant, wherever located, if the manner of service is constitutionally adequate.[45] Depending on the circumstances of each case, an out-of-state defendant can be served by substituted service within the forum state, by constructive service of publication, or by extraterritorial mail or personal service, so long as the method of service is reasonably calculated to provide the defendant with notice of the action.[46]

Not surprisingly, existing personal jurisdiction and service rules were amended to reflect these new constitutional standards.[47] States enacted long-arm statutes that authorized their courts to assert personal jurisdiction across state boundaries to defendants located in another state, often to the maximum extent permitted by due process.[48] Likewise, states enacted provisions that greatly expanded the service of process options available to plaintiffs. For example, a plaintiff could serve a resident defendant by substituted service on a competent person at the defendant's usual place of abode or usual place of business, or, in the case of a business entity, on a designated agent or on someone in charge of the office.[49]

States also enacted additional service options specifically aimed at out-of-state defendants, including extraterritorial service by mail, substituted service on an actual or implied agent, or service in accordance with the laws of the state where the defendant was located.[50] Constructive service by publication typically became available when, after a diligent search, the plaintiff could not ascertain the defendant's whereabouts and could not serve the defendant by other means, such as by personal or substituted service.[51]

As a result of these new service options, the concerns that prompted states to adopt absence-based tolling provisions cease to exist. Plaintiffs no longer encounter legal obstacles to effecting service of process on absent

---

44. *See Mullane*, 339 U.S. at 314-15.

45. *See id.*

46. *Id.* at 315-17.

47. *See* ROBERT C. CASAD & WILLIAM M. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 4-1 (3d ed. 1998) (observing that all states have now enacted provisions for invoking jurisdiction over nonresident individuals and corporations and discussing those statutes or court rules).

48. *See id.* § 4-1[1] (discussing the types of state long-arm statutes).

49. *E.g.*, CAL. CIV. PROC. CODE § 415.20(b) (Deering 2011); N.Y. C.P.L.R. § 308 (McKinney 2010); *see* FED. R. CIV. P. 4(e)(2)(B)-(C) (permitting substituted service in federal courts); CASAD & RICHMAN, *supra* note 47, § 3-1[3] (discussing various states' substituted service statutes).

50. *E.g.*, CAL. CIV. PROC. CODE §§ 415.40, 413.10(b); N.Y. C.P.L.R. §§ 311, 313-314; *see* CASAD & RICHMAN, *supra* note 47, § 3-1[1]-[4] (discussing options available under federal and state service of process provisions).

51. *E.g.*, CAL. CIV. PROC. CODE § 415.50 (allowing service by publication); N.Y. C.P.L.R. §§ 315-316 (permitting service by publication); *see* CASAD & RICHMAN, *supra* note 47, § 3-1[4][a] to [b] (discussing prerequisites for constructive service by publication).

defendants, whether their absence was permanent or temporary. In some instances, a plaintiff may still experience some practical difficulties when attempting to serve an absent defendant who absconded, but even these difficulties are rarely significant. In most cases, such a defendant can be served by publication, accompanied by mailing the complaint and summons to the defendant's last known address.

II. COMMERCE CLAUSE LIMITATIONS ON TOLLING BASED ON ABSENCE FROM THE STATE

A. A Dormant Commerce Clause Primer

The Commerce Clause of the United States Constitution empowers Congress "[t]o regulate Commerce . . . among the several States."[52] This affirmative grant of power authorizes Congress to enact legislation that regulates the channels of interstate commerce, any activities of persons or things in interstate commerce, and single-state activities that substantially affect interstate commerce.[53] Such federal legislation preempts any contrary state law under the Supremacy Clause.[54]

The Supreme Court has construed the Commerce Clause to incorporate a restriction on a state's power to regulate interstate commerce even in the absence of congressional action.[55] This negative aspect is commonly referred to as the "dormant" Commerce Clause.[56] The Court has devised two tests for reviewing state legislation under the dormant Commerce Clause. One is a "strict scrutiny" test: a statute that facially discriminates against interstate commerce is "virtually *per se* invalid and will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable non-

52. U.S. CONST. art. I, § 8, cl. 3.

53. Gonzales v. Raich, 545 U.S. 1, 16-17 (2005); United States v. Morrison, 529 U.S. 598, 608-09 (2000); United States v. Lopez, 514 U.S. 549, 558-59 (1995); *see* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE § 4.9, at 621 (4th ed. 2007) (discussing contemporary Commerce Clause standards).

54. *See* U.S. CONST. art VI, cl. 2; Gibbons v. Ogden, 22 U.S. 1 (1824).

55. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2 (3d ed. 2000) (discussing the historical and theoretical underpinnings of the dormant Commerce Clause).

56. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338-39 (2007) (discussing the "dormant" aspect of the Commerce Clause); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 427-48 (2008) (discussing the origins and development of the dormant Commerce Clause principles); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 574-81 (discussing the origins and development of the dormant Commerce Clause).

discriminatory alternatives.'"[57] "In this context," the Court explained, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[58]

Under this strict scrutiny test, a state statute that patently discriminates against out-of-state interests "will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[59] Therefore, "[d]iscriminatory laws motivated by 'simple economic protectionism' are subject to a 'virtually *per se* rule of invalidity,' which can only be overcome by showing that the State has no other means to advance a legitimate local purpose."[60]

A more deferential constitutional test applies to facially neutral state legislation. Under the test articulated by the Supreme Court in *Pike* v. *Bruce Church, Inc.*,[61] when a statute has only indirect effects on interstate commerce and regulates evenhandedly, the relevant inquiry is "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."[62] The extent to which the burden will be tolerated "depend[s] on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[63] This balancing test – often referred to as the "*Pike* balancing test"[64] – requires a court "to weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed is an unreasonable one."[65]

Although easy to state in the abstract, the *Pike* balancing test is unclear and unpredictable in operation.[66] A court must evaluate the state's local in-

---

57. Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (citation omitted) (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 100-01 (1994)).

58. *United Haulers*, 550 U.S. at 338 (quoting *Or. Waste Sys.*, 511 U.S. at 99).

59. Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (citation omitted); *accord Or. Waste Sys.*, 511 U.S. at 99.

60. *United Haulers*, 550 U.S. at 338 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)); *see also* Maine v. Taylor, 477 U.S. 131, 148 (1986).

61. 397 U.S. 137, 142 (1970).

62. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (citing *Pike*, 397 U.S. at 142); *see also* Nw. Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 525-26 (1989) (discussing the *Pike* balancing test).

63. *Pike*, 397 U.S. at 142.

64. *See, e.g.*, Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 763 (1995) (Kennedy, J., concurring), *Oregon Waste Sys.*, 511 U.S. at 100; Kleinsmith v. Shurtleff, 571 F. 3d 1033, 1043-44 (10th Cir. 2009); Denning, *supra* note 56, at 422 n.8.

65. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 891 (1988).

