FOREIGN CORPORATIONS—STATE BOUNDARIES FOR NATIONAL BUSINESS

The United States combines economic unity with political federalism. As a result, corporations chartered in one state carry on an enormous volume of trading in other states, to which they are "foreign." Nor is the chartering state necessarily the locus of a corporation's principal contacts. Promoters tend to seek a charter in a state whose laws entail a minimum of expense and the least restriction of corporate and managerial powers. This trend has been intensified by a "race of laxity," in which state legislatures compete in their efforts to attract revenue from out-of-state enterprises. Thus the "tramp" corporation, chartered in one state for the evident purpose of

1. The granting of ordinary charters is theoretically a function of the state legislatures. 1 Fletcher, Cyclopedia of the Law of Private Corporations § 114 (1931). Under modern general incorporation acts, incorporators of course write their own charters, in conformity with broad statutory restrictions. Beale & Warren, Cases and Materials on the Law of Business Organization (Corporations) 1-2 (1948). While a state's power to create corporations is part of its sovereign prerogative, Congress' constitutional authority to grant corporate charters is found in the commerce clause, the "necessary and proper" clause, and the power to legislate for the territories and the District of Columbia. 1 Fletcher, op. cit. supra, §§ 121-2. Exercise of the power of Congress to grant charters to privately owned corporations formed to carry on interstate and foreign commerce seems to have been confined to communication and transportation enterprises. See Berlack, Federal Incorporation and Securities Regulation, 49 Harv. L. Rev. 396, 397 (1936).

2. Many states extend the privilege of securing a charter to nonresident incorporators. E.g., Ariz. Code Ann. §§ 53-203 (1939) ("Any number of persons"); Del. Rev. Code c. 65, § 1 (1935) ("Any number of persons, not less than three"). Furthermore, the inconveniences of distance are minimized by the mail-order service offered by incorporating companies. See Corporation Trust Co., Delaware Corporations 9 (1949).

3. The widely quoted phrase comes from Mr. Justice Brandeis' excursion, in dissent, into the history of corporate regulation, in Louis K. Liggett Co. v. Lee, 283 U.S. 517, 541, 559 (1933). He felt that the impact of the foreign corporation had resulted in a general deterioration of state regulatory laws, in that the removal of old-fashioned limits on corporate size and powers often came not from a conviction that the restrictions were undesirable but rather from the fear that they would be circumvented by foreign incorporation. Id. at 557.

4. Competition between states for charters is a well recognized legislative motive. See, e.g., Professor Beard's Jefferson, Corporations and the Constitution 17, 31 (1936); Dimock & Hyde, Bureaucracy and Trusteeship in Large Corporations 130 (TNEC Monograph 11, 1940); Larcom, The Delaware Corporation 10 et seq. (1937). Delaware approved 7,537 charters in 1929, id. at 155, and in 1932 it was the charter state of 34% of 605 industrial companies listed on the New York Stock Exchange. Id. at 175.

A study of 162 foreign corporations registered in Wisconsin disclosed that 120 of them were Wisconsin concerns to the extent of having 40% or more of their capital represented in Wisconsin, and that 84 of these were incorporated in Delaware. Their charters indicated that many of them were attracted by features of the Delaware law not available in Wisconsin. Shiels, Why Do Wisconsin Concerns Incorporate in Other States?, 11 Wis. L. Rev. 457 (1936).
doing business in others, has become an accepted instrument of American corporate enterprise.

The "tramp" has evoked special legislative recognition from the state unable to exert control through the corporate charter.\(^5\) While every state has detailed laws delineating corporate privileges, duties and liabilities, the statutory words "every corporation" have often been construed as embracing only domestic corporations.\(^6\) The extension of local rules to foreign corporations often requires express statutory reference.\(^7\) Here at least the legislatures have not been lax for long. All states have special laws providing for service of process; \(^8\) most states require filing of information for public record \(^9\) and assess a variety of taxes.

However, the need for legitimate "equalizing" legislation \(^10\) presents an

5. But legislation for foreign corporations does not in general attempt to distinguish between the enterprise incorporated in its principal place of business and the enterprise chartered in a state where it has no business contacts.


8. See note 37 infra.

On the necessity of jurisdictional statutes, see St. Clair v. Cox, 106 U.S. 350, 354-5 (1882): "Formerly it was held that a foreign corporation could not be sued in an action for recovery of a personal demand outside of the State by which it was chartered.

"... To meet and obviate this inconvenience and injustice, the legislatures of several States interposed, and provided for service of process on officers and agents of foreign corporations doing business therein."


9. See note 30 infra.

10. See Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888): "It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to
opportunity for the raising of interstate barriers, with the aim of conferring a competitive advantage upon locally incorporated businesses. Regulation designed to force conformity to local policy can be expanded to "protectionism." This issue first arose in an era of economic provincialism and hostility toward "outsiders." Checker-board thinking dominated legislative and judicial minds. Local "protectionism" received doctrinal justification in terms of state constitutional power. Since a corporate charter was considered to confer no legal existence outside the state which granted it, recognition of that existence elsewhere was merely a matter of comity. It was said that a state might exclude a foreign corporation entirely if it saw fit. Furthermore, the power to exclude carried with it as a corollary the right to admit the corporation subject to conditions.

limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character."

11. For example, statutes requiring foreign insurance companies to insure persons or property within a state only through resident agents, e.g., Idaho Code Ann. § 41-901 (Supp. 1949), serve to keep business in the hands of local residents. Similarly, taxation so graduated as to discourage chain store merchandising serves to protect local storekeepers from "outside" competition. See note 66 infra.


13. See Bank of Augusta v. Earle, 13 Pet. 519, 588 (U.S. 1839); 17 Fletcher, op. cit. supra note 1, § 8314.

14. In order to uphold the validity of a contract entered into by a foreign corporation outside the state of its creation, and yet adhere to its geographically restrictive theory of corporate existence, the Supreme Court invoked the idea that comity was to be extended to foreign laws provided they were not repugnant to the state's policy or prejudicial to its interests. Bank of Augusta v. Earle, supra note 13, at 589. Repugnancy may be indicated by legislation, but in the absence of statute or other affirmative evidence of the state's policy, the courts will not overthrow the presumption in favor of comity, and will recognize the powers of a foreign corporation. Id. at 591-7; Thompson v. Waters, 25 Mich. 214 (1872) (foreign railroad could hold title to local land); 17 Fletcher, op. cit. supra note 1, § 8332. But cf. American Telephone & Telegraph Co. v. Secretary of State, 159 Mich. 195, 123 N.W. 568 (1909) (under statute subjecting foreign corporations to some restrictions as domestic, a statutory policy of limiting powers of telephone and telegraph companies was held applicable to foreign concern).

15. See Paul v. Virginia, 8 Wall. 168, 181 (U.S. 1869) (foreign insurance companies could be obliged to post a bond, though none required of domestic companies). Reasoning from the opinion in Bank of Augusta v. Earle, 13 Pet. 519 (U.S. 1839), the Court pointed out that corporations are not entitled to the privileges and immunities of citizens. Paul v. Virginia, supra, at 178-82. In finding a power to "exclude entirely," the Court was only making more explicit the dictum of the Augusta case to the effect that the recognition prompted only by comity might be withheld.

