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

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I. INTRODUCTION

Statutes of limitation are a fundamental part of any modern legal system.[1] They also have a long pedigree, making their appearance in both the American and English legal systems as early as the seventeenth century.[2] Black's Law Dictionary defines a statute of limitations as "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued" to ensure the "diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh."[3] A statute of limitations defense is an affirmative defense that must be specifically pled.[4] Although a successful statute of limitations defense does not normally have res judicata effects, it still results in a judgment on the merits.[5]

Under some circumstances, a plaintiff can toll the running of a statute of limitations.[6] Legislatures frequently recognize circumstances where a plaintiff can toll a statute of limitations by adopting a tolling statute.[7] Black's Law Dictionary defines a tolling statute as "a law that interrupts the

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[1] Bd. of Regents v. Tomanio, 446 U.S. 478, 487 (1980).

[2] *See* Harry B. Littell, *A Comparison of the Statutes of Limitation*, 21 IND. L.J. 23, 23 (1945) (noting the adoption of statutes of limitation in England and the United States since the Limitation Act of 1623).

[3] BLACK'S LAW DICTIONARY 1549 (9th ed. 2009).

[4] *See, e.g.*, FED. R. CIV. P. 8(c)(1).

[5] *See* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001).

[6] *See infra* Part II.B.

[7] *See infra* Part II.B.

running of a statute of limitations in certain situations."[8] This Comment focuses on one particular type of tolling statute that virtually every United States jurisdiction has adopted, a tolling statute that applies while the defendant is absent from the state.[9]

Most jurisdictions originally adopted these particular tolling statutes to protect their residents from the often unpredictable and arbitrary procedural rules that once governed personal jurisdiction.[10] Many of these statutes predate[11] the seminal *Pennoyer* decision issued in 1878 that clarified, and arguably complicated, the ability of a court to exercise personal jurisdiction over an out-of-state defendant.[12]

Courts at one time applied these tolling statutes literally, tolling a statute of limitations whenever a defendant was physically absent from the state, potentially even decades.[13] Needless to say, this type of tolling statute served as a powerful tool in circumventing a statute of limitations.[14] However, once the United States Supreme Court's *International Shoe* decision dramatically simplified the process for asserting personal jurisdiction over a defendant, many states no longer saw the need for such broad tolling statutes.[15] Gradually, a majority of jurisdictions reinterpreted or amended these statutes to redefine absence from the state more narrowly; the tolling statute would only apply when the defendant was not subject to a court's personal jurisdiction under the state's long-arm statute in light of the new minimum contacts analysis from *International Shoe*.[16] A minority of

[8] *See* BLACK'S LAW DICTIONARY 1625 (9th ed. 2009); *infra* Part II.B.

[9] *See, e.g.*, Tex. Civ. Prac. & Rem. Code. Ann. § 16.063 (Vernon 2008). *See generally* 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. 2009).

[10] *See* Borchers, Patrick J., *The Death of Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 25–57 (1990); Gregory J. Livingston, Comment, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?*, 23 PAC. L.J. 1639, 1643–1647 (1992).

[11] *See* Livingston, *supra* note 10, at 1655; *infra* note 53.

[12] *See* Pennoyer v. Neff, 95 U.S. 714, 733–35 (1877), *overruled by* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); Borchers, *supra* note 10, at 33–56.

[13] *See, e.g.*, Dicker v. Binkley, 555 S.W.2d 495, 497 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

[14] *See id.*

[15] *See Int'l Shoe* , 326 U.S. at 316–18; *infra* notes 60–63 and accompanying text.

[16] Vaughn v. Dietz 430 S.W.2d 487, 489–90 (Tex. 1968) (discussing the majority and minority approaches), *overruled by* Ashley v. Hawkins, 293 S.W.3d 175 (Tex. 2009).

states rejected the majority approach and adhered to the traditional approach.[17]

The United States Supreme Court eventually voiced its opinion on these tolling statutes because of a concern that they might inhibit interstate commerce.[18] In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the Court struck down a tolling statute in a state following the minority approach, finding that the tolling statute encroached on Congress's Dormant Commerce Clause powers.[19]

Texas is one of the last states, possibly the last state,[20] to move away from the minority approach.[21] The imminent death of this minority approach raises some interesting questions that will be the focus of this Comment, particularly whether or not there are any alternate approaches available besides the majority and minority approach. Part II of this Comment summarizes the policy underlying both statutes of limitation and the tolling of statutes of limitation. Part III tracks the history of statutory tolling in this specific area in Texas, including several recent decisions. Part IV analyzes the state and federal commerce interests raised by these tolling statutes. Part V explores whether there are any judicial or legislative alternatives to the current majority and minority rules.

II. POLICY UNDERLYING STATUTES OF LIMITATION AND TOLLING

Statutes of limitation address a wide variety of different policy concerns.[22] Specifically, they provide more predictability and a sense of

[17] *See id.* Many courts rejected the majority approach because it required a non-literal reading of the tolling statute and involved courts exercising an essentially legislative policy judgment. *See id.*

[18] *See* 486 U.S. 888, 894–95 (1988).