66. *See* Denning, *supra* note 56, at 449-77 (discussing the divergent outcomes when the dormant Commerce Clause is applied to cases with similar facts); Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395, 398-400 (1986) (discussing cases and observing that "results in dormant commerce clause cases are notoriously unpredictable"); Earl M. Maltz, *How Much Regulation is Too Much – An Examination of Commerce Clause Jurisprudence*, 50 GEO.

terest, weigh it against the resulting burden on interstate commerce, and determine which of the two is more important. The difficulty of this task caused Justice Scalia to remark that although "[t]his process is ordinarily called 'balancing,' . . . 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."[67]

Moreover, the Supreme Court has indicated that a *Pike* examination is inappropriate when invoked in particular applications of the dormant Commerce Clause.[68] For example, in *Department of Revenue v. Davis*, the Court considered whether a state's differential tax scheme, which exempted interest on bonds issued by that state but taxed interest on bonds issued by another state, violated the Commerce Clause.[69] After deciding that the state tax law did not constitute "forbidden discrimination against interstate commerce," the Court turned its attention to the *Pike* balancing test.[70]

The *Davis* Court declined to engage in a *Pike* inquiry, noting "that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the [plaintiffs] to satisfy a *Pike* burden in this particular case."[71] Even though the plaintiffs identified several economic harms arguably attributable to the differential tax scheme, the Court expressed concern with the institutional difficulty of weighing them for purpos-

---

WASH. L. REV. 47, 85-86 (1981) (surveying cases and concluding the dormant Commerce Clause ad hoc balancing test does not provide guidance or consistent decisions); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 56 (2008) (noting that, in practice, "dormant Commerce Clause doctrine is confusing and unpredictable").

67. *Bendix*, 486 U.S. at 897 (Scalia, J., concurring) (citation omitted). Indeed, some Justices question the propriety of *any* dormant Commerce Clause doctrine. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 348-49 (2007) (Scalia, J., concurring) (arguing that balancing values should be left to Congress); *id.* at 349-54 (Thomas, J., concurring) (finding no constitutional basis for the doctrine). *See generally* Redish & Nugent, *supra* note 56 (arguing the dormant Commerce Clause doctrine is invalid).

68. For example, the "market participation" rule shields states from dormant Commerce Clause scrutiny where states act as market participants rather than as market regulators. Reeves, Inc. v. Stake, 447 U.S. 429, 436-39 (1980). *See generally* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989) (analyzing the "market participant" exemption); Norman R. Williams & Brannon P. Denning, *The "New Protectionism" and the American Common Market*, 85 NOTRE DAME L. REV. 247, 294-304 (2009) (summarizing the "market participant" exception to dormant Commerce Clause scrutiny); TRIBE, *supra* note 55, §§ 6-11, 6-23 (summarizing exceptions).

69. 553 U.S. 328, 331-32 (2008).

70. *Id.* at 353.

71. *Id.*

es of a cost-benefit analysis, finding the judicial process and judicial forums unsuitable for making such predictions and finding such answers.[72]

Although *Davis* may be viewed as an indictment of the *Pike* balancing test in general,[73] the Court was careful to limit its ruling to cases where the *Pike* test would require a court to evaluate the relative economic burdens of various methods of taxation.[74] The *Davis* Court explained that a "traditional local government function," such as selling bonds, is not susceptible to standard dormant Commerce Clause scrutiny.[75] Nevertheless, the *Davis* Court aptly identified a problem inherent in the *Pike* test when a court applies it in any type of case, including one that does not challenge a government function or the validity of a tax scheme.[76]

Further complicating the dormant Commerce Clause analysis is the Supreme Court's recognition that there is no clear line separating the category of state regulation subject to the strict scrutiny test from the category subject to the *Pike* balancing test.[77] The strict scrutiny test may apply to a state law that does not facially discriminate against interstate commerce if it has the practical effect of discriminating.[78] Consequently, a statute that makes no express distinction in treatment between in-state and out-of-state interests may nonetheless be deemed to discriminate against interstate commerce.[79]

Without further Supreme Court guidance, it would have been difficult, if not impossible, to predict precisely how the dormant Commerce Clause applied to state statutes that toll statutes of limitations based on absence from the state. However, the Court lent significant assistance in 1988 when it decided *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*[80] Because of its

---

72. *Id.* at 355.

73. *See* Williams & Denning, *supra* note 68, at 304-12 (discussing whether *Davis* is the "deathknell of *Pike* balancing").

74. *See Davis*, 553 U.S. at 354-57.

75. *Id.* at 341-42.

76. *See id.* at 355.

77. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) ("We have also recognized that there 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."); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440-41 (1978) ("[T]he Court has employed various tests to express the distinction between permissible and impermissible impact upon interstate commerce, but experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case.").

78. *See, e.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353, 359-61 (1992); Nw. Cent. Pipeline v. State Corp. Comm'n, 489 U.S. 493, 523 (1989).

79. *See Fort Gratiot Sanitary Landfill*, 504 U.S. at 361-63.

80. 486 U.S. 888 (1988).

importance to the issues raised in this Article, the *Bendix* decision is discussed in considerable detail below.

B. The Dormant Commerce Clause and State Tolling Statutes: Bendix *and Its Progeny*

1. The Supreme Court's Decision in *Bendix*

The dormant Commerce Clause issue in *Bendix* arose out of an ordinary contract dispute.[81] The defendant Midwesco, an Illinois corporation, entered into a contract with the plaintiff Bendix to deliver and install a boiler system at the plaintiff's facility in Ohio.[82] Dissatisfied with Midwesco's work, Bendix commenced a diversity action in a federal district court in Ohio.[83] As a defense, Midwesco claimed Ohio's four-year statute of limitations had elapsed.[84] In response, Bendix argued that the limitations period had not yet run because, under Ohio law, the time is tolled when the claim is against an out-of-state entity without a designated Ohio agent for service of process.[85]

The Ohio tolling statute provided:

> 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 . . . does not begin to run until he comes into the state or while he is so absconded or concealed.[86]

In order for a nonresident corporation, such as defendant Midwesco, to gain the protection of an Ohio statute of limitations, that corporation would have to expose itself to general jurisdiction in Ohio by appointing a resident agent to receive service of process in Ohio.[87] In this statutory scheme, the *Bendix* Court found that the Ohio tolling provision, which suspended the limitations protection for out-of-state entities, violated the Commerce Clause.[88]

The *Bendix* Court first observed that the Ohio tolling statute discriminated against interstate commerce in a manner that might render it invalid "without extended inquiry."[89] However, rather than subject the statute to such strict scrutiny, the Court expressly chose "to assess the interests of the

---

81. *Id.* at 889.
82. *Id.*
83. *Id.* at 889-90.
84. *Id.* at 890.
85. *Id.*
86. *Id.* at 890 n.1 (quoting OHIO REV. CODE ANN. § 2305.15 (Supp. 1987)).
87. *Id.* at 892 (citing OHIO REV. CODE ANN. § 1703.04.1 (1985) (requiring nonresident corporations to appoint an agent for service of process within the state)).
88. *Id.* at 889, 894.
89. *Id.* at 891.

State, to demonstrate that its legitimate sphere of regulation is not much advanced by the statute while interstate commerce is subject to substantial restraints."[90] Applying this balancing test (the *Pike* balancing test), the Court examined whether the burden imposed on interstate commerce by the tolling statute exceeded any local interest that Ohio might advance.[91]

The *Bendix* Court found that the tolling statute placed a significant burden on interstate commerce from the restrictions the statute placed on out-of-state defendants.[92] To gain the protection of the relevant Ohio statute of limitations, Midwesco would have to appoint an agent for service of process in Ohio and thereby be subject to jurisdiction in Ohio for any suit, regardless of whether the underlying transaction had any connection with Ohio.[93] The Court found these requirements constituted a significant burden: "The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity."[94]

Next, the Court assessed the local interest in subjecting out-of-state corporations without a designated agent for service to tolling provisions not applicable to domestic corporations or nonresident ones with such an agent.[95] The proffered justification was to protect Ohio residents from the difficulties of serving nonresident corporations who had no designated in-state agent for service.[96] The Court viewed this interest as relatively weak, because Ohio's long-arm statue would have permitted service on defendant Midwesco throughout the statute of limitations period.[97]

The *Bendix* Court concluded that the burden imposed on interstate commerce by the tolling statute outweighed any local interest Ohio might advance, and therefore the statute violated the Commerce Clause.[98] Although the Court reached this conclusion by conducting a *Pike* balancing test, some of the Court's final remarks echoed its initial observations about the statute's discriminatory effect.[99] "The Ohio statute of limitations is tolled only for those foreign corporations that do not subject themselves to the general jurisdiction of Ohio courts," the Court reasoned, and "[i]n this manner the Ohio statute imposes a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations."[100] The *Bendix* Court therefore suggests a

90. *Id.*
91. *Id.* at 891-95.
92. *Id.* at 895.
93. *Id.* at 892-93.
94. *Id.* at 893.
95. *Id.* at 894.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*; *see supra* note 89 and accompanying text.
100. *Bendix*, 486 U.S. at 894.

state law that has the practical effect of favoring in-state parties and disadvantaging out-of-state parties impermissibly burdens interstate commerce.