16. Paul v. Virginia, supra note 15. Without state powers to exclude and impose conditions, the Court feared, a "flood" of foreign corporations would soon control a state's principal business. Id. at 182. The Virginia statute might conceivably have been upheld without resort to the power to exclude. Even if foreign corporations were held to be entitled to the privileges and immunities of citizens, a distinction between resident and nonresident firms could be supported as a reasonable legislative classification if not
But the power to exact conditions was subsequently circumscribed. Any theoretical *carte blanche* has been delimited by decisions invoking the Federal Constitution. Due process measured by "fair play and substantial justice" permits a corporation to be sued or taxed in a foreign state only if its activities there are sufficient to constitute "doing business." What activities are sufficient depends on the burden sought to be imposed. The commerce clause forbids a state to tax the business of a foreign corporation whose activities are "wholly" in interstate commerce, or to exclude it from its courts. Once a foreign corporation has been admitted to a substantially discriminatory. See Henderson, *The Position of Foreign Corporations in American Constitutional Law* 105-6 (1918). But the exclusion doctrine became useful. In 1870, in a case which arose before the Fourteenth Amendment was adopted, it was invoked to sustain a discriminatory municipal tax on the receipts of local agents of foreign insurance companies, where the statute was in force at the time the agent took out a license. Ducat v. Chicago, 10 Wall. 410 (U.S. 1870).


19. See note 32 infra.

20. See note 76 infra.

21. The question of what amounts to "doing business" is one of difficulty both for courts and for corporate managers. Although the meaning of the term is crucial in interpreting the statutes as well as in resolving constitutional claims, the legislatures attempt no comprehensive definitions. The draftsmen of the Uniform Foreign Corporation Act contented themselves in Section 2 with specifying some illustrative transactions which do not constitute doing business. Handbook of the National Conference of Commissioners on Uniform State Laws 287-8, 307 (1934).

22. Different degrees of activity may be discerned as the requisite "doing business" for service of process, for taxation, and for registration. An attempt at generalization is made in Isaacs, supra note 12.

23. Federal supremacy over commerce among the states precludes a state from forbidding the doing of either corporate or individual interstate business within its territory. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1 (1877) (state could not, by granting exclusive privilege of maintaining a telegraph line, exclude other companies which were permitted to maintain lines under federal law passed in the interest of commerce).

24. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925) (excise tax measured by proportions of capital and of net income allocable to the state). Only two members of the present Court joined in the contrary reasoning of Justice Rutledge in Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662 (1949), 48 Mich. L. Rev. 360 (1950). Four, or perhaps five, of the Justices who participated in that decision adhered to the view that a state may not tax the privilege of carrying on interstate commerce.

state the equal protection clause is said to prohibit its being subjected to discrimination between corporations foreign and domestic. And it has often been held that a state may not require a foreign corporation to forego, as a condition of admission, a constitutional protection which it would otherwise enjoy. In the light of these decisions it would seem that a state no longer has the power to exclude altogether any corporation it wants to exclude. In any case, their impact serves seriously to limit application of the maxim "the power to exclude is the power to exact conditions."

Despite these developments, inequality persists. Many states by statute assert that the privileges and restrictions of foreign and domestic firms are the same, but these statutes are often reduced to pious legislative avowals of a non-existent policy. Indeed, some commonly used statutory devices openly favor domestic corporations. Others, though seemingly calculated to produce equitarian results, nevertheless permit inequalities in some of the situations in which they are applied. "Protection" against foreign corporations has not altogether given way to treatment more consistent with an interdependent economy.

interstate or foreign commerce is narrow. Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944) (statute applicable to customhouse broker); Kansas City Structural Steel Co. v. Arkansas, 269 U.S. 148 (1925) (local delivery to foreign subcontractor by foreign contractor of imported materials under a construction contract).


27. This is the doctrine of "unconstitutional conditions." It was crucial in cases involving deprivation of the right of foreign corporate defendants to remove state cases to the federal courts. Expulsion from the state for violation of a statute forbidding removal was approved in Doyle v. Continental Ins. Co., 94 U.S. 535 (1877). This holding was overruled in Terral v. Burke Construction Co., 257 U.S. 529 (1922), where the Court adopted the view of the doctrine taken by Mr. Justice Bradley, dissenting in the Doyle case, supra, at 543, and by Mr. Justice Day, dissenting in Security Mutual Life Ins. Co. v. Prewitt, 202 U.S. 246, 258, 267-9 (1906). It appeared in the tax field in Mr. Justice Harlan's dissenting opinion in Philadelphia Fire Ass'n v. New York, 119 U.S. 110, 120, 125-8 (1886), and was invoked to nullify tax statutes which discriminated against foreign corporations, in Western Union Telegraph Co. v. Kansas, 216 U.S. 1 (1910), and Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926). It was relied on in finding invalid a statute establishing unequal venue provisions, in Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927).

The idea is difficult to reconcile logically with a total exclusion power. See Mr. Justice Holmes, dissenting in Western Union Telegraph Co. v. Kansas, supra, at 52 et seq., and in Power Mfg. Co. v. Saunders, supra, at 497-8. As applied to equal protection in taxation, it has been virtually repudiated by the Court. See pages 751-2 infra. On the doctrine generally see Henderson, op. cit. supra note 16, c. VIII and pp. 161-2; Hale, Unconstitutional Conditions and Constitutional Rights, 35 Col. L. Rev. 321 (1935); Merrill, Unconstitutional Conditions, 77 U. of Pa. L. Rev. 879 (1929).

28. In the statutes or constitutions of a majority of the states there exist "equality" provisions which define the overall rights and liabilities of foreign corporations or their officers and stockholders, or their rights and liabilities in specified particulars, by stating that they shall be equal to those of domestic corporations. See pages 752-7 infra.
REGISTRATION AND JURISDICTION

Insofar as a state is not obliged to recognize the legal existence of foreign corporations, it is free to require local incorporation as a condition of doing local business. But reincorporation is demanded today only in the case of a few special types of enterprises. Instead, states merely require foreign firms to register. Registration consists essentially of filing the corporate charter, together with such information as the location of the principal local office, and appointment of an agent for service of process.

Registration is not a prerequisite of jurisdiction. Service on the ordinary agents of a corporation who are present for business purposes may subject it to suit even though its business activities in a state are not such as to justify requiring it to appoint a process agent. The Supreme Court's test...

29. In theory, the result of incorporation in a second state is two separate legal entities rather than one. See Fletcher, op. cit. supra note 1, §120; Beale, Corporations of Two States, 4 Col. L. Rev. 391, 393 (1904). Multiple incorporation is rare outside of the railroad field, where it is a result of consolidations. See Steckler v. Pennroad Corp., 136 F.2d 197, 199-200 n.4 (3d Cir. 1943), cert. denied, 320 U.S. 757 (1943). Thus, South Carolina allows railroad lines within the state to be owned or operated only by domestic corporations, but a foreign railroad may organize a South Carolina subsidiary, with which it may be consolidated. S.C. Const. Art. 9, §8; S.C. Code Ann. §§7777-9, 7785 (1942). Exclusion in this sense may give way to an overriding federal power: the Interstate Commerce Commission, acting in a consolidation proceeding, is not bound by these laws. Seaboard Airline R.R. v. Daniel, 333 U.S. 118 (1948). States require local charters for certain other types of activity. Some do not admit foreign corporations doing a general banking business. Minn. Stat. Ann. § 303.04 (West, Supp. 1949).