[19] *See id.*

[20] *See* Cadles of Grassy Meadows II, L.L.C. v. Goldner, No. 3:06-CV-1542-M, 2007 WL 1701839, at *3–6 (N.D. Tex. June 12, 2007) (summarizing the case law following *Bendix* in which tolling statutes in minority jurisdictions were struck down as unconstitutional). States that did not reject the minority approach following *Bendix* were heavily criticized. *See* Livingston, *supra* note 10, at 1640–41; Henry M. Pogorzelski, Note, *For Whom Does the Statute Toll? Serious Concerns About Our Antiquated Texas Tolling Statute*, 17 REV. LITIG. 589, 601 (1998); Stephen R. Smoak, Note, *Limitations on the Tolling Statute: A Temporary Solution to a Permanent Problem in South Carolina*, 50 S.C. L. REV. 861, 867 (1999).

[21] Ashley v. Hawkins, 293 S.W.3d 175, 178–79 (Tex. 2009); Kerlin v. Sauceda, 263 S.W.3d 920, 927 (Tex. 2008).

[22] *See* Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944).

fairness to the legal system while also promoting the quick resolution of disputes.[23] The decision to toll a statute of limitations, on the other hand, reflects a sense of equity that defendants should not be able to take advantage of a statute of limitations in some circumstances, particularly when the defendant himself has acted in a questionable manner.[24]

A. Policy Underlying Statutes of Limitation

The United States Supreme Court nicely summarized the main policy concerns that statutes of limitation address when it stated that "statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[25] This assertion reflects a concern for (1) providing repose for the defendant, (2) promoting accuracy in fact finding, and (3) curtailing plaintiff misconduct.[26] Furthermore, statutes of limitation also promote efficiency within the legal system.[27]

First, providing defendants with repose increases the predictability of litigation and protects defendants from the fear of impending lawsuits.[28] Society desires this predictability because it allows people to pursue activities and structure their behavior in a way that will result in relatively predictable legal consequences.[29] Second, statutes of limitation help avoid evidentiary problems.[30] When the discovery process begins early, the evidence obtained tends to be more reliable and easier to obtain because the witnesses' memories are fresh and physical evidence is less likely to have been misplaced or have lost its evidentiary value.[31] Third, statutes of

[23] *See infra* Part II.A.

[24] *See infra* Part II.B.

[25] *Order of R.R. Telegraphers*, 321 U.S. at 348–49.

[26] *See id.*; Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 74–75 (2005).

[27] Hardin v. Straub, 490 U.S. 536, 542–43 (1989); Brown v. Fullenweider, 135 S.W.3d 340, 344 (Tex. App—Texarkana 2004, pet. denied).

[28] *See, e.g.*, Computer Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1996).

[29] *See* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. 667, 672 (1986) ("A sound system of rights resolves [disputes] early in the process to reduce the legal uncertainty in subsequent decisions on investment and consumption.").

[30] *See* Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188, 199 (Tex. 2003).

[31] *See* Malveux, *supra* note 26, at 76; *supra* note 30.

limitation discourage a wide variety of plaintiff misconduct. More specifically, statutes of limitation help root out fraudulent claims.[32] Likewise, they encourage the plaintiff to file his suit diligently.[33] Courts also state that statutes of limitation generally level the playing field between plaintiffs and defendants by giving defendants more notice of claims against them.[34]

Last of all, statutes of limitation promote efficiency in the legal system.[35] They reduce the inherit uncertainties involved in litigation by providing a bright line for courts to follow.[36] Unlike the doctrine of laches,[37] a court can defer to the legislature's judgment when it applies a statute of limitations, thus avoiding the need to use its own judgment to decide whether to deny a particular claim.[38] Furthermore, courts can sometimes resolve what would otherwise be complicated legal and factual issues by simply enforcing the statute of limitations,[39] an increasingly important factor in an age of overloaded court dockets.[40]

B. Policy Underlying Tolling

Legislatures and courts have recognized that defendants should not be able to hide behind a statute of limitations in all circumstances, particularly

[32] Malveaux, *supra* note 26, at 77 ("Thus, if there is no restriction on when a plaintiff may file, she may intentionally file a frivolous claim remote in time, knowing that its frivolity cannot be proven.").

[33] *See* Wood v. Carpenter, 101 U.S. 135, 140–41 (1879); *Natural Gas Pipeline*, 124 S.W.3d at 199.

[34] See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983) ("Limitations periods are intended to put defendants on notice of adverse claims . . .").

[35] *See* Hardin v. Straub, 490 U.S. 536 542–43 (1989) (discussing the balance between interest in disposing of litigation as quickly as possible and allowing claims to be heard on the merits); Brown v. Fullenweider, 135 S.W.3d 340, 344 (Tex. App.—Texarkana 2004, pet. denied).

[36] Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 468–71 (1997).

[37] *See* BLACK'S LAW DICTIONARY 953 (9th ed. 2009). Black's Law Dictionary defines laches as "[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought." *Id.*

[38] *See* Malveaux, *supra* note 26, at 80–81.

[39] *See* Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965) ("[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."); Malveaux, *supra* note 26, at 79–80.