The opinion did not profess to resolve Commerce Clause questions with respect to all applications of absence-based tolling provisions. This is hardly surprising, given the case-specific nature of the dormant Commerce Clause balancing test.[101] Obviously, where the state statutory scheme is similar to Ohio's and the defendant is a nonresident corporation, *Bendix* is dispositive.[102] But *Bendix* itself does not expressly determine whether such a tolling provision violates the dormant Commerce Clause when applied to nonresident defendants who are individuals, or when applied to resident defendants who are temporarily absent from the state. However, *Bendix* does provide some general guidelines for analysis in these other applications.

First, the Court recognized that statutes of limitations are important in interstate commerce.[103] "Although statute of limitations defenses are not a fundamental right," the Court observed, "it is obvious that they are an integral part of the legal system and are relied upon to protect the liabilities of persons and corporations active in the commercial sphere."[104] Consequently, the Court reasoned, "[t]he State may not withdraw such defenses on conditions repugnant to the Commerce Clause."[105] Where a state denies this tolling defense to parties engaged in interstate commerce, a court must determine whether the denial is discriminatory on its face or constitutes an impermissible burden on interstate commerce.[106] In other words, while *Bendix* suggests that the very existence of an absence-based tolling provision imposes a burden on interstate commerce within the meaning of the *Pike* balancing test, the significance of that burden depends on the circumstances of each tolling application.

Second, in reaching its decision, the *Bendix* Court did not rely on empirical evidence of an adverse effect on interstate commerce. Although condi-

---

101. *See, e.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440-41 (1978) (acknowledging, with respect to "the distinction between permissible and impermissible impact upon interstate commerce, . . . no single conceptual approach identifies all of the factors that may bear on a particular case"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 5.3 (3d ed. 2006) (surveying cases and noting the fact-dependent nature of the dormant Commerce Clause balancing test).

102. *E.g.*, Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064, 1074 (8th Cir. 1992) (ruling on the constitutionality of the pre-1989 North Dakota tolling statute); Juzwin v. Asbestos Corp., 900 F.2d 686, 690 (3d Cir. 1990), *superseded by statute* N.J. STAT. ANN. § 2A:14-22, *as recognized in* Knauf v. Elias, 742 A.2d 980 (N.J. Super. Ct. App. Div. 1999); Fin. Bancorp, Inc. v. Pingree & Dahle, Inc., 880 P.2d 14, 17-18 (Utah Ct. App. 1994) (applying the California tolling statute).

103. *Bendix*, 486 U.S. at 893.

104. *Id.*

105. *Id.*

106. *Id.*

tioning the limitations defense on submission to general jurisdiction certainly imposes a burden on a nonresident corporation, the Court did not identify or describe precisely how this burdens interstate commerce in the traditional business sense. Lacking from the opinion is any discussion of how this tolling provision might interfere with the defendant's ability to conduct business in Ohio. Perhaps the Court was concerned that the defendant would no longer sell its products to buyers in Ohio or in other states with similar statutes. But the Court never mentioned this concern, and the facts do not support it. Moreover, additional business activities in Ohio would still not make the corporation "present" in Ohio for purposes of the tolling statute, because a nonresident corporation must appoint an in-state agent for service of process to obtain that "present" status. The Court focused instead on the state's withdrawal of the statute of limitations defense, and the burden imposed on a defendant corporation as a condition of asserting that defense.[107] The Court seemed to be concerned only with the possible adverse impact on interstate commerce rather than any actual consequences demonstrated by facts in the record.

Third, the *Bendix* Court provided useful guidance on how to assess the state's proffered justification for a tolling provision for purposes of the *Pike* balancing test. In giving little weight to Ohio's justification for its statutory scheme, the Court explained that "state interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny."[108] This explanation was necessary because previously, in *G.D. Searle & Co. v. Cohn*, the Court upheld a New Jersey tolling provision nearly identical to Ohio's when it was challenged under the Equal Protection and Due Process Clauses.[109] The *Searle* court found that the potential difficulties in locating and serving a nonresident corporation provided a rational basis for New Jersey's different treatment of nonresident corporations who had not appointed an agent for service of process within the state.[110]

In contrast, the Court in *Bendix* expressly determined that this same state interest was an insufficient justification for Ohio's tolling provision under the Commerce Clause because the Ohio long-arm statute would have

---

107. *Id.* at 894.

108. *Id.* at 895.

109. 455 U.S. 404, 405 (1982).

110. *Id.* at 410-12. The *Searle* court found the New Jersey tolling provision rationally related to a valid state interest and therefore not a denial of equal protection, even though the plaintiffs had little or no trouble locating the well-known defendant and could have made service under New Jersey's long arm statute. *Id.* at 409-10. Because the tolling provision was premised on a reasonable assumption that foreign corporations, as a general rule, may not be easy to find and serve, the court considered the state's interest legitimate for equal protection purposes. *Id.* at 410; *see also* Dew v. Appleberry, 591 P.2d 509, 513-14 (Cal. 1979) (ruling that California's absence-based tolling statute bears a rational relationship to a valid state interest and therefore does not violate the constitutional right to travel).

permitted service on the defendant throughout the limitations period.[111] *Bendix* therefore instructs courts to assess the necessity of the state's putative interest when weighing that interest against the burden on interstate commerce. Although the Court did not explicitly use this terminology, *Bendix* is an example of a *Pike* analysis that includes an additional consideration: whether the state can adequately promote its interests with a lesser impact on interstate activities.[112]

2. Lower Courts Extend *Bendix* to Out-of-State Individuals

After the Supreme Court invalidated Ohio's tolling provision in *Bendix*, several lower courts considered the constitutionality of similar absence-based tolling statutes when applied to defendants other than nonresident corporations.[113] In some jurisdictions, courts narrowly defined the statutory term "absence" to exclude individual defendants who, although physically absent from the state, are amenable to service of process.[114] This construction largely eliminates applications that may run afoul of the Commerce Clause by limiting absence-based tolling to those rare instances where, despite liberal substitute, constructive, and mail service options, a diligent plaintiff still cannot accomplish service of process.[115] Accordingly, courts in these jurisdic-

111. *Bendix*, 486 U.S. at 894.

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

113. *See infra* notes 114-82 and accompanying text. Some states amended their tolling statutes to provide that they did not apply if the absent person was amenable to service and subject to personal jurisdiction. *See, e.g.*, Crespo v. Stapf, 608 A.2d 241, 245-46 (N.J. 1992) (noting 1992 New Jersey amendment to tolling statute); Muller v. Custom Distribs., Inc., 487 N.W.2d 1, 3 & n.4 (N.D. 1992) (noting that North Dakota amended its tolling provision in 1989).