31. See note 37 infra.

32. Where a state provided by statute for service of process on the agents of foreign corporations, a company which maintained an agent in the state was deemed to have assented to service though it had given no express consent. Lafayette Ins. Co. v. French, 18 How. 404 (U.S. 1856). But cf. St. Clair v. Cox, 106 U.S. 350 (1882) (service on agent invalid unless corporation doing business in forum).

33. The fact that a corporation which fails to appoint a process agent is engaged entirely in interstate commerce does not by itself confer immunity from process, if an agent carrying on its business in a state can be found and served there. International Harvester Co. of America v. Kentucky, 234 U.S. 579 (1914) (continuous solicitation by traveling agents having authority only to take orders and receive payment); Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917). But cf. Davis v. Farmers Co-operative Equity Co., 262 U.S. 312 (1923) (nonresident plaintiff, cause of action arising in another state).
of "fair play and substantial justice" for such cases has made it more difficult for the foreign corporation to escape local jurisdiction. But since finding a corporate agent may be difficult, the primary function of a registration law is to make the foreign corporation readily suable in the local courts. The statutes attempt to insure availability of a person on whom valid process may be served, by requiring the designation of an agent expressly authorized to receive it. These statutes, when complied with, make it no more inconvenient or expensive to sue a foreign than a domestic corporation. And the foreign corporation's burden of defending is not


35. It appears to have reduced the quantum of corporate activity required to support jurisdiction, by doing away with the rule that "mere solicitation" is not "doing business." See id. at 525–30.

36. Compliance with a registration statute constitutes consent on the part of a nonresident corporation to suit begun against it by service on its designated agent not only in the state courts, Bagdon v. Philadelphia & Reading Coal & Iron Co., 217 N.Y. 432, 111 N.E. 1075 (1916), but also in the federal courts of that state, Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939), venue.

37. Every state requires either that a foreign corporation name a resident process agent of its own choice, e.g., Ariz. Code Ann. § 53–501 (Supp. 1949); or requires that it appoint, or be deemed to have appointed a state official its agent for the same purpose, e.g., N.Y. Gen. Corp. Law § 210. Some add a provision that service on the official will be valid if the agent is not maintained or cannot be found, e.g., Ill. Ann. Stat. c. 32, § 157.111 (1934).

38. Federal as well as state courts are an available forum. A corporation is a citizen of the chartering state for federal jurisdictional purposes. Louisville, C. & C. R.R. v. Letson, 2 How. 497, 557 (U.S. 1844); see Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 169 (1939). For local plaintiffs, therefore, diversity of citizenship always exists in an action against a foreign corporation. The Judicial Code makes a corporation suable in any judicial district in which it is incorporated or licensed to do business or is doing business, and such district is regarded as its residence for venue purposes. 28 U.S.C. § 1391 (Supp. 1949). But diversity gives the foreign corporation the advantage, not enjoyed by domestic litigants, of being able to invoke federal jurisdiction against local individuals or firms, both in choosing its forum, under 28 U.S.C. § 1332 (Supp. 1949), when it is a plaintiff, and in removing to federal court, under 28 U.S.C. § 1441 (Supp. 1949), when it is sued in a state court. But removal is not likely to prejudice seriously a plaintiff's convenience, for trial then takes place in the federal district court for the district and division embracing the place where the state action was pending. Ibid. And removal will of course leave unaffected the substantive law applicable to the case. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

Proposals were once made in Congress for legislation requiring a corporation to be treated for jurisdictional purposes as a citizen of the state where it chiefly does business, or of each state where it does business. See American Bar Association, Report of the Fifty-Fifth Annual Meeting 100 et seq. (1932).
necessarily greater, since it is no longer realistic to assume that a corporation's principal contacts are in the state of its charter.

Often, neither foreign nor domestic corporations can avoid suit by failing to register or failing to maintain an agent. Many legislatures have required foreign, like domestic, corporations to submit to "substituted" service of process on a state official if no corporate agent has been maintained. Provision is usually made for notifying the defendant by registered mail. But in one state a registered foreign corporation must submit to jurisdiction in these circumstances without notice, even though notice is required for domestic corporations, and is thus subjected to a greater hazard of default judgments.

The device of substituted service may be extended to corporations which fail to register. This prevents the foreign firm from being able to hit and run, to do business in a state and then withdraw. The test of "fair play and substantial justice" is as appropriate for cases of substituted service as for the case of service on an actual agent. Perhaps the new, more elastic approach to the jurisdictional problem indicates that the Court would be willing finally to do away with the result, reached via the older "implied

40. E.g., Ore. Comp. Laws Ann. § 77-301 (1940).
42. Compare Wash. Rev. Stat. Ann. § 3836-18 (Supp. 1940) with id. § 227 (1932). This difference in treatment was upheld as not violating due process or equal protection in Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U.S. 361 (1933) (foreign corporation, having complied and withdrawn, had burden of arranging to have notice if it wanted it; difference between treatment of foreign and domestic corporations a permissible legislative classification). The Court strongly relied on the exclusion power. Id. at 364, 365. Lack of notice would seem to make the decision questionable on due process grounds.
44. The hit-and-run problem is more likely to arise in the case of foreign than domestic corporations. The Supreme Court early recognized this difference as supporting the application of special regulations to foreign corporations: "In the state where a corporation is formed ... [d]irectors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the State is passed difficulties arise; it is not so easy to determine who represent the corporation there...." St. Clair v. Cox, 106 U.S. 350, 353-4 (1882). Today the place of business in the chartering state may be a mere formality, but a corporation which remains in business at all will be deterred from disappearing from the one jurisdiction which can revoke its charter or impose lesser sanctions which would cripple the corporate management. Delaware, for example, requires of domestic corporations an annual report stating the location of the principal office in the state and the name of the agent upon whom process may be served. Wilful failure to file such report may disqualify all the directors from election or re-election to any office in the corporation. Del. Rev. Code c. 6, § 63 (1935).
consent" doctrine, that an unregistered foreign corporation was not amenable to substituted service on a cause of action arising in another state.45

Penalties for Non-Registration

A foreign corporation which fails to register before doing business 44 may be denied the use of local courts to enforce local obligations. Statutes commonly declare that the noncomplying corporation's contracts are void on its behalf but enforceable against it,47 or that no corporation which does business without registering may bring or maintain any action in the courts of the state,48 or both.49 Under either type of statute, a noncomplying corporation may be barred from enforcing an otherwise valid agreement,50 though it register before bringing suit 51 or while the litigation is pending.52

45. The Supreme Court held that, under a statute providing for service on an official in the case of corporations failing to comply with the appointment requirement, such service is not effective against such a corporation in a suit arising out of business done outside the jurisdiction, Simon v. Southern Ry., 236 U.S. 115 (1915); Old Wayne Mutual Life Ass'n of Indianapolis v. McDonough, 204 U.S. 8 (1907), whereas "express assent" to such service will render it valid even though the cause of action be foreign, Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917). The Court sought support for this result in the inconvenience and hardship in defending suits wherever business is done. See Simon v. Southern Ry., supra, at 130. Defense is likely to be more convenient in a state where sufficient business is done to have impelled the corporation to register. But an examination of actual inconvenience would seem a more realistic test than an inquiry whether the formality of local registration has been observed. The "fair play and substantial justice" test sanctions such an examination. The reasoning of the opinion, International Shoe Co. v. Washington, 326 U.S. 310 (1945), seems broad enough to permit extension to the substituted service situation. This is especially so in view of the judicial attrition of the doctrine of the Simon and Old Wayne cases. See Cohen v. American Window Glass Co., 126 F.2d 111, 113 (2d Cir. 1942). And see Note, 16 U. of Chi. L. REV. 523, 530-1 (1949).

