I. INTRODUCTION

A jurisdictional question that has divided state and federal courts concerns the effect of a foreign corporation’s appointment of a resident agent, in compliance with state registration requirements, on the existence of "general personal jurisdiction" over the foreign corporation—jurisdiction over the corporation for causes of action unrelated to the corporation’s activities in the state. The Restatement (Second) of Conflicts adopts the position that the jurisdictional effect of such an appointment is a matter entirely within the state’s control. Section 44 of the Restatement and its accompanying comments address the jurisdictional issue as one involving only a question of statutory construction, and would honor unlimited general jurisdic-

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1. "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984).
tion based on appointment of an agent without any due process analysis.⁡

A majority of state and federal courts considering that question have resolved it like the Restatement, and have applied various forms of consent theory to hold that by such an appointment a foreign corporation automatically submits itself to unlimited assertions of a state’s jurisdiction. Those courts include the First³ and Fifth⁴ United States Circuits; United States District Courts in Kansas,⁵ Illinois,⁶

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2. Restatement (Second) Conflict of Laws § 44 (1971) provides:

Foreign Corporations—Appointment of Agent

A state has power to exercise judicial jurisdiction over a foreign corporation which has authorized an agent or a public official to accept service of process in actions brought against the corporation in the state as to all causes of action to which the authority of the agent or official to accept service extends.

Comment:

a. Rationale. The rule of this Section is based upon consent. . . . This consent is effective even though no other basis exists for the exercise of jurisdiction over the corporation.

c. Extent of consent thus given. If a corporation has authorized an agent or a public official to accept service of process in actions brought against it in the state, the extent of the authority thereby conferred is a question of interpretation of the instrument in which the consent is expressed and of the statute, if any, in pursuance of which the consent is given. It is a question of interpretation whether the authority extends to all causes of action or is limited to causes of action arising from business done in the state . . . .

3. Holloway v. Wright & Morrissey, Inc., 739 F.2d 695, 697 (1st Cir. 1984) ("It is well-settled that a corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent's authority.").

4. Cowan v. Ford Motor Co., 694 F.2d 104, 107 (5th Cir. 1982) (distinguishing other decisions which had required showing of forum state interest in the action on ground that those cases did not involve defendant which had appointed agent "and voluntarily subjected itself to [the state's] process"); Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270-71 n.21 (5th Cir. 1981) (noting that defendant's qualification to do business in state after service of process was made would have been sufficient standing alone to confer jurisdiction in Algerian air crash action; suggesting that jurisdiction would be proper if action dismissed and refiled with new service of process).

5. Slawson v. Dome Petroleum Corp., 561 F. Supp. 67, 73 (D. Kan. 1983) (suggesting that qualification and appointment of agent was sufficient basis for general jurisdiction; finding, on assumption due process was required, that it was satisfied by qualification, some past business in state, and willingness to do future business).

Pennsylvania,7 and New York;8 and appellate courts in Delaware,9 Florida,10 Mississippi,11 Nebraska,12 New York,13 North Carolina,14 Ohio,15 and Texas.16

Other courts, however, have reached a contrary result, finding that appointment of an agent is jurisdictionally inconsequential and that a foreign corporation is subject to jurisdiction only if it otherwise has constitutionally sufficient contacts with the forum state. Those courts include the Fourth17 and Tenth18 United States Circuit Courts;

7. Kyle v. Days Inn of Am., Inc., 550 F. Supp. 368, 369 (M.D. Pa. 1982) (jurisdiction proper over defendant that alleged it was not doing business in state because defendant had qualified to do business and "therefore had subjected itself to jurisdiction and named an agent for service of process").
11. Read v. Sonat Offshore Drilling, Inc., 515 So. 2d 1229, 1231 (Miss. 1987) (jurisdiction proper over defendant which had designated agent but was not actually doing business; accuses defendant, which had objected based on insufficient contacts with state, of confusing issues with those under long-arm statute, "where minimal contacts and other requisites are essential"). But cf. Williams v. Taylor Mach., Inc., 529 So. 2d 606, 608-09 (Miss. 1988) (jurisdiction over registered corporation requires two conditions: statutory basis for service of process and compliance with due process).
12. Mittelstadt v. Rouzer, 213 Neb. 178, 184, 328 N.W.2d 467, 470 (1982) (appointment is consent to jurisdiction without regard to place where cause arose).
18. Schreiber v. Allis-Chalmers Corp., 611 F.2d 790, 793 (10th Cir. 1979) (applying minimum contacts test for general personal jurisdiction, approving jurisdiction based on "continuous and systematic activities" of defendant in forum state).
United States District Courts in Georgia\textsuperscript{19} and Maryland;\textsuperscript{20} and appellate courts in Maryland\textsuperscript{21} and New Hampshire.\textsuperscript{22}

The position adopted in the \textit{Restatement} and followed by the majority of courts is erroneous. This article demonstrates that treating a foreign corporation's appointment of a resident agent, in compliance with a state's registration requirements, as the basis for altering the state's jurisdictional power over the corporation imposes an unconstitutional condition on a foreign corporation's opportunity to transact business in the state.

The venerable doctrine of "unconstitutional conditions" is a subject that has occupied judicial and academic energies for decades.\textsuperscript{23} Described simply but inadequately, the doctrine holds that a state cannot condition the receipt of a state-conferring benefit on the recipient's consent to the relinquishment or limitation of constitutional rights.\textsuperscript{24} The doctrine was born at the turn of the century in cases


\textsuperscript{21} Goodyear Tire & Rubber Co. v. Ruby, 312 Md. 413, 423, 540 A.2d 482, 486-87 (1988) (despite appointment of resident agent, general jurisdiction over foreign corporation would require continuous and systematic general business conduct).

Prior to the \textit{Goodyear Tire} decision, the Maryland Court of Special Appeals had endorsed an unusual approach that took a compromise position on the jurisdictional question. That approach treated the appointment as justification for a relaxed minimum contacts test: the foreign corporation was subject to the state's jurisdiction in a foreign cause of action if the corporation had contacts with the state which, although normally insufficient for an assertion of general personal jurisdiction, would have been a sufficient basis for jurisdiction if the action had arisen locally. See Springle v. Cottrell Eng'g Corp., 40 Md. App. 267, 288, 391 A.2d 456, 469 (1978).


\textsuperscript{22} See Travelers Indem. Co. v. Abreem Corp., 122 N.H. 583, 585, 449 A.2d 1200, 1201 (1982) (rejecting jurisdiction over defendant that had qualified in state, but had not done business, because state was "not related to the parties or the litigation and has no interest which would justify the exercise of jurisdiction").