114. *E.g.*, Kuk v. Nalley, 166 P.3d 47, 52 (Alaska 2007); Shin v. McLaughlin, 967 P.2d 1059, 1063 (Haw. 1998); Meyer v. Paschal, 498 S.E.2d 635, 639 (S.C. 1998); Kerlin v. Sauceda, 263 S.W.3d 920, 926-28 (Tex. 2008); *see also* Avery v. First Resolution Mgmt. Corp., 568 F.3d 1018, 1021-23 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 554 (2009) (discussing the New Hampshire tolling statute); Cardozo v. Am. Med. Sys., Inc., 228 Cal. Rptr. 627, 630 (Cal. Ct. App. 1986) (holding California tolling statute inapplicable to foreign corporation that was amenable to substituted service). Even before the *Bendix* decision, courts in some states had construed such tolling provisions as inapplicable where the defendant remained subject to personal jurisdiction and service of process. *See* Kenneth J. Rampino, Annotation, *Tolling of Statute of Limitations During Absence from State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Nonresidence*, 55 A.L.R. 3d 1158 (1974 & Supp. 2010) (discussing cases).

115. *E.g.*, *Kuk*, 166 P.3d at 53-54 (noting a narrow construction of the Alaska tolling statute avoids Commerce Clause complications); Blyth v. Marcus, 517 S.E.2d 433, 435 (S.C. 1999) (finding no Commerce Clause violation because South Carolina tolling provision interpreted to not apply when nonresident defendant amenable to service of process); *cf.* Mercer v. Anderson, 715 N.W.2d 114, 120-21 (Minn. Ct. App.

tions held that tolling would occur only when service on the out-of-state defendant is impossible because his whereabouts are unknown or he is evading service.[116] However, some courts ruled that even an out-of-state defendant whose whereabouts are unknown is amenable to service, and therefore not "absent," when service by publication is available.[117]

Courts in other jurisdictions chose not to narrow the definition of absence and therefore construed the tolling provisions in their state statutes to apply whenever the defendant is physically absent from the forum state, regardless of whether that defendant remains amenable to service of process under the laws of the forum state.[118] With *Bendix* as controlling precedent, courts readily found these statutes violated the Commerce Clause when applied to out-of-state corporations.[119] The more difficult question is whether these absence-based tolling provisions also violate the Commerce Clause when applied to *individuals* and, if so, under what circumstances.

Abramson v. Brownstein is one of the first cases to apply *Bendix* to a nonresident individual defendant.[120] In *Abramson*, California buyers com-

---

2006) (ruling that tolling was not appropriate because plaintiff failed to diligently search for nonresident defendant).

116. *See* Doyle v. Shubs, 717 F. Supp. 946 (D. Mass. 1989) (tolling not available under Massachusetts statute because plaintiffs' failure to commence suit in a timely manner was not connected to a lack of knowledge concerning defendant's whereabouts); Sullivan v. Trustmark Nat'l Bank, 653 So. 2d 930 (Miss. 1995) (tolling available under Mississippi statute when a defendant leaves the state and is not amenable to service because his whereabouts are unknown); Tiralango v. Balfry, 517 S.E.2d 430 (S.C. 1999) (tolling only available under South Carolina statute where plaintiff did not know and could not have known defendant's whereabouts).

117. *E.g.*, *Shin*, 967 P.2d at 1065; Ashley v. Hawkins, 293 S.W.3d 175, 181 (Tex. 2009); *see* Ryan Walters, Note, *Worth the Toll? The Dormant Commerce Clause's Effect on Statutory Tolling Based on a Defendant's Absence from the State in Texas and Other States*, 62 BAYLOR L. REV. 628, 634-39 (2010) (discussing judicial interpretations of the Texas tolling statute).

118. *E.g.*, Dew v. Appleberry, 591 P.2d 509, 510 (Cal. 1979); Poling v. Moitra, 717 S.W.2d 520, 522 (Mo. 1986) (en banc), *overruled on other grounds by* State *ex rel.* Bloomquist v. Schneider, 244 S.W.3d 139, 144 (Mo. 2008) (en banc); Brown v. Lavery, 622 N.E.2d 1179, 1181 (Ohio Ct. App. 1993); Olseth v. Larson, 158 P.3d 532, 534 (Utah 2007) (outlining pre-2009 Utah tolling statute). After a 2009 amendment, the Utah tolling statute only applies when the person is out of state "and the person is not subject to the jurisdiction of the courts of this state." UTAH CODE ANN. § 78B-2-104 (2010).

119. *E.g.*, Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064, 1074 (8th Cir. 1992) (ruling on the constitutionality of the pre-1989 North Dakota tolling statute); Juzwin v. Asbestos Corp., 900 F.2d 686, 690 (3d Cir. 1990), *superseded by statute* N.J. STAT. ANN. § 2A:14-22, *as recognized in* Knauf v. Elias, 742 A.2d 980 (N.J. Super. Ct. App. Div. 1999); Fin. Bancorp, Inc. v. Pingree & Dahle, Inc., 880 P.2d 14, 17-18 (Utah Ct. App. 1994) (applying the California tolling statute).

120. 897 F.2d 389, 391 (9th Cir. 1990).

menced a breach of contract action against a New York seller.[121] The trial court dismissed the action because the statute of limitations had expired.[122] On appeal to the U.S. Court of Appeals for the Ninth Circuit, plaintiffs argued that the statute of limitations was tolled under the California tolling statute because the nonresident defendant, an individual, was "absent" from the state.[123] The defendant responded that the California tolling provision was unconstitutional.[124] The Ninth Circuit relied on *Bendix* to hold that the California statute violated the dormant Commerce Clause when applied to a nonresident individual.[125]

The *Abramson* court first noted that the defendant seller engaged in interstate commerce when he entered into a sales transaction with the California plaintiffs.[126] Relying on *Bendix*'s Commerce Clause analysis and applying a *Pike*-like balancing test, the Ninth Circuit then weighed California's putative interests against the interstate restraints to determine if the burden imposed was an unreasonable one.[127] A principal burden of the California statute was that, in order to avoid tolling, those engaged in interstate commerce outside of California were required to remain in California for the entire limitations period.[128]

The *Abramson* court acknowledged the difference between this burden and the one at issue in *Bendix*, where nonresident corporations, in order to avoid tolling, had to expose themselves to general state court jurisdiction by appointing an in-state agent.[129] Nevertheless, the court concluded the California statutory scheme still imposed a significant burden because it "forces a nonresident individual engaged in interstate commerce to choose between being present in California for several years or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity."[130]

Turning to the other side of the Commerce Clause balancing analysis, the *Abramson* court identified California's interest as alleviating the hardship to a plaintiff when "a defendant's physical absence impedes his availability for suit."[131] Without further discussion, the court concluded that "[b]ecause this interest did not support the corresponding burden created by the Ohio tolling statute in *Bendix*, it also cannot support the burden created by [the

121. *Id.* at 390.
122. *Id.* at 391.
123. *Id.*
124. *Id.*
125. *Id.* at 392-93.
126. *Id.* at 392.
127. *Id.* (quoting Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 891 (1988)).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 392-93 (quoting Dew v. Appleberry, 591 P.2d 509, 513-14 (Cal. 1979)).