46. The definition of "doing business" is attended by the usual uncertainty. But some statutes specify activities which shall not of themselves bring foreign corporations within the registration requirements. E.g., DEL. REV. CODE c. 65, § 215 (1935) (solicitation by catalogs or by resident or traveling salesmen).

47. E.g., WIS. STAT. § 226.02(9) (1947) ("void on its behalf and on behalf of its assigns, but shall be enforceable against it or them").

48. E.g., VT. STAT. § 5996 (1947) (no action on a contract made in the state if at the time of making the contract the corporation was doing business without authority).

49. E.g., UTAH CODE ANN., § 18-8-5 (1943).

50. E.g., Delaware River Quarry & Construction Co. v. Bethlehem & Nazareth Passenger Ry., 204 Pa. 22, 53 Atl. 533 (1902) (statute providing no foreign corporation may do business until it has registered; claim on quantum meruit for labor and materials denied).

Such a penalty, as applied to contracts made after passage of the statute, was held not to violate either the contract clause or the due process clause of the Federal Constitution, in view of the state's power to exclude a corporation or condition its entrance. Munday v. Wisconsin Trust Co., 252 U.S. 499 (1920).

51. Perkins Mfg. Co. v. Clinton Construction Co. of California, 211 Cal. 228, 295 Pac. 1 (1930) (statute prohibiting corporation from maintaining or defending any ac-
Whatever its value as a punitive device, this penalty does not serve to rectify the harm done by non-registration. The state's interest in registration lies in the receipt of taxes and the protection of its citizens against irresponsible acts. To deny a noncomplying firm the right to enforce its claims does not satisfy either of these interests, but instead confers a windfall on the person against whom the claim would be outstanding. Even considered as a deterrent rather than a remedial expedient, unenforceability of contracts is a crude and erratic punishment. Many offenders may be able to collect their claims without resort to legal action. Suit may be possible in another jurisdiction. And the firm which acts on a bona fide belief that it is not transacting such business as to bring it within a registration statute may be under the same disability as a wilful violator. If such provisions are desirable at all, it seems clear that room should be left for the courts to make exceptions.

State courts have, in fact, shown a tendency to give relief to a plaintiff corporation if it later complies with the statute, albeit after the contract was made. In the teeth of statutes making contracts unenforceable, they have found it possible to allow an equitable action for the value of services performed. Or, if both parties adopt the terms of the invalid agreement by
acts done after the plaintiff's compliance with the registration requirement, it may be enforced as a new obligation. Similarly, if the statute prohibits "maintaining" rather than "commencing" a suit, a corporation can be held competent to enforce its contracts if it complies either before or after bringing its action. Prior to *Erie v. Tompkins* it was possible to avoid many of these statutes by utilizing a federal forum. But now in diversity suits the federal court is bound by laws denying foreign corporations access to state courts. Perhaps the new rule will amplify the impact of the statutes sufficiently to stimulate their modification.

Some legislatures as well as courts have tended to liberalize the non-compliance provisions, and have made the penalty merely a disability to sue before the requisite certificate is obtained. The weakness of such a

58. National Fertilizer Co. v. Fall River Five Cents Savings Bank, 196 Mass. 458, 82 N.E. 671 (1907) (statute providing no action to be maintained so long as corporation fails to comply; corporation complied after bringing action but before hearing).
59. Where the effect of a noncompliance statute was only to prohibit maintenance of actions in the state courts, the statute, being "procedural," did not bar action in a federal court. David Lupton's Sons Co. v. Automobile Club of America, 225 U.S. 489 (1912); Republic Creosoting Co. v. Boldt Construction Co., 38 F.2d 739 (6th Cir. 1930). But where the statute made a contract void, either by its terms, Diamond Glue Co. v. United States Glue Co., 103 Fed. 838 (C.C.E.D. Wis. 1900), aff'd, 187 U.S. 611 (1903), or by state judicial construction, Cyclone Mining Co. v. Baker Light & Power Co., 165 Fed. 996 (C.C.D. Ore. 1908), enforcement was denied in the federal courts.
60. Woods v. Interstate Realty Co., 337 U.S. 535 (1949). The Supreme Court had earlier held that *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), required that a federal court, when called upon to enforce state-created rights, was bound by a statute closing state courts to proceedings on specified causes of action. *Angel v. Bullington*, 330 U.S. 183 (1947) (statute prohibiting suits for deficiency judgments under mortgages). In so holding, the Court had observed that the *Lupton* decision, *supra* note 59, was obsolete insofar as it was based on a pre-*Erie* view of diversity jurisdiction. *Id.* at 192. See 49 Col. L. Rev. 852 (1949); 44 Ill. L. Rev. 533 (1949).
61. The *Woods* decision, *supra* note 60, calls attention to the question whether state legislators, in prohibiting suits by noncomplying foreign corporations, relied upon the former availability of the federal forum. See Mr. Justice Jackson, dissenting in *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538, 539 (1949). To the extent that they did, statutory changes may be expected.
62. *E.g.*, Ill. Ann. Stat. ch. 32, § 157.125 (1934), enacted in 1933. The statute further provides that failure to obtain a certificate shall not impair the validity of any contract or act of the corporation and shall not disqualify the corporation from defending any action in the courts of the state. It also makes a corporation doing business without authority liable to the state in the amount of all the fees and taxes which it would have paid had it complied, plus ten per cent of that amount. *Ibid.*

That a corporation should thus be enabled to enforce contracts made before registration was the expressed intention of the draftsmen of the Illinois statute. See 1 Chicago Bar Association, Illinois Business Corporation Act Annotated 403-9 (2d ed. 1947). Even noncompliance continuing after suit is brought will not bar a plaintiff from maintaining an action. Emcee Corp. v. George, 293 Ill. App. 240, 12
statute is that it allows a corporation to pursue its activities with impunity until it finds the use of the courts more profitable than further evasion of the law. But the weakness can be, and often is, largely overcome by imposing a fine for noncompliance and a requirement that past taxes and fees be paid.

**TAXATION**

Taxation is a means of directly and continuously influencing the economic return from corporate business. A tax can be used as a means of making the foreign corporation pay its fair share for the privilege of doing business in a state. But it can also be used to eliminate legitimate competitive advantage—as in the case of chain stores—or simply as a method of "soaking the foreigner" and "protecting" local enterprise.


63. See MacDonald Bros., Inc. v. Quality Aluminum Casting Co., 251 Wis. 27, 32, 27 N.W.2d 769, 772 (1947) (if reinstatement restored right to sue on contract made after forfeiture of license, expelled corporation could wait until it had a profitable contract to enforce before requalifying).