\textsuperscript{24} See infra notes 34-56 and accompanying text (extensive discussion of the doctrine of unconstitutional conditions, including the ambiguities and problems of application it engenders).
concerning state regulation of foreign corporations, but more recently has become the focus for wide-ranging discussion about the proper limits on the conditioning powers of government as an employer, provider of welfare, or contractor, and on federal powers to condition economic allocations to the states.\textsuperscript{25} The jurisdictional principle approved in the Restatement returns the unconstitutional conditions doctrine to its roots.

Over the last sixty years there have been occasional scholarly suggestions that an automatic assertion of general personal jurisdiction based on the required appointment of an agent would be unconstitutional,\textsuperscript{26} but apart from my suggestion of the thesis in an earlier article,\textsuperscript{27} no recent commentator has contended that such an assertion would violate the unconstitutional conditions doctrine.\textsuperscript{28} This Article

\begin{footnotesize}
\begin{enumerate}
\item[25.] See generally Epstein, supra note 23 (reviewing wide range of applications of unconstitutional conditions reasoning).
\item[26.] The most recent suggestion is found in Brilmayer, Haverkamp, Logan, Lynch, Neuwirth & O'Brien, A General Look at General Jurisdiction, 66 Tex. L. Rev. 721 (1988). These authors noted that "[t]he most formidable constitutional issue surrounding general jurisdiction by consent arises when consent derives from a statutorily required appointment rather than from contract." Id. at 757 (footnote omitted). They believed that such statutes "circumvent all due process notions of fairness underlying minimum contacts analysis and expose the fiction of consent as a basis for jurisdiction." Id. at 760. They further observed that older cases have treated appointment as consent, but that "none of these cases or their underlying theories seems viable under today's due process standards." Id. at 758 (footnote omitted). These authors did not, however, consider the application of the unconstitutional conditions doctrine to the question, nor did they consider in depth the possible arguments in support of the validity of the jurisdiction.
\item[27.] See also R. Casad, Jurisdiction in Civil Actions ¶ 3.02[2][a][ii]3-66 to -69 (1983) (finding due process problems if consent is held to extend to unrelated causes of action; raising concern that this could result in states with longer statutes of limitations becoming "a haven for plaintiffs with time-barred claims").
\item[28.] Other authors have questioned more generally the soundness of the principle. See, e.g., Hill, Choice of Law and Jurisdiction in the Supreme Court, 81 Colum. L. Rev. 960, 981-82 (1981); Walker, Foreign Corporation Law: A Current Account, 47 N.C.L. Rev. 733, 734-38 (1969).
\end{enumerate}
\end{footnotesize}
makes that argument, and further undertakes an examination of the range of issues raised by such assertions of jurisdiction that is more extensive than previous writing has offered.

The current significance of this jurisdictional issue is demonstrated by a 1988 decision of the United States Supreme Court, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* 29 one of the first opinions for the Court by Justice Kennedy. There Justice Kennedy premised a commerce clause decision on a jurisdictional position identical to that adopted in the *Restatement.* Justice Kennedy found unconstitutional an Ohio statute that tolled limitations periods for foreign corporations that had not appointed a resident agent for service of process. The statute violated the commerce clause, he held, because appointment of an agent to avoid the tolling provision would have submitted the corporation to the general jurisdiction of the state even in the absence of the minimum contacts necessary to justify the jurisdiction under jurisdictional due process standards, a result that would impermissibly burden interstate commerce. 30 However, Justice Kennedy’s opinion treated that jurisdictional premise presumptively, offering no substantial authority or reasoning in its support, 31 despite the fact that the premise was central to the Court’s decision, 32 and despite the division among lower courts and the potentially widespread significance of the issue. 33

be answered in the negative.

Id. at 186 (footnote omitted).


30. Id. at 2221. See infra notes 80-83 and accompanying text (rationale of Bendix decision).

31. See infra text accompanying notes 90, 91-95 and accompanying text (discussion of Court’s support for jurisdictional premise), & 112 (discussing modern constitutional limits on general jurisdiction).

32. See infra notes 86-87 and accompanying text (controlling effect of jurisdictional premise on Bendix decision).

33. All but six states require appointment of a registered agent by foreign corporations that seek to do intrastate business in the state. Model Business Corp. Act Ann. § 15.10 statutory comparison 2 (Supp. 1988). Six states (Arkansas, Massachusetts, New York, Oklahoma, Pennsylvania, and West Virginia) provide instead that the secretary of state is the agent for service of process, although Arkansas, New York, Oklahoma, and West Virginia also provide for the designation by the corporation of an optional agent. Id.

The statutory appointment provision involved in *Bendix* provided: “‘Every foreign corporation for profit that is licensed to transact business in this state . . . shall have and maintain an agent, sometimes referred to as the ‘designated agent,’ upon whom process against such corporation may be served within this state.’” *Bendix*, 108 S. Ct. at 2221 n.2 (quoting Ohio Rev. Code Ann. § 1703.04.1(A)
The examination of the jurisdictional issue here proceeds first with a review of the doctrine of unconstitutional conditions. It then considers the validity of the Restatement position in light of that doctrine. That inquiry is largely focused by an analysis of the Bendix decision and of contradictions inherent in the Bendix opinion that, properly viewed, establish the invalidity of both the Restatement position and the Bendix decision. The jurisdictional principle adopted in the Restatement and used in Bendix approves a condition imposed on foreign corporations that violates their equal protection and due process rights. Moreover, the opinion in Bendix itself contains the necessary ingredients for a rejection of the jurisdictional principle not only on those grounds but also under the commerce clause when applied to a corporation, like that in Bendix, engaged in interstate commerce in the state.

The Restatement position and Bendix ultimately rest on the conclusion that by appointing an agent a corporation consents to jurisdiction where it otherwise would be unconstitutional, but that position necessarily violates the doctrine of unconstitutional conditions. Thus, the Restatement and Bendix are facially erroneous. The article concludes that the Restatement, Bendix, and the similar decisions of other courts have perpetuated an anachronistic relic of past jurisdictional due process doctrine. A state's jurisdictional power over a foreign corporation that has appointed a resident agent in compliance with state requirements must comply with the same minimum contacts requirements that would apply to any other corporation or person.