California statute]."[132] "Like the defendant in *Bendix*," the court reasoned, "the California long arm statute would have permitted service on [the defendant] throughout the limitations period."[133] Therefore, the court held that the California tolling statute was unconstitutional.[134]

The brevity of the *Abramson* court's balancing analysis leaves something to be desired. There was very little discussion of how the California tolling provision actually burdened interstate commerce beyond the possible permanent withdrawal of the limitations defense. Perhaps the court was concerned that the tolling provision would deter the nonresident seller from pursuing future business opportunities in California. However, as in *Bendix*, the court never mentioned this concern nor discussed any facts that might support it. The only burden explicitly discussed in *Abramson* was that the statutory scheme forced a nonresident individual engaged in interstate commerce to either be present in California for several years or forfeit the limitations defense.[135]

Nevertheless, *Abramson* is a reasonable extension of *Bendix*'s Commerce Clause holding. The *Bendix* Court characterized the statute of limitations defense as an integral part of the legal system, one that is important to persons and corporations active in the commercial world.[136] When applied to individual defendants engaged in interstate business, the permanent withdrawal of this defense affords a commercial advantage to resident defendants that is not available to nonresident defendants. Moreover, unlike a nonresident corporation, a nonresident individual may not have the option of registering with the state for service of process purposes.[137] Although the *Abramson* court applied the *Pike* balancing test, it likely was aware of the discriminatory effect of the California statute.

After *Abramson*, courts in other jurisdictions also applied *Bendix* to nonresident individuals.[138] In many of these cases, the defendant was a resident of the forum state at the time of the event that gave rise to the litigation, but

---

132. *Id.* at 393.

133. *Id.* (citing Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 894 (1988)).

134. *Id.*

135. *Id.* at 392.

136. *See supra* note 104 and accompanying text.

137. *See* Tesar v. Hallas, 738 F. Supp. 240, 242 (N.D. Ohio 1990) (observing that nonresident individuals may be burdened to a greater degree than *Bendix*'s nonresident corporations); Crespo v. Stapf, 608 A.2d 241, 248 (N.J. 1992) (noting that requiring a person to establish residency is even more burdensome than requiring a corporation to designate an agent for service of process), *superseded by statute* N.J. STAT. ANN. § 2A:14-22, *as recognized in* Knauf v. Elias, 742 A.2d 980 (N.J. Super. Ct. App. Dev. 1990).

138. *E.g.*, *Tesar*, 738 F. Supp. at 241-43; Ellis v. Anderson, 901 S.W.2d 46, 51 (Ky. Ct. App. 1995); *Crespo*, 608 A.2d at 246-49; Grover v. Bartsch, 866 N.E.2d 547, 557 (Ohio Ct. App. 2006); *see also* cases cited *infra* note 139.

left the state before the statute of limitations expired.[139] If the reason for the relocation was to seek new employment or to establish a new business, courts readily concluded that the move affected interstate commerce.[140] However, it is particularly noteworthy that, in some cases, the litigation did not arise out of an interstate business transaction, and the court did not consider the purpose of the individual's relocation to be relevant.[141]

For example, in *State ex rel. Bloomquist v. Schneider*, the plaintiff commenced a medical malpractice action against several health care providers, all Missouri residents at the time of their alleged negligent treatment.[142] The plaintiff invoked the Missouri tolling statute as to one defendant physician who moved his residence out of Missouri during the statute of limitations period.[143] Relying on *Bendix*, that defendant challenged the validity of the Missouri tolling provision.[144] In response, the plaintiff argued that the Commerce Clause did not apply.[145] The Supreme Court of Missouri rejected the plaintiff's argument and held that the application of the Missouri tolling statute to persons who move their residence out of Missouri during the statute of limitations period is unconstitutional.[146]

The *Bloomquist* court's dormant Commerce Clause analysis purports to directly rely upon *Bendix*.[147] But unlike the defendants in *Bendix* and *Abramson*, the defendant in *Bloomquist* was not involved in interstate commerce.[148] Indeed, the plaintiff argued that the defendant's medical treatment of the plaintiff did not involve interstate commerce because it took place while both parties were living in Missouri.[149] The Supreme Court of Missouri "rejected this cabined interpretation of the Commerce Clause" because the Missouri tolling statute "plainly discourages and burdens [the defendant's] ability to move from state to state, which falls afoul of the Commerce Clause."[150] "'Commerce among the states . . . consists of intercourse and traffic between

139. *E.g.*, Rademeyer v. Farris, 284 F.3d 833, 838 (8th Cir. 2002); *Tesar*, 738 F. Supp. at 240; Heritage Mktg. & Ins. Servs., Inc. v. Chrustawka, 73 Cal. Rptr. 3d 126, 128 (Cal. Ct. App. 2008); State *ex rel.* Bloomquist v. Schneider, 244 S.W.3d 139, 141 (Mo. 2008) (en banc); Drum v. Brekken, 2005 Ohio 1428, *P2 (Ohio Ct. App. 2005); Gray v. Austin, 598 N.E.2d 893, 894 (Ohio Ct. App. 1992); Blyth v. Marcus, 517 S.E.2d 433, 434 (S.C. 1999).

140. *E.g.*, Rademeyer v. Farris, 145 F. Supp. 2d 1096, 1101, 1105-06 (E.D. Mo. 2001), *aff'd*, 284 F.3d 833 (8th Cir. 2002); *Tesar*, 738 F. Supp. at 241-43; *Gray*, 598 N.E.2d at 895.

141. *See infra* notes 147-69 and accompanying text.

142. 244 S.W.3d at 140-41.

143. *Id.*

144. *Id.* at 141.

145. *Id.* at 142.

146. *Id.* at 144.

147. *Id.* at 141-44.

148. *See id.* at 142.

149. *Id.* at 142.

150. *Id.* at 142-43.

their citizens,'" the court noted, "'and includes the transportation of persons and property.'"[151] Moreover, the court did not inquire into whether the defendant's relocation was for a business or employment purpose.[152]

Turning to the state-interest side of the ledger, the *Bloomquist* court considered whether the tolling provision was "a reasonable restriction on interstate commerce because it is harder to locate and serve an out-of-state [defendant] than it is one who is in Missouri."[153] However, there was no showing that it was difficult to locate the defendant because, even after he moved out of state, he "remained fully amenable to suit under Missouri's long arm statute."[154] More importantly, the court emphasized that, in any event, a plaintiff need not obtain service in order to commence an action within the statute of limitations.[155] In Missouri, as in most other states, the court observed, the statute of limitations "is tolled by the filing of suit."[156]

Bloomquist's Commerce Clause analysis is significant in at least two respects. One is the court's characterization of the burden the Missouri tolling statute imposed on interstate commerce. The court construed the Commerce Clause to apply to individuals who moved out of state, regardless of the reason for the move.[157] The court found that the tolling statute discouraged individuals from moving from state to state, and that alone implicated the Commerce Clause.[158] The court implied that movement of people from state to state constitutes interstate commerce, regardless of whether the move is for business or purely personal reasons.[159] Also, as in *Bendix* and *Abramson*, the *Bloomquist* court did not require empirical evidence to support its assessment of the burden on interstate commerce.[160] Nor did the factual record indicate any such burden on the defendant, who moved out of state apparently undeterred by the adverse effect of the tolling provision on his limitations defense.[161]

The other significant aspect of *Bloomquist* involves the court's assessment of the state interest advanced by Missouri as justification for its tolling

151. *Id.* at 143 n.4 (quoting Hoke v. United States, 227 U.S. 308, 320 (1913)). "'There may be, therefore, a movement of persons as well as of property;'" the *Bloomquist* Court continued, "'that is, a person may move or be moved in interstate commerce.'" *Id.* (quoting *Hoke*, 227 U.S. at 320).

152. *See id.* at 140-41.

153. *Id.* at 143.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 142-43.

158. *Id.* at 143.

159. *Id.* at 142-43 & n.4; *see* Heritage Mktg. & Ins. Servs., Inc. v. Chrustawka, 73 Cal. Rptr. 3d 126, 131 (Cal. Ct. App. 2008) (observing that the *Bloomquist* court did not indicate its holding was based on a finding that the defendant's move was for employment purposes).