64. Fines for doing business without registering are imposed by some states on the corporation, e.g., *Minn. Stat. Ann.* § 303.20 (West, 1945); or on its officers and agents, e.g., *Mass. Gen. Laws* c. 181, § 5 (1932); or on both, e.g., *Cal. Corp. Code Ann.* §§ 6800, 6803 (1947). Use of a fine was the recommendation of the draftsmen of the Uniform Foreign Corporation Act, who disapproved making contracts void on behalf of the corporation. *Handbook of the National Conference of Commissioners on Uniform State Laws* 329–30 (1934). Statutes in a few instances make officers, agents, directors, and stockholders personally liable for the debts of a noncomplying foreign corporation. E.g., *Va. Code Ann.* § 13–218 (1950). In the absence of such a provision, officers and agents are usually held not liable in jurisdictions where the statutes recognize the validity of contracts made before compliance by permitting them to be enforced against the corporation and by permitting the corporation to bring an action on them after complying. *American Soap Co. v. Bogue*, 114 Ohio St. 149, 150 N.E. 743 (1926). But cf. *Joseph T. Ryerson & Son v. Shaw*, 277 Ill. 524, 115 N.E. 650 (1917) (officers liable in a jurisdiction where contracts were construed as void on behalf of corporation but enforceable against it).


66. The desire to keep business in local hands by protecting it from the competition of multiple unit distribution is evident in the anti-chain store tax legislation which became popular during the depression. E.g., *Fla. Stat. Ann.* §§ 204.01–204.16 (Supp. 1948); *Ind. Stat. Ann.* §§ 42–301 to 42–313 (Burns, 1933). See Collins, *Anti-Chain Store Legislation*, 24 *Cornell L.Q.* 198 (1939). Although these taxes are not directed against foreign corporations as such, many of the largest taxpayers are corporations of other states.
The forms of state taxes on foreign corporations are as varied as their purposes. 67 Most states impose a flat entrance fee, 68 or one which varies with the amount of the corporation's capital. 69 A state may seek to keep the combined cost of a foreign charter and local registration at least as high as the cost of local incorporation. 70 Some admission fees are made equal to the fee a similar enterprise would pay upon local incorporation, if its total stock were equal to that portion of the foreign corporation's stock allocable to the state. 71 Franchise and income taxes account for a predominant part of state revenues from corporations. 72 They are often measured by corporate business without regard for place of incorporation. 73 These offer no special economic barriers to foreign enterprise; they must be borne by all competing corporations, foreign and domestic, doing a similar business within the jurisdiction of the taxing state.

67. The variety of method and measure has long been troublesome to management. See the report of a committee of the National Association of Manufacturers in 1903, quoted in Sen. Doc. No. 92, Part 69-A, 70th Cong., 1st Sess. 56-7 (1934). Any approach to uniformity seems an unlikely prospect. When the Uniform Foreign Corporation Act was drawn up, the Commissioners refrained from touching upon the subject of taxation because of the existing diversity of state laws. Handbook of the National Conference of Commissioners on Uniform State Laws 305 (1934).

68. The largest amount among the states whose entrance fee consists only of a flat tax is $300. Tenn. Code Ann. § 4120 (Williams, 1934).

69. Such a tax may be based on all the corporation's authorized capital stock, e.g., N.C. Gen. Stat. Ann. § 55-118 (1943); or on that portion of its authorized capital stock which represents assets or business in the taxing state, e.g., Ill. Ann. Stat. c. 32, § 157.136 (Supp. 1949); or on the same portion of its issued stock, e.g., Ohio Gen. Code Ann. § 8625-9 (Supp. 1949).

70. See, e.g., the repeated actions of the New York legislature to make the initial tax on foreign corporations as great as the organization tax imposed on domestic firms in order to remove the inducement to incorporate elsewhere, recounted in People ex rel. Elliott-Fisher Co. v. Schmer, 148 App. Div. 514, 515-6, 132 N.Y. Supp. 789, 790-1 (3d Dep't 1911), aff'd, 206 N.Y. 634, 99 N.E. 1115 (1912). Obviously, equal cost can be attained only in a generalized way in view of the number of jurisdictions to which a corporation might resort for a charter and the varied incidence of different tax laws on corporations of different sizes, structures and earnings. It was found, for example, that some firms having a substantial part of their capital in Wisconsin saved money by incorporating in Delaware, while others found it slightly more expensive to do so. Shiel, supra, note 4, at 463.

71. E.g., Ohio Gen. Code Ann. § 8625-9 (Supp. 1949). The allocation basis is property within the state and business done in the state as compared with total property and business. Id. § 8625-8.

72. The Federal Treasury estimated that in 1938 the states collected $313,000,000 in the form of corporate privilege taxes. Of this, about $200,000,000 was from corporate income taxes and the greater part of the remainder was probably from annual franchise taxes other than on income. Hyning, Taxation of Corporate Enterprise 111 (TNEC Monograph 9, 1941).

73. Some states make a single scheme of annual franchise taxation expressly applicable to both foreign and domestic corporations. E.g., N.Y. Tax Law § 209. Many subject foreign companies to the same apportioned income taxes as are imposed on domestic corporations. E.g., Pa. Stat. Ann. tit. 72, § 3420b (1949).
But some states have separate franchise taxes for corporations having foreign charters, based on some form of allocation of capital or revenue. These may permit minor inequalities in the tax consequences of like business activities depending on the methods of allocation.

Some constitutional protection from unequal taxation stems from the equal protection clause of the Fourteenth Amendment. Southern Ry. v. Greene held that the clause forbade discrimination, in the form of a franchise tax not imposed on domestic corporations, against a previously admitted foreign corporation which had acquired property within the state.

74. E.g., W. VA. CODE ANN. § 935 (1949).
75. The state seeks to tax the general privilege of doing business within the state. See Ford Motor Co. v. Beauchamp, 308 U.S. 331, 334-5 (1939). Allocation fractions for determining, on the basis of the corporation's local property, sales, payroll, or other factors, what portion of its capital or income is to be attributed to the taxing state as the measure of the tax are used to satisfy the due process prohibition, International Paper Co. v. Massachusetts, 246 U.S. 135 (1918), of taxes on nonresidents based on property or sources of income outside a state's jurisdiction. The results do not always reflect business done with any precision, but only in extreme cases will a corporation be able to show that an allocation fraction produces a basis so out of proportion to the amount of the business transacted as to violate due process. Compare Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931), with Butler Bros. v. McColgan, 315 U.S. 501 (1942). See International Harvester Co. v. Evatt, 329 U.S. 416, 422-3 (1947). Although the domicile of domestic corporations might justify taxation without apportionment, nearly all states do provide for allocation of franchise and income taxes in the case of domestic as well as foreign corporate taxpayers.

76. Equal protection is not the only constitutional guarantee invoked against tax statutes by foreign corporations, but it is the one which arises most frequently in connection with the franchise taxes imposed on foreign corporations as such. The commerce clause prohibition of direct tax burdens on interstate commerce may be invoked by domestic as well as by foreign companies. E.g., J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).

The due process requirement raises not only the question of what the tax base may be, note 75 supra, but also that of what degree of local business brings the transactions of a foreign corporation within a state's tax jurisdiction. The farthest advance in this area has been in requiring nonresident vendors to collect use taxes although their only activity in the taxing state was solicitation of orders by traveling salesmen. General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944); Note, 57 HARV. L. REV. 1086 (1944). And although a foreign corporation doing a purely interstate business cannot be taxed for the privilege of carrying on that business, see note 24 supra, a nonresident mail order house which ships goods across state lines on orders solicited only through the circulation of catalogues is not immune from being required to collect a use tax on those sales for the buyer's state if it is also maintaining retail stores in that state. Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941). See Hellerstein, State Franchise Taxation of Interstate Business, 4 TAX L. REV. 95 (1948); Steiner, The Alabama Use Tax and Interstate Commerce, 9 ALA. LAWYER 282 (1948).