II. The Doctrine of Unconstitutional Conditions

The doctrine of unconstitutional conditions imposes a limitation on the powers of government by prohibiting a state from conditioning the extension of government benefits on an unjustified limitation of

(1985)). That provision is substantively identical to the comparable provision in the Model Business Corporation Act, which has been widely followed among the states. Section 15.10 (a) of the Act provides: “The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation.” MODEL BUSINESS CORP. ACT § 15.10(a) (Supp. 1988).

Some states have, however, expressly limited the reach of process against such an agent to suits arising from in-state activities, and courts have imposed equivalent limits through judicial interpretation. See, e.g., Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033 (10th Cir. 1975) (New Mexico statute ambiguous; narrow construction required); Gray Line Tours of S. Nev. v. Reynolds Elec. & Eng'g Co., 193 Cal. App. 3d 190, 238 Cal. Rptr. 419 (1987) (narrow construction justified).
the recipient’s constitutional rights. In its simplest form, the doctrine provides:

[A]s a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it deems fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.34

The limitation was first recognized in the last century,35 but was not actively developed by the Court for over three decades. Beginning in 1910, however, the Court frequently called upon the doctrine to invalidate conditions on state benefits. The great majority of those decisions involved state regulation of foreign corporations, perhaps because at that time the states exercised a limited role as benefactor, other than in their grants of the privilege of doing local business to foreign corporations.36 In some of those decisions the condition in

35. The first use of the doctrine to invalidate a condition appears to have been in Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874). Morse invalidated the refusal of a Wisconsin court to honor the removal petition of a foreign insurance company that had executed, as a condition of doing business in the state, an agreement not to remove suits in the state courts to the federal courts. The subsequent history of that holding reflects the Court’s uncertain acceptance of the doctrine into the next century. Three years after Morse, in Doyle v. Continental Ins. Co., 94 U.S. 535 (1877), the Court upheld the power of a state to revoke the license of a company that had exercised the right of removal contrary to its agreement not to remove. Doyle was essentially discarded in Barron v. Burnside, 121 U.S. 186 (1887), but reestablished in Security Mutual Life Ins. Co. v. Prewitt, 202 U.S. 246 (1906). In Doyle and Prewitt, the Court distinguished the state’s power to enforce the required waiver of rights, denied in Morse, and its power to withdraw the privilege without reason. Doyle and Prewitt were overruled in Terral v. Burke Constr. Co., 257 U.S. 529 (1922):

The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation’s doing business in the State, extract from it a waiver of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. Id. at 532.

36. It long has been established that states have the power to exclude foreign corporations from doing local business in the state. See Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 517, 588-89, 592 (1839). See also Asbury Hosp. v. Cass County, 326 U.S. 207, 211 (1945). States cannot, however, prohibit foreign corporations from entering to engage in interstate commerce. See, e.g., International Textbook Co. v. Pigg, 217 U.S. 91 (1910).
question violated the commerce clause by imposing unreasonable burdens on interstate commerce. More frequently, however, the doctrine surfaced in decisions invalidating conditions imposed on intrastate business, where the commerce clause was not involved. For example, the Court invalidated, as violations of equal protection rights, a discriminatory tax imposed on foreign corporations as a condition of doing local business and discriminatory venue provisions applied to foreign corporations doing local business, and, as violative of other rights, the revocation of a foreign corporation's license to do local business because of its removal of a suit to federal court, or because of its use of out-of-state insurance brokers in violation of state regulation. In addition, the Court found unconstitutional conditions in a state's subjection of a domestic corporation, a private carrier, to regulation as a public carrier as a condition of using the state's highways, and in a federal agency's regulation of matter outside its jurisdiction through a condition on the issuance of a permit. That early development of the doctrine received contemporary scholarly comment and criticism, but little, if any, attention for the following twenty-five years.

The post-Depression growth of government welfare functions created fertile ground for the unconstitutional conditions doctrine by dramatically expanding the state's position as economic benefactor, with a corresponding expansion of the circumstances in which the state could seek to impose conditions upon its extension of benefits. That change in government role and the decisions that followed gave rise to a renewed academic discussion of the doctrine in the 1960's.

41. Fidelity & Deposit Co. v. Tafoya, 270 U.S. 426 (1926).
44. See Hale, supra note 23; Merrill, Unconstitutional Conditions, 77 U. Pa. L. Rev. 879 (1929); Oppenheim, supra note 28.
a discussion that more recently has been revived.46

The more recent inquiry has mainly concerned the issues raised by the changed role of government, debating the strings that legitimately may be attached to allocations of governmental economic largess. In such debate the unconstitutional conditions doctrine may only raise, rather than answer, the inquiry. As commentators have noted, the unconstitutional conditions doctrine is, in that context, problematic because the doctrine does not answer whether a benefit recipient has a constitutional right to that which the state would limit by a condition.47 Rarely are constitutional rights absolute; instead, most constitutional rights are contextual, with a scope dependent on circumstances and defined by a balancing of societal and individual interests.48 Accordingly, the doctrine is not helpful in resolving issues which primarily concern the scope of a person’s constitutionally protected interest in a given relationship with the government.


47. See, e.g., French, supra note 45, at 242-48; Rosenthal, supra note 46, at 1120-23; Van Alstyne, supra note 45, at 1448-49; Comment, supra note 45, at 181-82.

Professor Peter Westen has taken this recognition a considerable step further, contending that the doctrine is false, that it “exploits a rhetorical ambiguity in the concept of ‘rights’ to conceal its falsity,” and that “[s]tripped of its rhetoric . . ., the problem of unconstitutional conditions turns out to be no different from ordinary problems of constitutional analysis.” Westen, Rueful Rhetoric, supra note 46, at 986. Westen claims, “If [the doctrine of unconstitutional conditions] is restated in ways that are unambiguous, it ceases to be valid and meaningful and becomes either valid and meaningless, or meaningful and invalid.” Id. at 1006. See infra note 56 (discussing Westen’s position as it relates to the topic of this article).

48. See, e.g., Barenblatt v. United States, 360 U.S. 109, 126 (1959) (“Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.”).

Thus, where the issue is whether a benefit recipient should have a constitutional "right" to that which a condition would deny, a reliance on the unconstitutional conditions doctrine may obscure necessary inquiry into the scope of the person's rights under the circumstances. The doctrine properly operates only after a determination that a benefit recipient would, absent the condition, be entitled to constitutional protection under the circumstances, when the question becomes whether the state may, as a condition of the benefit, extract an enforceable waiver of that protection from the recipient.