160. *See Bloomquist*, 244 S.W.3d at 142-43.

161. *Id.* at 140-41.

statute.[162] That assessment turns, in large part, on when an action is considered "commenced" for purposes of the statute of limitations. The fact that Missouri deems an action commenced when filed, and not when served,[163] undermines the state's justification for its tolling provision. In other words, where a state does not require service of process on the defendant within the limitation period in order to satisfy the applicable statute of limitations, the difficulties a plaintiff may encounter in serving a defendant do not justify suspending the statute of limitations during the defendant's absence.

The California Court of Appeal adopted *Bloomquist*'s reasoning in *Heritage Marketing & Insurance Services, Inc. v. Chrustawka*.[164] The *Heritage Marketing* court was very specific about the nature of the burden imposed by the California tolling statute on an individual who moves out of state, even when the move is not for the purpose of business or employment.[165] After observing that the California statute "penalizes people who move out of state by imposing a longer statute of limitations on them than on those who remain in the state," the court stated that "[t]he commerce clause protects persons from such restraints on their movements across state lines."[166] "By creating disincentives to travel across state lines and imposing costs on those who wish to do so," the court observed, "the statute prevents or limits the exercise of the right of freedom of movement."[167] Therefore, the court concluded the application of California's tolling provision "under the facts of th[e] case would impose an impermissible burden on interstate commerce."[168] The defendants would then be forced "to choose between remaining residents of California until the limitations period expired or moving out of state and forfeiting the limitations defense, thus 'remaining subject to suit in California in perpetuity.'"[169]

In cases involving an individual defendant who moved out of state, courts vary in their interpretations of *Bendix*: not every court interprets *Bendix* in the same manner as *Bloomquist* and *Heritage Marketing*. Indeed, a few courts have held that a tolling statute does not violate the Commerce Clause when applied to an individual who is not engaged in interstate commerce and is absent for non-business reasons.[170] The propriety of these applications of

162. *See id.* at 143.

163. *See* MO. REV. STAT. § 506.110 (2000).

164. 73 Cal. Rptr. 3d at 132.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* (quoting Abramson v. Brownstein, 897 F.2d 389, 392 (9th Cir. 1990)).

170. *E.g.*, Pratali v. Gates, 5 Cal. Rptr. 2d 733, 740 (Cal. Ct. App. 1992) (finding no Commerce Clause violation when the California tolling statute was applied to individual defendant who left state but was not engaged in interstate business); Kohan v. Cohan, 251 Cal. Rptr. 570, 572, 576 (Cal. Ct. App. 1988) (holding that the application of California tolling statute to defendant while absent from California did not

the dormant Commerce Clause will be discussed in Part III.[171] Before turning to that analysis, it is important to examine another series of decisions where the lower courts determined whether an absence-based tolling statute is unconstitutional. In these cases, the tolling provision was invoked by an individual who is a resident of, but was temporarily absent from, the forum state.

3. Application of *Bendix* to Resident Defendants Who Are Temporarily Absent from the State

The final installment in this dormant Commerce Clause saga involves courts that have applied *Bendix* to forum residents who are temporarily absent from the state. Courts in at least one state have concluded that absence-based tolling statutes impose a significant burden on interstate commerce when applied to individual residents who travel outside the state for business purposes.[172] Conversely, the application of absence-based tolling provisions to individuals who temporarily leave for non-business reasons, such as for a vacation, do not impose a significant burden on interstate commerce.[173] Because this application of the dormant Commerce Clause is the main focus of the Article, the reasoning employed by the courts in these cases – referred to in the discussion below as the "temporary-absence cases" – is discussed in detail below.

The temporary-absence cases examine both the nature of the underlying transaction that gave rise to the litigation as well as the reasons for the defendant's absence from the state.[174] If the underlying transaction involves interstate commerce, such as a business contract between residents of different states, that fact alone may implicate the Commerce Clause.[175] More importantly, according to these cases, if the reason for the temporary absence is to

---

violate Commerce Clause where acts giving rise to causes of action occurred in another country while defendants were residents of that country and did not affect interstate or international commerce); *cf.* Mounts v. Uyeda, 277 Cal. Rptr. 730, 737-38 (Cal. Ct. App. 1991) (holding application of California tolling statute during defendant's temporary absence did not violate the Commerce Clause because both parties were California residents and the alleged injury, pointing a gun at plaintiff in a threatening manner, did not involve interstate commerce).

171. *See infra* Part III.

172. *E.g.*, Filet Menu, Inc. v. Cheng, 84 Cal. Rptr. 2d 384, 387-88 (Cal. Ct. App. 1999); *cf.* Johnson v. Rhodes, 733 N.E.2d 1132, 1134 (Ohio 2000) (holding Ohio's tolling statute does not violate the Commerce Clause statute as applied to an individual who temporarily leaves the state for "non-business reasons").

173. *See* cases cited *supra* note 170.

174. *See* cases cited *supra* note 170.

175. *See, e.g.*, *Filet Menu*, 84 Cal. Rptr. 2d at 386; *see also Pratali*, 5 Cal. Rptr. 2d at 740-41 (questioning "whether a single amicable loan between California acquaintances while visiting [Nevada] can rise to the level of interstate commerce within the meaning of the commerce clause").

facilitate interstate commerce, such as to attend a business meeting in another state, tolling in such circumstances requires application of *Bendix* and the *Pike* balancing test.[176]

Courts in these temporary-absence cases then assess the burden that the tolling statute imposes on interstate commerce in such circumstances and determine whether this burden is counterbalanced by state interests supporting the statute. Some find the tolling provisions "impose[] a special burden on residents who travel in the course of interstate commerce that is not shared by residents involved solely in 'local business and trade.'"[177] Consequently, these provisions impose a significant burden on residents engaged in interstate commerce because they "must curtail their travel outside the state" to avoid tolling the statute of limitations "or endure extended exposure to litigation because of their travel in the course of interstate commerce."[178] Not surprisingly, courts in these temporary-absence cases readily find that "no state interest outweighs this burden."[179] Residents of the forum state are subject to service of process, regardless of the reasons for traveling out of state.[180] Relying on *Bendix*, these courts conclude that the tolling provisions violate the Commerce Clause with respect to residents who travel in the course of interstate commerce.[181] They likewise conclude that the application of tolling statutes to an individual who temporarily leaves the forum state for non-business reasons, such as for a vacation, does not constitute an impermissible burden on interstate commerce.[182] The propriety of these conclusions is discussed below.

176. *See, e.g.*, *Filet Menu*, 84 Cal. Rptr. 2d at 387-88; *Pratali*, 5 Cal. Rptr. 2d at 740-41; *Johnson*, 733 N.E 2d at 1134.

177. *E.g.*, *Filet Menu*, 84 Cal. Rptr. 2d at 387 (quoting Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 891 (1988)).

178. *Id.* at 388.

179. *Id.*

180. *Id.*

181. *E.g.*, *id.* at 388-89; *cf. Pratali*, 5 Cal. Rptr. 2d at 740-41(indicating that a tolling provision may violate the Commerce Clause when applied to individual defendants engaged in interstate commerce).

182. *Filet Menu*, 84 Cal. Rptr. 2d at 388; Johnson v. Rhodes, 733 N.E.2d 1132, 1134 (Ohio 2000).