77. 216 U.S. 400 (1910).
78. But the acquisition of fixed and permanent property is not a prerequisite to invalidation under the equal protection clause of a tax on net receipts imposed on foreign but not on domestic companies. Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926).
But complete identity of franchise taxes is not required. Separate taxes on foreign and on domestic corporations, though measured by different tax bases and resulting inevitably in different tax liability, will be valid if they are roughly equivalent.\(^7\)

However, the guarantee of equal protection was early held not to come into play until after a corporation has been admitted to a state,\(^5\) and this is the gap which permits the more patent examples of discrimination. State power to exclude a corporation altogether has been relied upon to uphold entrance taxes larger than any corresponding levy on domestic corporations.\(^9\) Furthermore, this power apparently permits a discriminatory franchise tax in the guise of an entrance fee. If the proper formula has been invoked in the granting of admission, *Southern Ry. v. Greene* may be effectively avoided. In *Lincoln National Life Ins. Co. v. Read*,\(^8\) the Supreme Court held that a state may provide for recurrent "admission" of foreign corporations for short terms and at each "readmission" require payment of an "entrance fee" more onerous than the taxes it imposes on domestic corporations.\(^8\) The Court rejected the doctrine established in earlier tax deci-

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\(^7\) St. Louis S.W. Ry. v. Arkansas, 235 U.S. 350, 366 (1914) (separate annual franchise taxes based on capital stock of foreign and of domestic corporations); Aetna Ins. Co. v. Hobbs, 160 Kan. 300, 311, 161 P.2d 726, 734 (1945), aff'd, 338 U.S. 822 (1946) (tax on domestic insurance companies based on capital; tax on foreign, based on premiums); cf. Atlantic Refining Co. v. Virginia, 302 U.S. 22, 31 (1937) (entrance tax on foreign corporations offset by annual franchise tax on domestic corporations). But cf. Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949) (ad valorem tax on intangibles arising from certain transactions of foreign corporations held not offset by statutory "reciprocity" scheme which would leave other states free to tax similar transactions of domestic corporations); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926) (tax on net receipts of foreign insurance companies violated equal protection where corresponding tax on domestic companies was levied on personal property at a valuation of 30% of its full worth).

\(^8\) Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886). With regard to the subordination of this principle to the doctrine of unconstitutional conditions and its later liberation therefrom, see note 27 supra and text accompanying note 85 infra.


\(^82\) 325 U.S. 673 (1945).

\(^83\) To reach this result the Court had to rely heavily on slender distinctions as to the form of admission. The Court had earlier said that a state which required admitted foreign corporations annually to procure an authorization showing compliance with its tax laws could not relieve itself of the equal protection requirement with respect to a tax on net receipts by arguing that failure to comply would justify revocation or "refusal to renew." Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 514 (1926). See Note, 35 Mich. L. Rev. 1013 (1938). This holding was distinguished in the *Lincoln* opinion on the ground that the Hanover Co. had been granted an "unequivocal license." *Lincoln National Life Ins. Co. v. Read*, 325 U.S. 673, 676 (1945).
sions 84 that a state may not require the surrender of a constitutional right as a condition of doing business, 85 and took doctrinal refuge in the state's power to exclude the corporation altogether. 86 The exclusion power thus permits any legislature, if it has exercised tax-conscious foresight in framing its registration statute, to disregard the equal protection clause 87 and to control "foreign" competition with a flexibility made possible by changeable tax levies. 88 Perhaps the only effective check on undue discrimination has been the fear of killing a goose that lays golden eggs. 89

**Equality by Statute**

It has become a truism that a corporation by entering a foreign state subjects itself to local laws. 90 This derives from the ancient principle that

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84. See note 27 supra.
86. Id. at 678.
87. The use of a short-term admission to circumvent equal protection is not a new idea. In Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886), the imposition, after initial admission, of a new retaliatory tax on corporations of a particular state did not violate equal protection, since admission had been for one-year periods. But the doctrine of "unconstitutional conditions," which appeared in the dissenting opinion in that case, gained acceptance in the tax field. See note 27 supra. The Greene opinion itself indicated the loophole, pointing out that the question there under consideration was not one of renewal of a limited license. Southern Ry. v. Greene, 216 U.S. 400, 413 (1910). Henderson, op. cit. supra note 16, at 159–62, argued that the doctrine of "unconstitutional conditions" should be applied to admission fees to prevent the kind of discrimination sanctioned in the Lincoln case.
88. This freedom, of course, does not exist with respect to corporations already "unequivocally" admitted to a state. Some states explicitly fix the duration of the authority to do business. E.g., Tex. Rev. Civ. Stat. Ann. art. 1529 (1925) (ten years); Vt. Stat. § 5984 (1947) (one year). But explicit limitation to a term is not necessary in order to make applicable the rule of Lincoln National Life Insurance Co. v. Read, 325 U.S. 673 (1945), since the state constitutional provision which governed that case limited the term only by implication, calling the annual tax an "entrance fee" and stipulating that refusal to pay taxes or fees should work a forfeiture of the license to do business. Okla. Const. Art. XIX, §§ 1, 2. Cf. Ore. Comp. Laws Ann. § 77–304 (1940) (certificate invalid in any legal proceeding unless accompanied by evidence of payment of last annual license fee).
89. See Mr. Justice Brandeis, dissenting in Louis K. Liggett Co. v. Lee, 288 U.S. 517, 541, 545 (1933). These benefits are frequently worth bidding for. New York, in 1892, granted a special charter modelled on New Jersey law to General Electric Co. to dissuade it from incorporating in the latter state. Id. at 561–2. Sizeable financial inducements may be offered. See, e.g., Midwest Sportswear Mfg. Co. v. Baraboo Chamber of Commerce, 161 F.2d 918 (7th Cir. 1947) (defendant paid foreign corporation's expenses of moving into the community and agreed to deed factory to it if it expended $250,000 in payroll within five years). Florida passed a constitutional amendment in 1934 exempting motion picture studios from all ad valorem taxation for fifteen years. Fla. Const. Art. IX, § 14.
the powers granted by the chartering state carry no extraterritorial force: they may be limited as the foreign state may choose.91 Frequently the corporation's powers are trimmed to the measure of those enjoyed by locally incorporated enterprises; 92 in other cases they are merely trimmed.93 Many states have enacted broad "equality" provisions, which call in general terms for the same privileges and liabilities to be applied to the foreign as to the domestic corporation.94

In some contexts these provisions may have the effect of merely restating the equal protection clause of the Federal Constitution; in others they go further. In general, the "equality" statutes may subject the foreign corporation to local ground rules 95 on such diverse matters as statutes of