There the unconstitutional conditions doctrine provides an unambiguous controlling principle: the state cannot attach a condition to the extension of a benefit that arbitrarily limits the recipient's constitutional protections. So described, the doctrine might appear to state only the obvious. It cannot, however, be dismissed as tautological, for it states a limitation on government power that is not inherent; in the absence of such a doctrine, there would be no logical reason why a government could not arbitrarily extract waivers or relinquishments of individual liberties in exchange for largess. The stated doctrine thus describes a belief about the proper limits on the state's bargaining role as a dispenser of benefits and declares a recipient's possessed liberties off limits from arbitrary reduction in the bargaining process.

That view has not always been accepted by the Court. For a period at the turn of the century the contrary view of Justice Holmes prevailed. Holmes was of the belief that if the state had the absolute power to withhold a benefit, it necessarily had the power to attach any condition it chose to the grant of the benefit. The Court's initial acceptance of that reasoning was short-lived, and Holmes soon

49. Holmes' best known exposition of this position was, perhaps, the opinion he wrote as a Justice of the Supreme Judicial Court of Massachusetts in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). There, Holmes rejected a police officer's challenge to his dismissal for engaging in political activity, stating that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Id. at 220, 29 N.E. at 517.

Holmes' reasoning prevailed in Security Mutual Life Ins. Co. v. Prewitt, 202 U.S. 246 (1906), where the Court upheld a state's revocation of a license to do business based on the corporation's removal of a suit to federal court. The Prewitt Court reasoned that "[a]s a state has power to refuse permission to . . . do business at all within its confines, . . . it has power to withdraw that permission when once given, without stating any reason for its action . . . ." Id. at 257.
found himself arguing his position in dissent,\(^50\) while the majority of the Court repeatedly reaffirmed the unconstitutional conditions doctrine.\(^51\)

The Court’s rejection of the Holmes position has not, however, been entirely uniform,\(^52\) an inconsistency that the Court itself has acknowledged.\(^53\) But, at least with respect to state regulation of foreign corporations, the Court’s rejection of the Holmes position and acceptance of the unconstitutional conditions doctrine is now complete; discriminatory conditions imposed on foreign corporations engaging in local business must be justified by a rational relation to a legitimate state purpose.\(^54\) And, despite academic complaints about the inability of the

50. See, e.g., Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910). There Holmes dissented from the majority’s finding that a license fee imposed on a foreign corporation as a condition of doing local business was an unconstitutional condition: Now what has Kansas done? She has not undertaken to tax the Western Union . . . . She simply has said to the company that if it wants to do local business it must pay a certain sum of money . . . . It does not matter if the sum is extravagant . . . . If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way . . . .

. . . . What I have said shows, I think, the fallacy involved in talking about unconstitutional conditions . . . . I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a State has absolute arbitrary power. Id. at 53-54 (Holmes, J., dissenting).

Holmes continued to press his point in dissent for a number of years. See, e.g., Frost & Frost Trucking Co., 271 U.S. at 601-02 (Holmes, J., dissenting); City & County of Denver v. Denver Union Water Co., 246 U.S. 178, 196-97 (1918) (Holmes, J., dissenting). On other occasions, however, he apparently bowed to the weight of the contrary precedent. For example, Holmes joined in the unanimous opinion in Terral v. Burke Constr. Co., 257 U.S. 529 (1922), which overruled Freewitt, a decision that had followed the Holmes reasoning.

51. See, e.g., cases cited supra notes 37-43.

52. See generally Kreimer, supra note 46, at 1307-10 (citing instances in which the Court has approved conditions using reasoning similar to Holmes’). See also Smolla, supra note 46, at 82-88 (arguing that the “right-privilege” distinction on which Holmes' view of state power rested has surfaced in more recent “entitlement doctrine” decisions, but concluding that the Court has since rejected the Holmes view and instead applies a rational basis requirement).

53. See Western & S. Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 657-58 (1981). There the Court noted the tension between its past decisions following Holmes’ reasoning and those applying the unconstitutional conditions doctrine, finding it “not surprising that the Court’s attempt to accommodate both principles has produced results that seem inconsistent or illogical.” Id. at 658.

54. In Western & S. Life Ins. Co., the Court overruled Lincoln Nat’l Life Ins. Co. v. Read, 325 U.S. 673 (1945), which had held that states were empowered to discriminate arbitrarily against foreign corporations seeking to do local business by
doctrine to solve the harder questions, as a declaration of a fundamental limit on state power that prohibits the state from conditioning benefits on acceptance of unjustified limitations on individual interests, the doctrine has the overwhelming approval of commentators,\textsuperscript{55}

admitting them under more onerous conditions than exacted from domestic companies, and held:

We consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose. \textit{Western & S. Life Ins. Co.}, 451 U.S. at 667-68. The two dissenting Justices, Stevens and Blackmun, agreed with the majority that a rational relation is required. \textit{See id.} at 676 n.4 (Stevens, J., dissenting).

The Court's rational relation requirement was not new doctrine. \textit{See} Southern Ry. v. Greene, 216 U.S. 400 (1910):

While reasonable classification [of domestic and foreign corporations for taxing purposes] is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which the classification is imposed; and classification cannot be arbitrarily made without any substantial basis.

\textit{Id.} at 417.

55. \textit{See, e.g.,} Epstein, \textit{supra} note 23 (noting problems with applications of doctrine, but endorsing doctrine as appropriate response to excesses in exercise of government monopolies on power); French, \textit{supra} note 45 (rejecting question-begging applications of doctrine, endorsing balancing of state and individual interests affected by regulation); Kreimer, \textit{supra} note 46, at 1352 (rejecting Holmes' view, arguing that "[t]he determination that an allocational sanction has infringed a constitutional right should lead to the same process of balancing against aggregate governmental interests or the same verdict of outright impermissibility as does the determination that a constitutional right has been infringed by a direct criminal sanction"; Rosenthal, \textit{supra} note 46, at 1152 (footnote omitted) (proposing "a presumption that conditions on federal spending may not be used to coerce conduct that would otherwise be protected by constitutional guarantees of civil liberties"); Smolla, \textit{supra} note 46, at 114 (endorsing approach in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), which requires that procedures for allocation of government benefits be rationally related to purpose of benefit program); Van Alstyne, \textit{supra} note 45 (recognizing limitations of doctrine if applied mechanically, arguing for general application of substantive due process review to regulation of interests in public benefits); Note, \textit{supra} note 45, at 1609 (concluding that "the power to withhold or revoke [a benefit] is not arbitrary in nature; rather, as in any case where the government confers advantages on some, it must justify their denial to others by reference to a constitutionally recognized reason"); Comment, \textit{supra} note 45, at 182 (finding that "the doctrine provides a useful vocabulary for expressing the causal impact that manipulations of governmental benefits have on individual choices within the ambit of constitutional rights," and arguing that "it must be utilized with considerable sensitivity to the equities and competing interests in specific constitutional contexts").
including its harshest critic.\footnote{56}

Although the stated doctrine does not resolve the hard questions about the appropriate measure of a recipient’s rights in a particular circumstance, it is wholly sufficient, as will be seen, to resolve the question whether a state’s assertion of general jurisdiction can be based on a required appointment of a resident agent.