[40] Malveaux, *supra* note 26, at 79.

when the defendant is partially or wholly responsible for the plaintiff not being able to timely bring his suit.[41] As a result, legislatures and courts have recognized a variety of situations where a statute of limitations should toll so that the defendant does not unfairly benefit from the situation.[42]

Legislatures, for example, almost universally recognize that a statute of limitations should toll when a plaintiff is under a legal disability at the time the cause of action accrues.[43] The vast majority of legislatures also allow a statute of limitations to toll for at least some period of time if a suit is dismissed for lack of jurisdiction.[44] To prevent abuse of statutes of limitation by defendants, legislatures also frequently allow parties to assert counterclaims and cross claims against each other even if the period of limitations has already passed.[45]

Courts sometimes intervene and create judicial tolling exceptions as well in the absence of legislative action. For instance, under the common law discovery rule, "a limitations period does not begin to run until the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim."[46] Many courts have also recognized that a statute of limitations will toll when a defendant has fraudulently concealed a material fact or circumstance from the plaintiff.[47] Furthermore, the majority of courts will toll a statue of limitations when the plaintiff failed to serve the defendant with process before the limitations period expired if the plaintiff

[41] A good example of this would be when the defendant has fraudulently concealed the injury he has caused to the plaintiff. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 260 § 12 (2004).

[42] Malveaux, *supra* note 26, at 82.

[43] *See, e.g.*, Tex. Civ. Prac. & Rem. Code. Ann. § 16.001 (Vernon 2002). *See generally* Jean E. Maess, Annotation, *Tolling of State Statute of Limitations in Favor of One Commencing Action Despite Existing Disability*, 30 A.L.R.4th 1092 (1984 & Supp. 2009).

[44] *See, e.g.*, Tex. Civ. Prac. & Rem. Code. Ann. § 16.064 (Vernon 2008). *See generally* C. T. Drechsler, Annotation, *Statute Permitting New Action After Failure of Original Action Commenced Within Period of Limitation, as Applicable in Cases Where Original Action Failed for Lack of Jurisdiction*, 6 A.L.R.3d 1043 (1966 & Supp. 2009).

[45] *See, e.g.*, Tex. Civ. Prac. & Rem. Code. Ann. § 16.069 (Vernon 2008). *See generally* M. A. L., Annotation, *Commencement of Action as Suspending Running of Limitation Against Claim Which is Subject of Setoff, Counterclaim, or Recoupment*, 127 A.L.R. 909 (1940 & Supp. 2009).

[46] BLACK'S LAW DICTIONARY 533 (9th ed. 2009). Almost every state without a statute codifying the discovery rule has adopted the rule judicially. *See, e.g.*, Computer Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1996).

[47] *See, e.g.*, *Computer Assocs. Int'l*, 918 S.W.2d at 455–56. Black's Law Dictionary defines fraudulent concealment as "[t]he affirmative suppression or hiding, with the intent to deceive or defraud, of a material fact or circumstance that one is legally (or, sometimes, morally) bound to reveal." BLACK'S LAW DICTIONARY 328.

was diligent in attempting to do so.[48]

III. STATUTORY TOLLING IN TEXAS: PAST AND PRESENT

Statutory tolling based on the defendant's absence from the state has a long history in Texas. The legislature adopted one of these tolling statutes before Texas was even admitted as a state into the Union.[49] Substantively, the statute has remained unchanged since it was first adopted.[50] The most notable developments related to the statute have been the judicial interpretations of this Texas statute.[51] Recent Texas Supreme Court cases have significantly narrowed the statute's application by judicially redefining when a defendant is absent from the state.[52] It remains to be seen whether these recent judicial interpretations will result in any statutory amendments to the tolling provision currently in effect.

A. Origins of Statutory Tolling and Early Judicial Interpretations

In 1841, prior to the Civil War and prior to its admission into the Union as a state, Texas passed a tolling statute that tolled a statute of limitations when the defendant was physically absent from the state.[53] The statutory

[48] *See, e.g.*, Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex.1990). *See generally* L. S. Tellier, Annotation, *Tolling of 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 & Supp. 2002, 2009).

[49] *See infra* note 53.

[50] *See* Cadles of Grassy Meadows II, L.L.C. v. Goldner, No. 3:06-CV-1542-M, 2007 WL 1701839, at *7 (N.D. Tex. June 12, 2007) (discussing the history of and predecessor statutes to the modern tolling statute, section 16.063).

[51] *See infra* Part III.A.

[52] *See infra* Part III.B–C.

[53] *See* Act approved Feb. 5, 1841, 5th Cong., R.S., § 22, 1841 Repub. Tex. Laws 163, 170, *reprinted in 2 H.P.N. Gammel, The Laws of Texas 1822–1897*, at 627, 634 (Austin, Gammel Book Co. 1898). The statute provided:

> That if any person against whom there is or shall be cause of action, is or shall be without the limits of this republic at the time of the accruing of such action, or at any time during which the same might have been maintained, then the person entitled to such action shall be at liberty to bring the same against such person or persons after his or their return to the republic and the time of such persons' absence shall not be accounted, or taken as a part of the time limited by this act.