III. TOLLING VIOLATES THE DORMANT COMMERCE CLAUSE IN TEMPORARY-ABSENCE CASES

A. The Proper Application of the Commerce Clause in Temporary-Absence Cases

There is little question that the transportation of persons from state to state constitutes "commerce" within the meaning of the Commerce Clause.[183] This definition applies both when determining the power of Congress to legislate under the Commerce Clause and when determining the validity of a state statute under the dormant Commerce Clause.[184] It does not "make any difference whether the transportation is commercial in character."[185] Transportation in this context refers not only to the carrying of passengers but also more broadly to the movement of persons from one state to another.[186] Therefore, the use of dormant Commerce Clause analysis to determine the validity of absence-based tolling statutes as applied to individuals is consistent with well-established Supreme Court precedent.[187]

The more difficult question is whether the lower courts properly utilize this analysis when they invalidate an absence-based tolling statute in a temporary absence case in some contexts but not in others. For example, as previously explained, some courts have concluded that such tolling violates the Commerce Clause when applied to individuals who leave the state for a business purpose, but not when applied to those who leave for a non-business purpose.[188] These courts apply the *Pike* balancing test, but their analysis is problematic.

---

183. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964); Edwards v. California, 314 U.S. 160, 172 (1941).

184. *See, e.g.*, *Heart of Atlanta Motel*, 379 U.S. at 255-58 (discussing Congress's power to legislate under the Commerce Clause); *Edwards*, 314 U.S. at 173-77 (discussing the validity of the state statute under the dormant Commerce Clause).

185. *Heart of Atlanta Motel*, 379 U.S. at 256; *accord Edwards*, 314 U.S. at 173 n.1.

186. *See, e.g.*, *Heart of Atlanta Motel*, 379 U.S. at 255-58 (upholding a federal statute that prohibits racial discrimination by motels that serve interstate travelers as a valid exercise of power by Congress under Commerce Clause); Katzenbach v. McClung, 379 U.S. 294, 302-05 (1964) (holding that Congress had power to enact a federal statue that prohibits racial discrimination by local restaurants serving interstate travelers); *Edwards*, 314 U.S. at 173-77 (invalidating a California statute that prohibited the transportation of indigent persons into the state because it was an unconstitutional burden upon interstate commerce). *See generally* Jide Nzelibe, *Free Movement: A Federalist Reinterpretation*, 49 AM. U. L. REV. 433 (1999) (discussing the Commerce Clause and the principle of free movement from one state to another).

187. *See supra* notes 52-112, 183-86 and accompanying text.

188. *See supra* Part II.B.3.

The first problem concerns the assessment of the burden imposed on interstate commerce when tolling statutes are applied to individual defendants. With respect to individuals who are temporarily absent from the forum state, the courts are totally unconcerned with any empirical evidence of actual adverse impact on interstate commerce.[189] If the defendant is absent for a business purpose, courts assume the application of the tolling statute imposes a significant burden on interstate commerce.[190] If the absence is for a non-business purpose, they usually assume the opposite.[191]

One view of dormant Commerce Clause jurisprudence suggests that neither assumption is appropriate. In the absence of competent evidence indicating otherwise, the adverse impact on interstate commerce in this context could just as properly be considered minimal, regardless of the reason for the temporary absence.[192] Under this evidence-requiring view, an absence-based tolling statute does not violate the Commerce Clause when applied to resident defendants who temporarily leave the forum state.

However, another reasonable view is that in general, dormant Commerce Clause analysis invites courts to make assumptions, or at least common-sense predictions, regarding the adverse impact of state law on interstate commerce. Except for "traditional government function" cases such as *Department of Revenue v. Davis*,[193] the existing dormant Commerce Clause jurisprudence endorses judicial assumption-making about burdens, as illustrated by the Supreme Court's analysis in *Bendix*.[194] Therefore, the assumption-making analysis employed by courts in tolling cases is a permissible approach, and is more consistent with Supreme Court precedent than the evidence-requiring view. However, this assumption-making approach leads to a second problem with the temporary-absence cases because some courts base their assumptions about the burden on interstate commerce on the *reason* for the defendant's temporary absence. In doing so, they narrowly define interstate commerce to mean traveling for business purposes,[195] ignoring the fact that travel from state to state for *any* purpose implicates interstate commerce in a broader sense.[196]

This narrow definition of interstate commerce is at odds with the broader view taken by the Supreme Court in such cases as *Edwards v. Califor-*

189. *See supra* notes 174-82 and accompanying text.

190. *See supra* note 172 and accompanying text.

191. *See supra* note 173 and accompanying text.

192. *See, e.g.*, Cadles of Grassy Meadows II, L.L.C. v. Goldner, No. 3:06-CV-1542-M, 2007 U.S. Dist. LEXIS 42515, at *28 (N.D. Tex. June 12, 2007), *aff'd*, 542 F.3d 437 (5th Cir. 2008).

193. 553 U.S. 328, 341-43 (2008); *see also supra* notes 69-76 and accompanying text.

194. *See supra* notes 92-107 and accompanying text.

195. *See supra* notes 172-76 and accompanying text.

196. *See supra* notes 183-86 and accompanying text.

nia.[197] Therefore, cases such as *Bloomquist* and *Heritage Marketing*, which invalidated tolling statutes as applied to individuals who move from one state to another without regard to the reason for the relocation, are more faithful to Supreme Court precedent.[198] Moreover, the assumption that only travel for business purposes affects commerce is unrealistic, as the following simple hypothetical illustrates.

Assume Smith and Jones are residents of California who travel to Las Vegas, Nevada to attend the annual Consumer Electronics Show (CES). Smith operates retail electronics stores in Los Angeles and attended the CES for the purpose of ordering new products for sale in his stores. Jones was on vacation and decided to attend the CES after learning about it upon arrival in Las Vegas. Smith and Jones each stay in Las Vegas for one week, attend the CES for about the same amount of time, and spend about the same amount of money on airfare, ground transportation, meals, hotels, and entertainment. Smith, the businessman, does not order any products for his stores from vendors at the CES. Jones, the tourist, buys several expensive electronic gadgets from CES vendors for use as gifts for his family.

If a California statute, such as the absence-based tolling provision, discourages Jones and Smith from leaving the state, the adverse impact on commerce – in this case, airlines and Nevada businesses that serve interstate travelers – is obvious. If that statute is construed to discourage only Jones from leaving California, the economic impact on Nevada is roughly the same as that of a construction that discourages only Smith from leaving the state. In other words, the economic consequences of the California statute are the same regardless of the purpose of the interstate travel. Therefore, the distinction made in the temporary-absence cases based on the reason for a defendant's absence from the forum state is inappropriate for Commerce Clause analysis.

Regardless of whether the lower courts are correct in basing their burden determination on the purpose of a temporary absence when conducting the *Pike* balancing test, they certainly are correct in their assessment of the state's interest as being not very strong. In most jurisdictions, an action is deemed "commenced" for purposes of satisfying the statute of limitations on the date the complaint is filed with the court, not on the date when the complaint and summons are served on the defendant.[199] There may be time limits specifically applicable to service of process in these jurisdictions, but they are typi-

197. *See supra* notes 183-86 and accompanying text.

198. *See supra* notes 147-61, 164-69 and accompanying text.

199. *E.g.*, CAL. CIV. PROC. CODE § 350 (Deering 2011); N.Y. C.P.L.R. § 304(a) (McKinney 2010); OHIO REV. CODE ANN. § 2305.17 (LexisNexis 2011); MO. SUP. CT. R. 53.01; *see* L.S. Tellier, Annotation, *Tolling the Statute of Limitations Where Process Is Not Served Before Expiration of Limitation Period, as Affected by Statutes Defining Commencement of Action, or Expressly Relating to Interruption of Running of Limitations*, 27 A.L.R.2d 236 (1953) (surveying various state definitions of commencement).

cally expressed in court rules and statutes that operate independent of statutes of limitations.[200] Moreover, these rules and statutes usually authorize an extension of time when the defendant cannot be served within the applicable time limits because the defendant is not amenable to service or where service is otherwise impossible or impracticable.[201] Consequently, in jurisdictions where an action is deemed commenced upon the filing of the complaint, there is no valid reason for tolling the statute of limitations simply because the plaintiff may subsequently have difficulty serving the defendant.