III. Appointed Agent-Based Jurisdiction as an Unconstitutional Condition

A. The Precedent for the Restatement Position

A decision by Justice Holmes, Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.,\footnote{supra} arguably supports the Restatement position and the Bendix Court’s jurisdictional premise. Gold Issue, however, was not cited by the Bendix Court, and an analysis of the

\footnote{56. Even Professor Westen, who has dismissed the doctrine of unconstitutional conditions as meaningless rhetoric, see \textit{supra} note 47, accepts the validity of the principle that conditions affecting constitutionally protected interests must be justifiable as rational responses to the circumstances. \textit{See} Westen, \textit{Incredible Dilemmas}, \textit{supra} note 46.}

\footnote{[W]hat is the true status of constitutional conditions? . . . The state may condition the person’s doing of \textit{B} on his surrender of his constitutional right to do \textit{X} if by doing \textit{B}, he places himself in such a position \textit{vis-à-vis} the state that his constitutional interest in asserting \textit{X} is outweighed by the state’s interest in suppressing \textit{X}. Conversely, a constitutional condition is invalid if by doing \textit{B}, a person has placed himself in a position \textit{vis-à-vis} the state that is not significantly different for constitutional purposes than the position he occupied beforehand. \textit{Id.} at 748-49. Westen’s argument that the doctrine is useless assumes that the state cannot enforce a waiver of rights given in exchange for a benefit unless the waiver condition is justified by a balancing of state and individual interests: “[O]ne analyzes unconstitutional conditions cases in the same way one analyzes all such cases—by weighing the state’s interest in enforcing the regulation against the individual’s constitutional interest in being free of the regulation.” \textit{Westen, Rueful Rhetoric}, \textit{supra} note 46, at 988 (footnote omitted).}

\footnote{57. 243 U.S. 93 (1917). \textit{See infra} notes 60-76 and accompanying text (discussing \textit{Gold Issue}).}
case demonstrates that it does not provide legitimate support for the Restatement position or the Bendix decision.

Prior to Gold Issue, in Simon v. Southern Railway Co.,\textsuperscript{53} the Supreme Court had applied unconstitutional condition reasoning to hold that a state could not base general personal jurisdiction on service on a statutory agent whose appointment is implied from a foreign corporation’s conduct of business in the state:

[E]very State has the undoubted right to . . . require [foreign corporations] to name agents upon whom service [of process] may be made; and also to provide that in case of the company’s failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law. Otherwise, claims on contracts wherever made and suits for torts wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any State in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction, by virtue of the power to make such compulsory appointments, could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle . . . that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other States.\textsuperscript{59}

Two years after Simon, however, Justice Holmes wrote the opinion for a unanimous Court in Gold Issue, holding that a foreign corporation’s actual appointment of a resident agent pursuant to a qualification requirement submitted the corporation to jurisdiction in litigation unconnected with the state. According to Holmes, “The construction of the [statute that authorized general jurisdiction based on service on the appointed agent] hardly leaves a constitutional question open.”\textsuperscript{60} Holmes concluded that “when a power actually

\textsuperscript{58} 236 U.S. 115 (1915).
\textsuperscript{59} Id. at 130 (citations omitted).
\textsuperscript{60} Gold Issue, 243 U.S. at 95.
is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act." Holmes had impressive support for that position. As Holmes noted, Judges Learned Hand and Benjamin Cardozo had both held the same. Holmes distinguished Simon because there the corporation "had not appointed the agent as required by statute. . . . The case of service upon an agent voluntarily appointed was left untouched."

Although the Court subsequently may have harbored doubts about the wisdom of Gold Issue, the decision has never been over-

61. Id. at 96 (citation omitted).
64. Four years after Gold Issue Justice Holmes wrote an opinion for the Court, Robert Mitchell Furniture Co. v. Selden Breck Constr. Co., 257 U.S. 213 (1921), that suggests some discomfort with the Gold Issue doctrine and its possible inconsistency with the rejection of jurisdiction in Simon. In Robert Mitchell, Holmes rejected an assertion of general jurisdiction based on service on an appointed agent. Holmes wrote:

The purpose in requiring the appointment of [a resident] agent is primarily to secure local jurisdiction in respect of business transacted within the State. Of course when a foreign corporation appoints one as required by statute it takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court. But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the State without appointing one. In the latter case the implication is limited to business transacted within the State. Unless the state law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere, at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence.

257 U.S. at 215-16 (citations omitted).

Again in 1929, within a one month period the Court twice reiterated the need for a restrictive application of Gold Issue. See Louisville & Nashville R.R. v. Chatters, 279 U.S. 320 (1929):

Where jurisdiction has been denied, the cause of action not only arose outside the state, but it was not shown to have arisen out of any business conducted by the corporation within it or to have had any relation to any corporate act there. In such a case, whether the jurisdiction invoked be deemed to depend upon the presence of the corporation within the state
ruled. If Gold Issue were viable precedent, the Restatement position would stand on firm footing. Gold Issue may have been correct under the controlling jurisdictional principles when it was issued, but it does not withstand constitutional scrutiny today.

According to Holmes, the controlling feature of Gold Issue was the existence of the foreign corporation's actual and voluntary, rather than fictional, appointment of the agent. The appointment was not, however, truly "voluntary," it was demanded by the state as a condition of entry into the state to do business. At the time of Gold Issue, the Court's unconstitutional conditions doctrine was in full bloom. That gives rise to the question, as put by one commentator, "[W]hy, if it is the Due Process Clause—or a 'principle of natural justice'—which denied the power of the state to imply consent to suit on claims arising out of the transactions occurring elsewhere than within the state, it did not also deny to the state the power to extort such a consent in writing." In other words, why did not Holmes or any other member of the Court see an unconstitutional conditions problem with the Gold Issue result?