Id.

language underwent a non-substantive revision in 1985 when the Texas legislature codified the current version of section 16.063.[54] The statute currently provides, "The absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence."[55]

Like Texas, many states adopted comparable statutes at a relatively early time because their residents had difficulty obtaining and enforcing judgments against non-resident defendants.[56] Besides the fact that simply locating these defendants could be quite difficult, the procedural rules for obtaining personal jurisdiction over non-resident defendants in order to enforce a judgment against them were not at all favorable to plaintiffs.[57] States sought to protect their residents from these practical and procedural difficulties by passing tolling statutes that would toll a statute of limitations whenever the defendant was physically absent from the state.[58] The United States Supreme Court's decision in *Pennoyer v. Neff* epitomizes how complicated obtaining a judgment against a non-resident defendant could be.[59]

Eventually, the need for these tolling statutes targeted at non-resident defendants became less pronounced. Once the United States Supreme Court overruled *Pennoyer* in 1945 with the *International Shoe Co. v. Washington* decision, courts had much broader authority to assert personal jurisdiction over out-of-state defendants without violating the due process clause.[60] For this reason, plaintiffs had a much easier time obtaining and executing a judgment against a defendant without having to worry about a collateral attack on the judgment on jurisdictional grounds afterwards.[61]

In light of *International Shoe*, a majority of states gradually decided these broad tolling statutes were no longer necessary and either amended them or interpreted them more narrowly.[62] This majority approach

[54] Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3257 (codified at Tex. Civ. Prac. & Rem. Code Ann. § 16.063 (Vernon 2008)).

[55] *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.063.

[56] *See supra* note 10 and accompanying text.

[57] *See supra* note 10 and accompanying text.

[58] *See* Livingston, *supra* note 10, at 1644; *supra* note 53.

[59] *See supra* note 12.

[60] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–18 (1945).

[61] *See id.*; *see also supra* note 15.

[62] *See* Vaughn v. Dietz, 430 S.W.2d 487, 489 (Tex. 1968) (discussing the majority rule), *overruled by* Ashley v. Hawkins, 293 S.W.3d 175 (Tex. 2009); Smoak, *supra* note 20, at 861.

redefined presence in the state as the time period which the defendant was subject to personal jurisdiction within that state through the state's long-arm statute under the new minimum contacts analysis.[63] A minority of states continued to interpret these tolling statutes literally and required defendants to be physically present within the state.[64]

The landmark Texas Supreme Court decision in *Vaughn v. Dietz* reaffirmed Texas's adherence to the minority approach.[65] In *Vaughn*, the dispute involved injuries arising out of an automobile accident between Texas residents.[66] The accident occurred on January 11, 1964, and in June of 1964, the defendants moved to Florida and established residency there.[67] The plaintiffs filed suit on January 18, 1966.[68] The defendants moved to dismiss the action claiming that their suit was barred by the two-year statute of limitations.[69] They argued that the applicable tolling statute did not apply because they were subject to substituted service of process upon a state official under Texas law.[70] Acknowledging that it was adopting what was the minority position nationally, the *Vaughn* court held that the tolling provisions applied notwithstanding the availability of an alternate method of personal service.[71]

Until recently,[72] Texas courts have continued to apply this minority approach and have tolled a statute of limitations whenever a defendant is absent from the territorial confines of the State.[73] Acknowledging how broadly this tolling statute applied, one Texas court commented that "the practical effect of this holding is to eliminate the defense of limitations in all suits against nonresidents who incur an obligation in Texas and go back to their home state without returning to Texas" since "[i]n such cases, the statute is tolled indefinitely."[74] Texas's continued adherence to this

[63] *See supra* note 62.

[64] *See supra* note 62.

[65] 430 S.W.2d at 493.

[66] *See id.* at 488.

[67] *See id.*

[68] *See id.*

[69] *See id.*

[70] *See id.* at 489.

[71] *See id.*

[72] *See infra* Part III.B.

[73] *See, e.g.*, Loomis v. Sillerns-Loomis Plaza, Inc., 593 S.W.2d 409, 410–11 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

[74] Dicker v. Binkley, 555 S.W.2d 495, 497 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

minority approach has drawn some significant criticism.[75]

B. Current Judicial Interpretation

The Texas Supreme Court finally revisited its decision in *Vaughn* in two recent opinions.[76] In the first of these opinions, *Kerlin v. Sauceda*, the Texas Supreme Court declined to expressly overrule *Vaughn*,[77] but effectively did so by significantly limiting the range of *Vaughn*'s application.[78] *Kerlin* involved a particularly factually complex dispute spanning forty years that primarily related to several fraudulent real property and mineral interest conveyances as well as some other fraudulent conduct.[79] The plaintiffs eventually brought suit against the defendant, who asserted a statute of limitations defense.[80] The plaintiffs claimed that the statute of limitations for their claims had been tolled under section 16.063 of the Texas Civil Practice and Remedies Code because the defendant had not been in the state for a two or four year period since the wrongdoing occurred.[81] The jury agreed with the plaintiffs, and the trial court tolled the statute of limitations.[82]

The *Kerlin* court held that *Vaughn* was not applicable to the application of section 16.063 in this case because *Vaughn* only dealt with statutory tolling when substituted service of process was available against a non-resident defendant.[83] The court then held that in all other circumstances a defendant is present in the State when he is subject to personal jurisdiction

[75] *See* Pogorzelski, *supra* note 20, at 608–09.

[76] *See* Ashley v. Hawkins, 293 S.W.3d 175, 178–79 (Tex. 2009); Kerlin v. Sauceda, 263 S.W.3d 920, 926–28 (Tex. 2008).

[77] *See Kerlin*, 263 S.W.3d at 926–28. The concurring opinion in the 5-4 *Kerlin* decision made it clear that it would have overruled *Vaughn* in light of the United States Supreme Court's decision in *Bendix Autolite Corp. Id.* at 928. This division on the court undoubtedly played a role in the Texas Supreme Court's decision to take another case involving section 16.063 only a year after its decision in *Kerlin*. *See Ashley*, 293 S.W.3d at 177 (considering whether section 16.063 tolls the limitations period when a defendant leaves Texas following a motor vehicle collision but is otherwise amenable to out-of-state service).