Even in those jurisdictions where an action is not deemed "commenced" until the defendant is served with the complaint and summons,[202] the state's interest is not particularly strong. As discussed previously, all states have adopted liberal rules which authorize substituted and constructive service.[203] Therefore, a plaintiff should have little difficulty serving an absent defendant within the limitations period using one of these alternative methods. Indeed, statutes requiring service within the limitations period typically also specify that "first publication" of the summons satisfies this service requirement.[204]

Another important inquiry under the *Pike* balancing test is whether the state's legitimate interest in assisting its residents in litigating against absent

---

200. *E.g.*, CAL. CIV. PROC. CODE § 583.210 (requiring mandatory dismissal if the defendant is not served within three years of filing complaint); *id.* § 583.420(a) (discretionary dismissal after two years); OHIO REV. CODE ANN. § 2305.17 (requiring service within one year of filing); FLA. R. CIV. P. 1.070(j) (requiring service within 120 days); MASS. R. CIV. P. 4(j) (requiring service within ninety days); *see* CASAD & RICHMAN, *supra* note 47, § 3-1[8] (surveying various state time limitations on service).

201. *E.g.*, CAL. CIV. PROC. CODE § 583.240; FLA. R. CIV. P. 1.070(j) (stating that the court shall extend time for appropriate period if plaintiff shows good cause for failure to serve); MASS. R. CIV. P. 4(j) (same).

202. *E.g.*, KAN. STAT. ANN. § 60-203 (2010) (stating that an action is deemed commenced when the complaint is filed if served within ninety days after filing); OR. REV. STAT. § 12.020 (2010) (deeming action commenced when the complaint is filed and summons served upon defendant, or if summons served within sixty days after filing complaint); WASH. REV. CODE § 4.16.170 (2011) (stating that an action is deemed commenced when the complaint is filed if served within ninety days after filing); MINN. R. CIV. P. 3.01.

203. *See supra* notes 47-51 and accompanying text.

204. *See, e.g.*, Clark v. Falling, 965 P.2d 644, 647 (Wash. Ct. App. 1998). State statutes authorizing service by publication typically require that the summons be published in an appropriate newspaper once a week for a specified period of consecutive weeks. *E.g.*, CAL. GOV. CODE § 6064 (requiring publication once a week for four successive weeks); KAN. STAT. ANN. § 60-307(d) (requiring publication once a week for three consecutive weeks); WASH. REV. CODE § 4.28.110 (requiring publication once a week for six consecutive weeks). In many jurisdictions where an action is not deemed commenced until the defendant is served, the first date of actual publication of the summons tolls the statute of limitations. *See, e.g.*, *Clark*, 965 P.2d at 647 (construing the Washington statute of limitation).

defendants could adequately be protected by a narrower statute.[205] The absence-based tolling statutes currently in effect in most jurisdictions are not narrowly drawn and do not protect significant state interests. However, as discussed below, an absence-based tolling statute may survive dormant Commerce Clause scrutiny in very limited circumstances.

B. Can Absence-Based Tolling Ever Be Consistent with the Commerce Clause?

The ultimate question is whether an absence-based tolling provision can ever be consistent with the Commerce Clause. The answer is yes, so long as a state has a legitimate interest and that interest is protected by a narrowly drawn statute. For example, a state does have a valid interest in helping residents litigate against absent defendants where an action is not deemed commenced until the complaint and summons is served upon the defendant *and* state law requires personal service. In such circumstances, an absence-based tolling provision will survive Commerce Clause scrutiny if it is narrowly drawn to protect that interest.

In Minnesota, for example, a civil action is not commenced for purposes of statutes of limitations until the complaint and summons are served upon the defendant.[206] The Minnesota tolling statute provides, in relevant part, that

> after a cause of action accrues, the person departs from and resides out of the state, *and while out of the state is not subject to process under the laws of this state or after diligent search the person cannot be found for the purpose of personal service when personal service is required*, the time of the person's absence is not part of the time limited for the commencement of the action.[207]

This narrow tolling provision eliminates the dormant Commerce Clause problems associated with broader ones, such as the California statute, because it applies only in contexts were the state's interest in assisting resident litigants is strong.[208] Because Minnesota requires service upon the defendant to commence an action within the statute of limitations period, the state has a very strong interest in helping plaintiffs avoid the limitations bar where the defendant is absent and also is not subject to service or, when personal service is required, cannot be found after a diligent search. Moreover, the Minnesota provision authorizes tolling only as to that limited subclass of absent

---

205. *See supra* note 63 and accompanying text.

206. MINN. R. CIV. P. 3.01-.02.

207. MINN. STAT. ANN. § 541.13 (West 2010) (emphasis added).

208. *See* Mercer v. Anderson, 715 N.W.2d 114, 121 (Minn. Ct. App. 2006) (holding tolling under section 541.13 unavailable because plaintiff failed to engage in a diligent search to serve the out-of-state defendant).

defendants. However, this confluence of a strong state interest and a narrowly drawn statute is very much the exception, not the rule, with respect to absence-based tolling statutes in effect today.[209]

IV. CONCLUSION

According to the Supreme Court in *Bendix*, a state statute that tolls applicable statutes of limitations during the time the defendant is absent from the state violates the dormant Commerce Clause when applied to nonresident corporations.[210] Lower courts have expanded this holding to apply to nonresident individuals as well.[211] This extension of *Bendix* to individual defendants is clearly appropriate, given the nearly identical Commerce Clause concerns implicated when absence-based tolling is applied to either nonresident individuals or corporations.

The more difficult question is whether *Bendix* should be applied to resident defendants who are temporarily absent from the forum state and, if so, in what context. Courts in these temporary-absence cases have concluded that absence-based tolling violates the Commerce Clause when applied to individual defendants who leave the forum state for business reasons, but not when the absence is for a non-business purpose. This distinction, based on the purpose of the out-of-state travel, is inappropriate in light of the Supreme Court's broad definition of interstate commerce. Therefore, absence-based tolling statutes should violate the Commerce Clause when applied to individuals who temporarily leave the forum state regardless of the reason for the absence.

The ultimate question examined in this Article is whether a statute that tolls the statute of limitations during the defendant's absence from the forum state is ever consistent with the Commerce Clause. In general, the answer is no. The only exception is in those very limited circumstances where the state's legitimate interest, expressed in a narrowly drawn statute, outweighs any burden on interstate commerce. In the context of absence-based tolling, this occurs only when the state requires personal service of the complaint and summons within the statute of limitations period. However, in nearly all other circumstances, under existing Supreme Court precedent, the application of an absence-based tolling provision violates the dormant Commerce Clause.

---

209. *See supra* notes 11-12 and accompanying text. Another limited exception is in a criminal prosecution, where the state's interest in detecting crime and capturing criminals outweighs the burden an absence-based tolling provision places on interstate commerce. *Ex parte* Jean Matthews, No. 01-92-0047-CR, 1994 Tex. App. LEXIS 2223, at *4-5 (Tex. Ct. App. Sept. 8, 1994), *overruled in part by* Proctor v. State, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998), *as stated in Ex parte* Guitierrez, 989 S.W.2d 55, 56 (Tex. App. 1998).

210. Bendix Autolite Corp. v. Midwesco Enters., Inc, 486 U.S. 888, 894 (1988); *see also supra* Part II.B.1.

211. *See supra* Part II.B.2.