91. See text accompanying notes 13-16 supra.
92. See note 94 infra. Contrary to the traditional notion that a state cannot confer upon a foreign corporation any powers not granted by the charter state, see Bank of Augusta v. Earle, 13 Pet. 519, 587 (U.S. 1839), charter powers are in effect sometimes expanded. See Note, The Powers of Corporations and the Conflict of Laws, 40 Col. L. Rev. 1210 (1940).
93. Arizona, for example, forbids any alien corporation to hold any land within the state. Ariz. Code Ann. § 53–804 (1939).
94. The provisions vary considerably in their scope, e.g., Cal. Const. Art. XII § 15 ("No [foreign] corporation . . . shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."); Ind. Stat. Ann. § 25–302 (Burns, 1933) ("the same, but no greater, rights and privileges, and be subject to the same liabilities, restrictions, duties and penalties, now in force or hereafter imposed upon domestic corporations of like character, and to the same extent as if it had been organized under this act to transact the business for which its certificate of admission is issued."); N.Y. Stock Corp. Law § 114 ("[T]he officers, directors and stockholders . . . shall be liable . . . in the same manner and to the same extent as the officers, directors and stockholders of a domestic corporation, for the making of 1. Unauthorized dividends; 2. Unlawful loans to stockholders; 3. False certificates, reports or public notices; 4. Illegal transfers of the stock and property of such corporation when it is insolvent or its insolvency is threatened."); Ohio Gen. Code Ann. § 8525–16 (1933) ("No foreign corporation shall transact in this state any business which could not be lawfully transacted by a domestic corporation.").
95. Complete identity of treatment for foreign and domestic corporations is of course impracticable. If domestic corporations are required, for instance, to hold directors' meetings in the home state, it is hardly reasonable to impose the same requirement on foreign companies. See 2 Rabel, The Conflict of Laws 83 (1947). Such considerations probably underlie statutes of the type in effect in California, asserting that liabilities of directors for unauthorized dividends may be enforced by stockholders in the courts of the state, but according to the laws of the place of incorporation. Cal. Corp. Code Ann. § 6601 (1947). Ideas of fairness can be invoked on the other side as well: it seems as reasonable to expect officers and even stockholders to know the laws of states where a corporation does business as to expect those who deal with it to recognize its foreignness and to know the law of its home state. See Spector v. Brandriss, 144 Misc. 848, 851, 259 N.Y. Supp. 558, 560 (Mun. Ct. 1932), rev'd, 184 Misc. 40, 54 N.Y.S.2d 527 (Sup. Ct. 1933) (statutory liability of stockholders for wages).
limitation, illegal businesses, statutory modifications of tort liability, suability after corporate demise, and sometimes even validity of stock issues, legality of dividends, and stockholders' liability to creditors. Absent an "equality" statute, local courts looking to traditional conflict of laws rules might in some circumstances be inclined to apply the law of the chartering state.

These statutes are designed to take some of the slack out of the loose incorporation provisions deliberately adopted by greedy legislatures. However, an extreme application of the equality idea would force a foreign corporation with far-flung activities to conform its capital structure and business practices to possibly aberrational local laws. Thus these laws may indirectly exert an extraterritorial influence. State courts, however, often take a less Olympian stand, and permit a corporation with nonconforming

100. State ex rel. Weede v. Iowa Southern Utilities Co. of Delaware, 231 Iowa 784, 2 N.W.2d 372, modified, 4 N.W.2d 869 (1942).
101. See note 108 infra.
102. See note 108 infra.
103. The traditional rule is that a corporation can exercise any of the powers granted by the state of incorporation, provided such exercise is not prohibited by the law of the state where it is to be performed. RESTATEMENT, CONFLICT OF LAWS § 165 (1934). If such a power exceeds those of domestic corporations, an equality statute serves to make the prohibition explicit. In the absence of such a statute the general rule favors the application of the law of the charter state with respect to the period after corporate dissolution during which a corporation may be sued, 17 FLETCHER, op. cit. supra note 1, § 8583; the validity of stock issues, 17 id. § 8435; legality of dividends, 11 id. § 5334; and liabilities of stockholders, 17 id. § 8326. With these rules compare the results reached under equality statutes in cases cited notes 99–102 supra.
104. In Firemen's Ins. Co. v. Beha, 30 F.2d 539 (S.D.N.Y. 1928), it was held that under a special equality statute requiring investments of foreign insurance companies to be of the same general character as those of domestic, a state official might revoke the license of a company making improper investments.
105. This extraterritorial effect was challenged in Firemen's Insurance Co. v. Beha, supra note 104, as an unconstitutional attempt to control the company's operations outside the jurisdiction of the regulating state; it was upheld by the court as being ancillary to genuinely local purposes. Id. at 542. Cf. Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) (fine imposed for price-fixing agreement entered into outside the state); State ex rel. Weede v. Iowa Southern Utilities Co. of Delaware, 231 Iowa 784, 2 N.W.2d 372, modified, 4 N.W.2d 869 (1942), 28 Iowa L. Rev. 141 (cannot dissolve "tramp" corporation, but may declare void a locally illegal stock issue).
106. See State ex rel. Standard Tank Car Co. v. Sullivan, 282 Mo. 261, 281–2, 221 S.W. 728, 735 (1920) (literal application of equality provisions to corporate structures would result in exclusion of large proportion of all foreign corporations). Some states have enacted statutes to the effect that a foreign corporation will not be excluded by
characteristics to be admitted, but deny to it, locally, the advantages secured by the nonconformity. Thus an exemption from liability granted any class of stock by the corporation's charter, though it does not preclude admission, may be denied any effect if local statutory policy imposes liability on all stockholders. But there is less room for middle ground where the issue involves corporate activity rather than corporate form. Some corporate activities, such as the payment of dividends and the issuance of stock, are necessarily carried out on a national scale without regard to geographical boundaries. One type of equality statute has been held to reason of the fact that the laws of its charter state differ from the local laws, e.g., Ill. Ann. Stat. c. 32, § 157.102 (1934). See Stevens, Uniform Corporation Laws through Interstate Compacts and Federal Legislation, 34 Mich. L. Rev. 1063, 1068 (1936).

107. Commonwealth Acceptance Corp. v. Jordan, 198 Cal. 618, 246 Pac. 796 (1926) (no-par stock; mandamus to compel admission); State ex rel. Standard Tank Car Co. v. Sullivan, 282 Mo. 261, 221 S.W. 728 (1920) (same); Washington ex rel. Fibreboard Products, Inc. v. Hinkley, 147 Wash. 10, 264 Pac. 1010 (1928) (common stock divided into two classes). But cf. State ex rel. Weede v. Iowa Southern Utilities Co. of Delaware, 231 Iowa 784, 2 N.W.2d 372, modified, 4 N.W.2d 869 (1942), note 105 supra. When the nonconformity is with respect to the kind of business carried on, an equality statute which permits only locally lawful businesses will preclude admission. American Telephone & Telegraph Co. v. Secretary of State, 159 Mich. 195, 123 N.W. 568 (1909) (power in single company to carry on both telephone and telegraph business); State ex rel. Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N.E. 557 (1905) (professional services). A perverse application of a statute forbidding a foreign corporation to exercise powers denied to domestic corporations occurred in an action to impose statutory liability on holders of bank stock, where a corporation licensed upon admission to carry on a brokerage business successfully raised a defense of ultra vires, because of a local prohibition against intercorporate stockholding. Golden v. Cervenka, 278 Ill. 409, 116 N.E. 273 (1917).