For Justice Holmes, the explanation may be simple. His view of the unconstitutional conditions doctrine as a limitation on state power had been made clear in earlier opinions; for Holmes, in conferring a benefit a state could attach whatever conditions it chose, without limitation. By that reasoning, Holmes would have seen no unconstitutional conditions problem in Gold Issue: since the state could exclude foreign corporations, it was fully empowered to admit them on any condition whatsoever; and because it therefore could extract an unlimited consent to jurisdiction as a condition of entry, enforcing that consent would raise no constitutional question.

Holmes' permissive view of state powers, however, was not shared by his contemporaries on the Court, who on a number of

through the doing of business there, or on its consent by the designation of an agent, the implication is that the liability to suit does not extend to causes of action which have nothing to do with any act of the corporation within the state.

279 U.S. at 328 (citations omitted). See also Morris & Co. v. Skandinavia Ins. Co., 279 U.S. 405, 409 (1929) ("[I]n the absence of language compelling it, [a resident agent process] statute ought not to be construed to impose upon the courts of the State the duty, or to give them power, to take cases arising out of transactions . . . foreign to its interests.").

67. See supra note 49 and accompanying text (discussing Holmes' rejection of unconstitutional conditions doctrine).
occasions had invalidated conditions on the extension of benefits because the conditions infringed constitutional rights. Why did they fail to see an unconstitutional condition in the required consent to general jurisdiction? The answer to that question seems to lie in the view the Gold Issue Court probably would have entertained about the constitutional impact of an assertion of general personal jurisdiction based on the mere appointment of a resident agent. Gold Issue would, of course, have presented the Court with an unconstitutional condition only if the condition in question affected the defendant’s constitutional rights. But under the jurisdictional due process theory then extant, the “condition” imposed by agent-based general jurisdiction would have been perceived differently than it must be today. Under current constitutional doctrine the condition presented by the Gold Issue facts would be the required submission to general personal jurisdiction in the absence of the connections among the defendant, the litigation, and the state required by International Shoe Co. v. Washington. But for the Gold Issue Court, operating under the doctrine of Pennoyer v. Neff, connections between the litigation and the state were irrelevant to jurisdiction. Instead, the only connection required for valid jurisdiction was service of process on the defendant within the state’s boundaries; if the defendant was present in the state when served with process, the constitutional inquiry ended, and it mattered not whether the litigation was related in any way to the state.

If the Gold Issue Court had addressed an unconstitutional condition inquiry, it likely would have proceeded as follows: States can

68. See, e.g., Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910) (holding that a license fee imposed on a foreign corporation as a condition of doing local business was an unconstitutional condition).
69. 326 U.S. 310 (1945). See also Shaffer v. Heitner, 433 U.S. 186, 204 (1977). In Shaffer the Court described the effect of International Shoe on jurisdictional due process analysis: “[T]he relationship among the defendant, the forum, and the litigation . . . became the central concern of the inquiry into personal jurisdiction” Id. (footnote omitted).
70. 95 U.S. (5 Otto) 714 (1877). Pennoyer established a defendant’s fourteenth amendment due process right to be free from a compelled defense in a state which lacks the recognized basis for jurisdictional authority over the defendant. Under Pennoyer, however, the recognized basis was territorial sovereignty—power over persons and property found within the state’s borders. Id. at 720. The clarity of that principle at the time of Gold Issue is illustrated by Holmes’ well-known statement in McDonald v. Mabee, 243 U.S. 90 (1917), issued in the same Term as Gold Issue, that “[t]he foundation of jurisdiction is physical power . . . .” Id. at 91.
71. Gold Issue, 243 U.S. at 93.
impose conditions (although not unconstitutional ones) on foreign corporations seeking to enter the state to do business; requiring a corporation that seeks to do business in the state to make itself "present" for service of process, by appointing a resident agent, is a reasonable condition;" therefore, service on the agent confers valid personal jurisdiction. Because the controlling jurisdictional doctrine did not differentiate between litigation connected with the state and unrelated litigation, the due process question in Gold Issue would have been indistinguishable from that raised by service on the agent in a suit arising out of the corporation's in-state activities. In that light, Holmes' finding that the asserted jurisdiction "hardly leaves a constitutional question open" would have raised no eyebrows.

However, the foregoing analysis oversimplifies the question by ignoring the distinction the Court previously had drawn, in Simon, between jurisdiction in state-related and unrelated litigation. If the Court recognized a constitutional distinction between related and unrelated claims where the appointment of an agent was implied, how can one explain the failure to recognize it where the appointment was actual? That answer rests now with the members of the Gold Issue Court, but again may be traceable to the status of jurisdictional doctrine at the time. Simon and Gold Issue were both decided during an era when the Court was struggling with the artificial limitations the Pennoyer doctrine placed on extraterritorial jurisdiction in an expanding national economy. One of the contemporary responses to those limitations was the development of fictional "consent" theories of jurisdiction, theories that were facing the Court with the practical need for a recognition of extraterritorial jurisdiction powers within the strictures of a "presence"-based jurisdictional theory. Ultimately, of course, the Court's solutions to that tension matured into the "minimum contacts" doctrine of International Shoe, a decision which drew heavily on the Court's earlier decisions concerning fictional "consent" and "presence." A modern observer, with the hindsight

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72. The agent appointment provisions initially were created to produce a corporate "presence" in the forum state that would permit suit, in response to early theory that a corporation could not be sued outside its state of incorporation because it had no extraterritorial presence. See St. Clair v. Cox, 106 U.S. 350, 354-55 (1882) (recounting the development of agent-based extraterritorial jurisdiction over corporations).
73. Gold Issue, 243 U.S. at 95.
74. Simon, 263 U.S. at 130.
75. The process of doctrinal development from Pennoyer to International Shoe,
of *International Shoe*, can easily perceive a doctrinal inconsistency between the Court’s constitutional treatment of the fictional consent in *Simon* and the actual consent in *Gold Issue*, but the inconsistency may well have been lost on the *Gold Issue* Court; at the time, fictional “presence” was a radical exception to established doctrine, but actual “presence” by appointment of an agent was an undoubtedly adequate basis for jurisdiction. By that contemporary view the rejection of jurisdiction in *Simon* could be squared with *Gold Issue* as an effort to rein in the substitution of fiction for reality.\footnote{76}

Thus, *Gold Issue* can be regarded as consistent with then-existing theories of both jurisdictional due process and unconstitutional conditions. That consistency does not, however, justify the post-*International Shoe* reiteration of the *Gold Issue* holding in *Bendix* or the Restatement, under jurisdictional due process theory in which “presence” is merely a euphemism for constitutionally sufficient contacts.