[78] *See Kerlin*, 263 S.W.3d at 926–28.

[79] *See id.* at 922–24.

[80] *Id.* at 924. Ultimately, over 275 of the original heirs to the land joined in the lawsuit against the defendant. *Id.*

[81] *See id.* The defendant had been living in another state for almost the entire period related to the dispute. *See id.* at 923–24.

[82] *See id.* at 924.

[83] *See id.* at 926–28.

under the Texas long-arm statute.[84] Concluding that the defendant was at all times constructively present in the State because he was subject to personal jurisdiction, the *Kerlin* court held that the statute of limitations had not at any time been tolled and reversed the lower court judgment.[85]

In *Ashley v. Hawkins*, the Texas Supreme Court ultimately decided to overrule *Vaughn*.[86] In *Ashley*, the plaintiff and defendant were involved in an automobile accident.[87] After the wreck, the defendant moved to California leaving behind no forwarding address.[88] Sixty days prior to the expiration of the two-year limitations period, the plaintiff filed a personal injury suit against the defendant.[89] The defendant was not actually served until almost a year later.[90] The trial court granted the defendant's motion for summary judgment based on the statute of limitations defense.[91] The appellate court reversed, claiming that the statute of limitations tolled while the defendant was outside of Texas.[92]

This case once again presented the Texas Supreme Court with the question of overruling *Vaughn* since the case involved substituted service of process, a path the court ultimately decided to take.[93] The *Ashley* court concluded that the definition of presence under those statutes providing for substituted service of process[94] conflicted with presence as defined in *Kerlin*.[95] The *Ashley* court overruled *Vaughn* in favor of *Kerlin* because it found that having two differing standards was "unworkable and inefficient"

[84] *See id.* at 927–28. The Texas long-arm statute allows a court to exercise jurisdiction over a nonresident if he "does business" in the state. *See* Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (Vernon 2008). The Texas Supreme Court has interpreted this provision to allow the exercise of personal jurisdiction over a non-resident defendant to the full extent allowed by the federal Constitution. *See* Schlobohm v. Schapiro, 784 S.W.2d 355, 356 (Tex. 1990).

[85] *See Kerlin*, 263 S.W.3d at 927–28.

[86] Ashley v. Hawkins, 293 S.W.3d 175, 179 (Tex. 2009).

[87] *Id.* at 177.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *See id.* at 178–79. Notably, the Texas Supreme Court did not decide the issue of whether or not the standard under *Vaughn* was unconstitutional. *See id.* at 179 n.5.

[94] *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 17.044, .062 (Vernon 2008).

[95] *See Ashley*, 293 S.W.3d at 179. Recall that the Texas Supreme Court in *Kerlin* said that *Vaughn* only applied to a situation in which a defendant was subject to substituted service of process. *See* Kerlin v. Sauceda, 263 S.W.3d 920, 927 (Tex. 2008).

and "[would] only serve to create confusion [among] litigants."[96]

C. Implications of the Recent Holding in Kerlin *and* Ashley

The *Kerlin* and *Ashley* decisions move Texas out of the minority position with respect to its interpretation of its tolling statute that tolls based on a defendant's absence from the state. Notably, Texas may have been the last state to finally adopt the majority approach.[97]

From the standpoint of the practitioner, the new standard is significantly more favorable to defendants than it is to plaintiffs. Under the previous standard, a plaintiff could potentially toll a statute of limitations for a virtually indefinite amount of time as long as the defendant was absent from the state.[98] Every Texas practitioner should be aware of this shift because it implicates potentially any case in which a statute of limitations defense is raised.

While the minority approach Texas previously followed was particularly unfair to defendants, and even raised significant constitutional concerns, the majority approach clearly has its own limitations. Because the minimum contacts analysis under *International Shoe* allows a plaintiff to relatively easily assert personal jurisdiction over defendants, section 16.063 will rarely even apply to a dispute. The primary purpose of this Comment is to explore whether there are any alternative approaches available besides the minority and majority approach. First, however, it is necessary to evaluate the federal interest in this area.

IV. CONFLICTS WITH THE DORMANT COMMERCE CLAUSE

The Commerce Clause grants Congress the power to regulate commerce among the states.[99] When Congress has not yet invoked this power with legislation, this power remains dormant within the Commerce Clause.[100] This Dormant Commerce Clause power restricts the states from discriminating against out-of-state interests or imposing undue burdens on interstate commerce.[101]

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[96] *See Ashley*, 293 S.W.3d at 179.

[97] *See supra* note 20.

[98] *See supra* note 74 and accompanying text.

[99] U.S. CONST. art. I, § 8, cl. 3.

[100] *See, e.g.*, New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988) (recognizing the "negative" aspect of the Commerce Clause that restricts the states).

[101] *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

The United States Supreme Court decided to weigh in on the issue of whether statutory tolling based on the defendant's absence from the state conflicted with the Commerce Clause in its decision *Bendix Autolite Corp. v. Midwesco Enterprises, Inc*.[102] In a minority approach jurisdiction, a tolling statute like Texas's section 16.063 could potentially toll a statute of limitations "in perpetuity."[103] Consequently, the Supreme Court was concerned about the effect these tolling statutes would have on interstate commerce.[104]

A. Federal and State Commerce Interests

The underlying purpose, history, limits, and application of the Dormant Commerce Clause have presented some of the most challenging issues in constitutional law.[105] An extensive analysis of this area of law is beyond the scope of this Comment.