108. Thomas v. Matthiessen, 232 U.S. 221 (1914) (though a foreign charter exempted stockholders from personal liability for corporate debts, nonresident stockholder held liable as having assented to liability imposed by local statute, where charter recited purpose to do business in foreign state); Provident Gold Mining Co. v. Haynes, 173 Cal. 44, 159 Pac. 155 (1916) (under statute specifically subjecting stockholders of foreign corporations to same liability as domestic, stockholder held to have assented though charter did not show purpose to do business in any particular state); Bailey v. Wagner-Thoreson Co., 125 Cal. App. 679, 14 P.2d 121 (1932) (stockholder could not escape liability by pleading that stock was divided into different classes and that local law made no provision for imposing liability in such cases). One writer suggests that liability of a stockholder requires some "contacts" between the stockholder and the regulating state, such as residence or an express charter purpose to carry on business in the state, beyond the mere doing of business in the state. See Holt, Full Faith and Credit—A Suggested Approach to the Problem of Recognition of Foreign Corporations, 89 U. of PA. L. Rev. 453, 471 (1941).

109. That of New York, supra note 94, which prescribes the liabilities of officers, directors, and stockholders for specified acts, including unauthorized dividends. The courts in New York have construed the statute broadly: Irving Trust Co. v. Maryland Casualty Co., 83 F.2d 168 (2d Cir.), cert. denied, 299 U.S. 571 (1936) (preferential transfers by foreign corporation invalidated by virtue of statute imposing liability therefor on
make a dividend payment illegal even though permitted by the law of the charter state. Thus the standard imposed by the strictest state in which corporations do business can tend to become the uniform law of all states. While uniformity may be appealing, it should not be at the expense of letting the tail wag the dog.

The sway of these "equality" statutes can be limited if the corporations operating on a national scale establish locally chartered subsidiaries. In the absence of this foresight on the part of corporations, courts have found means to avoid forcing total conformity with stringent local statutes threatening regulation of over-all corporate affairs. Courts have long declined to interfere with the "internal affairs" of foreign corporations, including such matters as the election of directors and the declaration of dividends. The sway of these "equality" statutes can be limited if the corporations operating on a national scale establish locally chartered subsidiaries.

110. International Ticket Scale Corp. v. United States, 165 F.2d 358 (2d Cir. 1948) (statute amounts to prohibiting locally illegal dividends, for purposes of federal undistributed profits tax).

111. The use of subsidiaries has been extensive. Of the Delaware industrial corporations whose stock was traded on the New York Stock Exchange in 1931, 86% had one or more subsidiaries. The opinion brushes aside dictum in Borg v. International Silver Co., 11 F.2d 147, 151 (2d Cir. 1925), which found "curiously fanciful" the notion that a dividend legal in the state of incorporation could be illegal in New York.

112. A classic statement of the doctrine was given in North State Copper & Gold Mining Co. v. Field, 64 Md. 151, 154, 20 Atl. 1039, 1040 (1885): "[W]here the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, . . . then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation, our Courts will not take jurisdiction." The rule has received legislative recognition: Ill. Ann. Stat. c. 32, § 157.102 (1934) ("[N]othing in this Act contained shall be construed to authorize this State to regulate the organization or the internal affairs of such corporation.").

dends. But the "internal affairs" doctrine is sufficiently pliable to adjust to the reality that the state of incorporation may not be the state of principal business activity. The presence of a corporation's principal officers, records, property, or business transactions within the state of the forum will lead a court to invoke countervailing considerations of convenience, efficiency, and justice, and may permit regulation by local courts, perhaps in accord with local standards. It is in just this situation, moreover, that local regulation is most defensible. Regulation is coming to depend more on the strength of local contacts and less on the presumptuous labels "foreign" and "domestic."

CONCLUSION

Nation-wide corporate activities are not easily reconciled with legislative diversity. It is unfortunate that courts and legislatures have so often tended to predicate their solutions upon the early notion that a corporation can have no existence outside the state of its charter except upon sufferance. Local economic activity of foreign corporations, before or after admission, is as real as the corporal existence of a nonresident natural person, whose legal status, unlike that of a corporate personality, is made secure by the privileges and immunities clause of the Fourteenth Amendment. The

118. State ex rel. Weede v. Iowa Southern Utilities Co. of Delaware, 231 Iowa 784, 2 N.W.2d 372, modified, 4 N.W.2d 869 (1942) (illegal issue of no-par stock of Delaware corporation operating entirely in Iowa declared void).
120. To take jurisdiction is not necessarily to apply local law. But once the hurdle of possible dismissal under the internal affairs rule is overcome, an equality statute may impel a court to choose forum law rather than that of the charter state. Even an application of the latter, where there is room for interpretation, may be strongly tinged with local policy.
121. The full faith and credit requirement of the Federal Constitution is a possible basis for recognition of foreign corporations. See Holt, supra note 103. The soundness of this proposal is perhaps enhanced by the 1948 revision of the Judicial Code, which brought the statutory language into conformity with that of the Constitution by making "Acts" as well as "records and judicial proceedings" entitled to full faith and credit. 28 U.S.C. §1738 and Reviser's Notes (Supp. 1949).
122. See note 15 supra.
need for protection may be equally great; conceptual distinctions offer cold comfort. But extension of privileges and immunities to corporations is not a likely development. Complete exclusion is rarely more than a threat; the promise of economic benefit forbids its exercise. But it will doubtless continue to serve as a springboard for judicial protection of provincialism.

The theoretical power to exclude has been made sufficiently sweeping to rationalize significant barriers to the growth of corporate enterprise along economic lines undistorted by political boundaries. Federal incorporation of enterprises carrying on interstate business is a conceivable solution. But the problem does not necessarily call for radical departure from our system of state charters. Both courts and legislatures have shown that by retreating from the logic of the exclusion power it is possible to minimize political interference with economic growth, without shackling a state's power to protect its citizens from abuse by foreign firms.

123. Far from suggesting that the privileges and immunities clause may be held to apply to corporations after all, recent judicial dissents from prevailing theory have looked toward withdrawing from corporations even the other protections—due process and equal protection—granted by the Fourteenth Amendment. See Justice Douglas, dissenting in Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576 et seq. (1949); Justice Black, dissenting in Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 83, 85 et seq. (1938).

124. The cases appear to fall short of proving the existence of an unqualified power to exclude. See Holt, supra note 108. But the Supreme Court continues to affirm it, even when finding state action constitutionally invalid. See Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571 (1949) (ad valorem tax on intangibles).

125. A series of federal licensing bills was the subject of extensive committee hearings under the leadership of Senator O'Mahoney in 1937 and 1938, but no legislation resulted. See Hearings before a Subcommittee of the Committee on the Judiciary on S. 10 and S. 3072, 75th Cong., 1st and 3d Sess. (1937-8). Such federal action has had support in responsible quarters for nearly fifty years. See Sen. Doc. No. 92, Part 69-A, 70th Cong., 1st Sess. (1934) (compilation of proposals and views). It has even been urged by representatives of business. See, e.g., the report of a committee of the National Association of Manufacturers in 1908, quoted in id. at 56, favoring compulsory federal incorporation; Robbins, Federal Licensing of Business Corporations, 13 Tulane L. Rev. 214, 217-9 (1939). The immunity of interstate business from state regulation and the supposed helplessness of the states in protecting their residents against the giant corporations has been a leading argument for federal licensing or chartering. See, e.g., Chaplin, National Incorporation, 5 Col. L. Rev. 415, 427-8 (1905); cf. Berlack, Federal Incorporation and Securities Regulation, 49 Harv. L. Rev. 396, 404, 409-13 (1936). Federal incorporation as a means of protecting foreign corporations from discriminatory state laws would presumably have far less political appeal.