**B. The Bendix Decision**

The majority opinion in *Bendix* was Justice Kennedy’s third chance to speak for the Court. In his debut he had written for a unanimous Court in finding, based on statutory language, that a legal issue could be raised on an administrative review despite its omission from initial proceedings.\footnote{77} In his second effort Justice Kennedy had managed to say something with which every other member of the Court agreed, but also to say something with which every other member disagreed.\footnote{78} The new Justice’s third effort, in *Bendix*,

\footnote{76. Even though *Simon* and *Gold Issue* may thus have been consistent under “presence” theory, the Court was not entirely comfortable with the distinction it was drawing. *See supra* note 64 (discussing Court’s subsequent efforts to reconcile the decisions and limit application of *Gold Issue*).


78. *See K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988) (plurality decision). Justice Kennedy announced the judgment of the Court and delivered an opinion, in which he was joined in two parts by Chief Justice Rehnquist and Justices White, Blackmun, O’Connor, and Scalia, in a third part by Justice White, and in a fourth by Chief Justice Rehnquist and Justices Blackmun, O’Connor, and Scalia. Justice Brennan wrote a separate opinion concurring in part and dissenting in part, in which he was joined by Justices Marshall and Stevens, and in a portion of which Justice White joined. In addition, Justice Scalia filed a separate opinion concurring in part and dissenting in part, in which Rehnquist, Blackmun, and O’Connor joined. *See id.* at 1814.
was less divisive—six members of the Court joined Justice Kennedy in full—\(^{79}\)—but, under the thesis of this article, was in error: *Bendix* reached the wrong result because the decision was based on the erroneous premise that appointment of a registered agent could operate as a consent to general jurisdiction in the absence of minimum contacts, a premise that violates the doctrine of unconstitutional conditions.

*Bendix*, ironically, was decided on reasoning which describes the doctrine of unconstitutional conditions:

Although statute of limitations defenses are not a fundamental right, . . . they are an integral part of the legal system . . . . The State may not withdraw such defenses on conditions repugnant to the Commerce Clause. . . . The State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain.\(^{80}\)

The Ohio tolling statute, the Court found, conditioned the availability of limitations defenses on a foreign corporation’s appointment of a resident agent, an act which would be a submission to general jurisdiction:

To gain the protection of the limitations period, [the foreign corporation] would have had to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio courts. This jurisdiction would extend to any suit against [the foreign corporation], whether or not the transaction in question had any connection with Ohio. . . . The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense . . . .\(^{81}\)

That jurisdiction would exist, according to the Court, in the absence of minimum contacts, and thus would result in the relinquishment of jurisdictional due process rights, a consequence that would significantly burden commerce:

\(^{79}\) Justice Scalia filed a concurring opinion and Chief Justice Rehnquist a dissent. *Bendix*, 108 S. Ct. at 2223, 2224.

\(^{80}\) Id. at 2221-22 (citations omitted).

\(^{81}\) Id. at 2221 (footnote and citations omitted).
The designation of an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts in matters to which Ohio's tenuous relation would not otherwise extend. . . . Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden.82

That burden on commerce, the Court held, was unjustified by any local interest advanced by the assertion of jurisdiction in the absence of minimum contacts.83

The Court's jurisdictional premise logically rested on a finding that an assertion of unlimited jurisdiction based on the appointment would be constitutionally permissible. The Ohio provision at issue in Bendix, like many resident agent appointment provisions, did not purport to assert jurisdiction in the absence of minimum contacts; it merely provided that the agent was one "upon whom process against such corporation may be served within this state."84 Service on such an agent could confer jurisdiction in the absence of minimum contacts only if a court construed the provision as intending that consequence and only if that construction was constitutionally permissible.85

The Court's jurisdictional premise cannot easily be dismissed as dictum, although it addressed a circumstance not present in the facts. The Court did not have before it a defendant who had appointed an agent and was objecting to an assertion of general jurisdiction based on the appointment; the Bendix defendant had not appointed an agent and was objecting to the resulting application of the tolling

82. Id. at 2221 (citation omitted).
83. It held that "the burden imposed on interstate commerce by the tolling statute exceeds any local interest that the State might advance." Id.
84. Id. at 2221 n.2 (quoting OHIO REV. CODE ANN. § 1703.04.1(A) (Anderson 1985)).
85. In this respect, the agent appointment provision would be no different than the long-arm provisions which courts routinely submit to case-by-case minimum contacts scrutiny. Courts will hold jurisdiction asserted under such provisions unconstitutional when the provision is applied to a defendant who lacks necessary minimum contacts but fails within the terms of the provision, without invalidating the provision itself. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). Thus, the jurisdictional consequence of an appointment provision such as that in Bendix flows from the judicial application of the provision rather than the provision itself.
provision to it. Nonetheless, the jurisdictional premise was central to and determinative of the outcome. If, instead, the Court had held that the appointment could not have expanded Ohio's jurisdiction beyond what otherwise would have been permissible, an appointment to avoid the tolling provision would not have subjected the corporation to any burden it did not already face; accordingly, the tolling provision would have imposed no burden on interstate commerce. If that had been the Court's holding, the tolling provision would have survived the Court's commerce clause analysis and should have been sustained as a valid exercise of state regulatory power. The validity of the Court's decision in *Bendix* therefore rests on the validity of its jurisdictional premise. If the Court was wrong about the jurisdictional consequence of a required appointment of a resident agent, *Bendix* was erroneously decided regardless of the validity of the Court's commerce clause analysis.

If for no other reason, the jurisdictional premise in *Bendix* should be suspect because of the superficiality of the Court's consideration

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86. Chief Justice Rehnquist dissented in *Bendix*, contending that the defendant would not, by appointing an agent, have been exposed to otherwise unavailable jurisdiction in the state. *See Bendix*, 108 S. Ct. at 2224-25 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist differed with the majority because he believed that the defendant had been engaged in both interstate and intrastate commerce in Ohio. Accordingly, he argued, Ohio could have required that the defendant appoint an agent as a condition of the intrastate business. Thus, coercion of the same action by the threat of a tolling provision would not burden the defendant's business in a manner to which the business was not already subject. *Id.* at 2225.

In one sense, then, the Chief Justice's dissent acknowledged the centrality of the jurisdictional issue to the Court's decision. However, he did not disagree with the majority's jurisdictional premise, nor did he discuss the jurisdictional consequence of an appointment; under his reasoning, the tolling provision would not burden commerce regardless of the jurisdictional effect of an appointment.