Modern Dormant Commerce Clause jurisprudence is driven by a federal interest in avoiding "economic protectionism" among the states in the form of "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[106] This federal interest is counter-balanced by (1) the powers reserved to the sovereign states under the Constitution and (2) the limits of judicial competence in deciding issues better left to Congress and state legislatures.[107]

First, the states also have some commerce powers that they share with Congress[108] as well as their own police power[109] not possessed by

[102] 486 U.S. 888, 891–95 (1988).

[103] *See id.* at 893; Tex. Civ. Prac. & Rem. Code. Ann. § 16.063 (Vernon 2008); *supra* notes 16–17 and accompanying text.

[104] *See Bendix Autolite Corp.*, 486 U.S. at 891–95.

[105] *See generally* Steven Breker-Cooper, *The Commerce Clause: The Case for Judicial Non-Intervention*, 69 OR. L. REV. 895 (1990); David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1 (2007); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987).

[106] *See* Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1808 (2008). This federal interest reflects the Framers' desire to prevent any of the states from retreating into the economic isolation that had plagued relations among the colonies and later among the states under the Articles of Confederation. *Id.*

[107] *See* James Hinshaw, Note, *The Dormant Commerce Clause After* Garcia: *An Application to the Interstate Commerce of Sanitary Landfill Space*, 67 IND. L.J. 511, 520 (1992).

[108] *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 320 (1851). The Dormant Commerce Clause analysis the United States Supreme Court applies implicitly recognizes the

Congress.[110] Second, there are many problems a court is ill-suited to address that are better left to the legislative process.[111] Courts should acknowledge that states face many local problems not encountered at a national level that require creating novel solutions.[112]

To determine whether a state law conflicts with the Dormant Commerce Clause, courts apply a two-tiered test.[113] The first tier focuses on statutes that directly regulate or discriminate against interstate commerce, or that have the effect of favoring in-state economic interests over out-of-state interests.[114] A state law is discriminatory if it is (1) facially discriminatory, (2) discriminatory in purpose, or (3) discriminatory in effect.[115]

Under the second tier, the Court balances the federal commerce interest against the state interest to determine whether the state law should be upheld; a test frequently referred to as the *Pike* balancing test.[116] Statutes that fall under this test typically only indirectly affect interstate commerce and regulate evenhandedly but still potentially place an impermissible burden on interstate commerce.[117] A court will not strike down the statute

states' ability to exercise some commerce powers unexercised by Congress, since state laws are only invalid if they do not satisfy the two-tier test. *See infra* notes 113–118 and accompanying text.

[109] Black's Law Dictionary defines police power as "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice." BLACK'S LAW DICTIONARY 1276 (9th ed. 2009).

[110] *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (acknowledging that only the states have police power). However, Congress's Commerce Clause power has been interpreted so broadly in modern times that it provides Congress with "extensive power and ample discretion to determine its appropriate exercise." *See id.* at 568 (Kennedy, J., concurring). The Court has strongly avoided "reverting to an understanding of commerce that would serve only an 18th-century economy." *See id.* at 574.

[111] *See, e.g.*, Reeves, Inc. v. Stake, 447 U.S. 429, 439 (1980).

[112] Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 429–30 (1989).

[113] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578–79 (1986). Notably, the United States Supreme Court itself has stated that "there is no clear line separating" these two tiers. *Id.* at 579.

[114] *See id.*

[115] Day, *supra* note 105, at 2. It is worth noting that legal commentators do not all necessarily agree on what exactly constitutes discrimination under this test, although in the Court's application of this test technical distinctions may not be significant. *See Brown-Forman Distillers*, 476 U.S. at 579; Hinshaw, *supra* note 107, at 518 n.41, 519.

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

[117] *See id.*

"[i]f a legitimate local purpose is found," the question then becoming "one of degree" as to the "extent of the burden that will be tolerated" given "the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities."[118]

B. Reigning in Statutory Tolling in Bendix

In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the United States Supreme Court decided to address the issue of whether these tolling statutes that apply when a defendant is absent from the state potentially conflicted with the Dormant Commerce Clause. [119]

In *Bendix*, the dispute was between an Illinois corporation who had agreed to deliver and install a boiler system at a facility in Ohio owned by a Delaware corporation and the Deleware corporation.[120] The Delaware corporation was unhappy with the installation and claimed that the system had been installed improperly because the system would not produce the amount of steam specified in the contract.[121] Six years after the installation, the Delaware corporation brought a diversity action in Ohio federal court against the Illinois corporation.[122] The Illinois corporation asserted a four-year statute of limitations defense.[123] Relying on a different statute, the Delaware corporation asserted that the statute of limitations had been tolled for the period of time that the Illinois corporation was absent from the state and had not appointed an agent for service of process in the state.[124] The Illinois corporation argued on appeal that this tolling statute conflicted with the Dormant Commerce Clause.[125]

The Supreme Court approached this Dormant Commerce Clause issue with the two-tiered test discussed earlier under which courts will strike down state laws that (1) discriminate against out-of state interests or

[118] *See id.* The Court itself has stated that it "has employed various tests to express the distinction between permissible and impermissible impact[s] upon interstate commerce, but . . . that no single conceptual approach identifies all of the factors that may bear on a particular case." Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440–41 (1978).

[119] *See* 486 U.S. 888, 891–95 (1988).

[120] *Id.* at 889.

[121] *Id.* at 889–90.

[122] *Id.*

[123] *Id.* at 890.

[124] *Id.*

[125] *See id.* at 890–91.

(2) place an impermissible burden on interstate commerce.[126] In addressing the constitutionality of this Ohio statute, the *Bendix* Court applied the second tier balancing test,[127] although the Court commented in dicta that it might have also reached the same result under the first tier.[128]

In applying this second tier balancing test, the Court concluded that this particular tolling statute did place an impermissible burden on interstate commerce.[129] While the Court recognized that there was likely a legitimate state interest in protecting residents from out-of-state corporations, it concluded that this interest did not justify the "substantial restraints" this tolling statute placed on interstate commerce.[130] In particular, the Court emphasized that the statutory scheme at issue required foreign corporations to make one of two unappealing choices to conduct business in the state, which resulted in a denial of basic legal defenses to these defendants.[131] A foreign corporation either had to appoint a registered agent for service of process in the state, which would subject the corporation to general jurisdiction within the state for all purposes, or instead forfeit any statute of limitations defense entirely because the corporation would be perpetually absent from the state under the tolling statute.[132] Notably, Ohio followed the minority approach discussed earlier in its interpretation of this tolling statute, tolling the statute of limitations whenever the defendant is physically absent from the state.[133]

In reaching its conclusion, the Court emphasized that the plaintiff had the ability at all times during the litigation to serve process on the defendant under Ohio's long-arm statute and that under the circumstances the use of the long-arm statute would have been a more suitable alternative to satisfy the state interest in question.[134] However, the Court did not hold that the availability of service under the long-arm statute was dispositive in its analysis.[135] This caveat will be the focal point of the analysis in Part V of

[126] *See id.* at 891.

[127] *See id.*; *supra* note 116 and accompanying text.

[128] *See Bendix Autolite Corp.*, 486 U.S. at 891 ("The Ohio statute before us might have been held to be a discrimination that invalidates without extended inquiry.").

[129] *Id.* at 894.

[130] *See id.* at 891, 894.

[131] *See id.* at 892–93.

[132] *See id.* at 892–94.

[133] *See id.* at 890; *supra* notes 16–17 and accompanying text.

[134] *See Bendix Autolite Corp.*, 486 U.S. at 893–94.

[135] *See id.* The *Bendix* Court instead simply stated that the "ability to execute service of

this Comment, which will explore whether there are any alternative approaches to interpreting or drafting these particular tolling statutes other than the current majority and minority approaches. An alternative approach is desirable because the current approaches stand at polar ends of the spectrum in their application; the minority approach applies these tolling statutes in an overly broad manner while the majority approach interprets them so narrowly that it almost reads them out of existence.[136]

V. A MIDDLE GROUND FOR STATUTORY TOLLING AFTER *BENDIX*?

In spite of the fact that few legislatures or courts have attempted to find some kind of middle ground for statutory tolling based on a defendant's absence from a state following *Bendix*, the United States Supreme Court's language in that opinion suggests that a more modest tolling provision could withstand constitutional scrutiny. Given the limits of judicial reinterpretation, however, these changes may have to come from the legislature rather than the courts.

A. Judicial Reinterpretation

Although there may be a middle ground to be found in this area, it will not likely be reached through judicial reinterpretation. This is primarily because these tolling statutes are drafted in a manner that offers little room for judicial reinterpretation other than the current approaches that courts follow.[137] Section 16.063 of the Texas Civil Practice and Remedies Code illustrates this point: "The absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence."[138] The fact that many of these statutes, including section 16.063, have not seen substantive revisions since the nineteenth century reinforces this problem.[139] Courts have simply had to do their best to reinterpret the language already in the statutes to avoid constitutional conflicts.[140]

process" on out-of-state defendants "is an important factor to consider in assessing the local interest in subjecting out-of-state [defendants] to requirements more onerous than those imposed on domestic parties." *See id.* at 893.

[136] *See supra* Part III.A, C.

[137] *See supra* note 9.

[138] Tex. Civ. Prac. & Rem. Code. Ann. § 16.063 (Vernon 2008).

[139] *See supra* notes 10–12.

[140] *See supra* Part IV.B.

B. Legislative Modifications

There are several options the Texas legislature and other legislatures could take to modify statutory tolling within their jurisdiction in light of the *Bendix* opinion. Before addressing some of them, it is important to remember that some jurisdictions, such as those that follow the Federal Rules of Civil Procedure, have separate limitations period for filing a claim and for serving a defendant with process.[141] Other jurisdictions, including Texas, use the same period of limitations as that listed under the statute of limitations for filing a claim and serving a defendant.[142] Thus, in jurisdictions like Texas, a plaintiff normally has a shorter period of time to timely serve a defendant with process.[143]

For a jurisdiction like Texas that does not have separate limitations periods for filing a claim and serving a defendant, the most conservative approach would be to adopt a rule comparable to Rule 4(m) of the Federal Rules of Civil Procedure.[144] Another conservative approach would be to adopt a tolling statute that triggers when the defendant has acted fraudulently to delay the filing of a claim, such as by using a false name.[145]

In the years following the *Bendix* opinion, legislatures have unfortunately not taken many steps to amend their tolling statutes in a way that explores the potential grey area between the majority and minority rules discussed earlier.[146] However, one Connecticut statute does potentially cross into some unexplored territory not directly addressed in

[141] *See, e.g.*, FED. R. CIV. P. 4(m) (allowing a plaintiff 120 days to serve process on a defendant once a complaint is filed unless the plaintiff can show good cause for failing to do so). This limitations period is independent of the limitations period for filing a cause of action. *See id.*

[142] *See, e.g.*, Proulx v. Wells, 235 S.W.3d 213, 215 (Tex. 2007).

[143] This can obviously vary depending on how long the specific period of limitations actually is in a given jurisdiction. Notably, many jurisdictions, including Texas, have judicial tolling exceptions that allow a plaintiff to toll a statute of limitations when he is diligent in attempting to serve a defendant but does not do so within the prescribed period of limitations. *See supra* note 48.

[144] FED. R. CIV. P. 4(m).

[145] *See, e.g.*, FLA. STAT. ANN. § 95.051(b) (West 2003) (tolling a statute of limitations when the defendant uses a false name in a manner that prevents him from being served); MO. ANN. STAT. § 516.280 (West 2002) (tolling a statute of limitations for a defendant absconding or concealing himself or other improper acts).

[146] Some states have modernized these tolling statutes following *Bendix Autolite Corp.* or have adopted additional statutes that specifically target plaintiffs who have concealed themselves. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/13-208 (West 2000); MO. ANN. STAT. § 516.280 (West 2002).

the *Bendix* opinion.[147] This statute provides, "In computing the time limited in the period of limitation . . . the time during which the party, against whom there may be any such cause of action, is without this state shall be excluded from the computation, except that the time so excluded shall not exceed seven years."[148] This time limit included within this tolling statute holds particular significance.[149]

The constitutionality of this statute has not been challenged because Connecticut courts have interpreted this statute in line with the majority approach, thus avoiding any constitutional conflict.[150] However, under a minority approach interpretation, this statute could potentially avoid a conflict with the Dormant Commerce Clause, although this seven-year period may still be too lengthy in light of *Bendix* to avoid constitutional scrutiny. It is important to remember why the *Bendix* Court struck down the tolling statute in that case; the Court emphasized that the tolling statute could potentially toll the statute of limitations "in perpetuity."[151] The tolling statute was simply too broad in relation to the state interest at stake. There were more narrowly tailored and less discriminatory alternatives available, such as service under the long-arm statute, that would not have put such a significant burden on interstate commerce.[152]

A modified version of this Connecticut statute with a shorter time limit than seven years, such as 120 days like the period in Rule 4(m) of the Federal Rules of Civil Procedure, would likely be narrowly tailored enough to withstand constitutional scrutiny in light of *Bendix* even if the jurisdiction followed the minority approach in its interpretation of the statute. This modified version would essentially be an alternate means of achieving what many tolling statutes permissibly achieve already, thus avoiding a conflict with the Dormant Commerce Clause.[153] The key is

[147] *See* CONN. GEN. STAT. § 52-590 (2005).

[148] *See id.*

[149] Surprisingly, virtually no jurisdiction has adopted a tolling statute comparable to this Connecticut statute. Some have, instead, set a minimum time that the defendant must be absent from the state for the tolling statute to trigger. *See, e.g.*, S.C. CODE ANN. § 15-3-30 (2005). Such an approach would not eliminate the conflict with *Bendix*, since the statute could still potentially toll for an indefinite period of time.

[150] Cadlerock Joint Venture II, L.P. v. Milazzo, 949 A.2d 450, 457 (Conn. 2008).

[151] Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 891–95 (1988).

[152] *See id.*; Pike v. Bruch Church, Inc., 397 U.S. 137, 142 (1970); *supra* note 118 and accompanying text.

[153] *See* FED. R. CIV. P. 4(m).

drafting the tolling statute in narrower terms.[154]

VI. CONCLUSION

While this Comment focuses on a relatively narrow issue, it raises broader concerns about a state's ability to regulate activities that go on within its borders. The states have a significant interest in regulating commerce that takes place within their territories, although that interest can come into conflict with federal commerce interests. While regulating commercial activity does sometimes have an adverse impact on interstate commerce, states still have a great deal of latitude under their police power to address problems the state faces as long as the state narrowly tailors the legislation to achieve specific goals.

The current minority and majority approaches towards the tolling statutes discussed in this Comment leave a great deal to be desired. The overly broad minority approach raises serious constitutional issues. On the other hand, the majority approach limits the application of these tolling statutes to such a degree that they have little, if any, real impact. There are still legitimate reasons for states like Texas to explore other alternative approaches. The states should exercise their police power in a way that solves the novel problems facing their citizens. The Framers of the Constitution designed our system of "constitutional federalism" to encourage "novel state experiments" and promote "governmental responsiveness to distinctive local needs."[155]

[154] *See supra* notes 118, 152 and accompanying text. It is worth noting that the *Bendix* Court said in dicta that the tolling statute in that case might have also been struck down under the first tier of the two-tiered test as a state law that discriminated against interstate commerce. *See supra* note 128 and accompanying text. This dicta could be significant given, as some commentators have argued, the Court's enhanced scrutiny under the first tier in recent years. *See* Day, *supra* note 105, at 47–51.

[155] *See* Coenen, *supra* note 112, at 429–30.