87. The provision still could have been challenged on equal protection grounds, under the argument that it unreasonably discriminated against foreign corporations as a class. However, that argument had been rejected by the Court in a previous decision on similar facts. *See infra* notes 104-07 and accompanying text (discussing Court's treatment of equal protection argument in *G.D. Scarle & Co. v. Cohn*, 455 U.S. 404 (1982)).

88. Justice Scalia filed a separate opinion in *Bendix* concurring in the judgment, which disagreed with the majority's balancing approach to the commerce clause analysis. Justice Scalia would have substituted a test that would find a commerce clause violation "if, and only if, [a state statute] accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose." *Bendix*, 108 S. Ct. at 2224 (Scalia, J., concurring). He found that such discrimination was present under the facts of *Bendix*. *Id.* He did not, however, disagree with the majority's jurisdictional premise. Chief Justice Rehnquist dissented, finding no interference with interstate commerce. *See supra* note 86 (discussing rationale of dissent).
of the jurisdictional question. Despite the division among lower courts over the question, the Court's opinion made no reference to *International Shoe* or to the Court's prior decisions on the constitutionally permissible scope of general jurisdiction. The Court's only references to its personal jurisdiction precedents were a comparative reference to *World-Wide Volkswagen Corp. v. Woodson*, apparently offered to show that Ohio lacked the constitutionally required relationship with the defendant, and a reference to *Asahi Metal Industry Co. v. Superior Court*, cited for its holding that defending litigation in a state that has limited contacts with the litigation can be a significant burden. Neither of those decisions involved an assertion of general jurisdiction. Nor did the Court discuss *Gold Issue* or its decisions requiring a narrow interpretation of agent-based jurisdiction. Thus, there is every indication that the Court simply failed to consider the possibility that its jurisdictional premise might be suspect. What is more remarkable about *Bendix*, however, is that it contains conclusions that demonstrate that the opinion itself honors the validity of an unconstitutional condition that would violate the commerce clause, and demonstrate as well that the Restatement position violates the equal protection and due process interests of foreign corporations.

C. The Jurisdictional Premise as a Commerce Clause Violation

In *Bendix* the Court applied commerce clause analysis to invalidate the Ohio tolling provision. In so doing, the Court necessarily implied that it was dealing with a state regulation of an interstate,

89. See *supra* notes 3-22 and accompanying text (discussing differing decisions on the jurisdictional issue).
90. See *infra* note 115 (discussing modern constitutional limits on general jurisdiction).
92. See *Bendix*, 108 U.S. at 2221.
94. See *Bendix*, 108 S. Ct. at 2221. In *Asahi Metal*, a Japanese component manufacturer contested its amenability to personal jurisdiction in California on a third-party claim by a Taiwanese manufacturer, where all other claims in the litigation had been resolved. In the plurality decision, eight justices agreed that under those circumstances, "[c]onsidering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court . . . would be unreasonable and unfair." *Asahi Metal*, 480 U.S. at 116.
95. See *supra* note 64 (discussing post-*Gold Issue* decisions requiring narrow interpretation of agent appointment provisions).
rather than intrastate, actor. State regulatory powers over corporations engaging in interstate commerce are limited by the commerce clause. Under current commerce clause doctrine, the Court applies a "two-tiered approach" to test such regulations:

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the . . . balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activities.

The Court's commerce clause analysis in Bendix was nearsighted, focused only on the tolling provision; the Court did not consider whether Ohio's jurisdictional treatment of an agent appointment also could withstand commerce clause scrutiny. As the Court recognized, however, the jurisdictional treatment was as much a part of the state regulation in question as the tolling provision, the one being the alternative to the other under the state scheme: "The Ohio statutory scheme . . . forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense . . . ." If one disregards the Court's jurisdictional premise, the nature of the regulatory scheme before the Court in

96. The majority opinion in Bendix does not explain why the Court applied a commerce clause analysis, but obviously it must have viewed the defendant's commerce as interstate. That conclusion was, however, not obvious to the Chief Justice, whose dissent in Bendix was premised on the belief that the defendant had engaged in both interstate and intrastate commerce in the transaction. See supra note 86 (discussing rationale of dissent).


Bendix becomes clear. The Ohio scheme actually forced only a choice between appointing a resident agent and forfeiting the limitations defense. Appointing an agent would burden commerce only if Ohio attempted, as part of its regulatory scheme, to assert general jurisdiction over a foreign corporation because of the appointment. Accordingly, the state’s power to assert general jurisdiction over the Bendix defendant if it had appointed an agent also should have been subject to the limitations of the commerce clause.

The Bendix Court found that an assertion of general jurisdiction over the defendant where minimum contacts were lacking would be a significant burden on commerce. The imposition of that burden could have survived commerce clause scrutiny only if a local interest advanced by the regulation in question sufficiently outweighed the burden. But Bendix itself held that any local interest served by the state’s regulatory scheme was outweighed by that burden.

Thus, by the Court’s own reckoning, the assertion of general jurisdiction against the Bendix defendant would have imposed a burden on commerce unjustified by Ohio’s regulatory interests. The jurisdictional premise in Bendix therefore fails because Ohio could not have treated the Bendix defendant’s appointment of a resident agent as a submission to general jurisdiction without thereby imposing an unreasonable burden on interstate commerce. It follows that the tolling provision would not burden commerce because a foreign corporation could not properly have been found to have relinquished rights by appointing an agent to avoid its operation.

However, the internal inconsistency of the Court’s jurisdictional premise with respect to the defendant in Bendix, under commerce clause scrutiny, does not resolve the validity of that premise for foreign corporations that appoint an agent as a condition of conducting intrastate business. The Court has distinguished a state’s power to regulate foreign corporations, like the Bendix defendant, engaging in interstate business and its power over those seeking to

99. See supra notes 81-83 and accompanying text (Court’s finding that general jurisdiction imposed unjustified burden on commerce).

100. See id. The Court found that Ohio cannot justify its statute as a means of protecting its residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction, for it is conceded by all parties that the Ohio long arm statute would have permitted service on Midwesco throughout the period of limitations. Bendix, 108 S. Ct. at 2222.
do intrastate business. State regulation of foreign corporations seeking to do intrastate business is subject to equal protection and due process limitations, not to the commerce clause. Such regulation must satisfy a "rational basis" test under which a condition that imposes more onerous burdens on foreign than domestic corporations is invalid unless justified by a rational relation to a legitimate state purpose.101 That test, a part of the Court's unconstitutional conditions doctrine,102 is more lenient toward state regulation than a commerce clause test.103

Nonetheless, the ingredients that invalidate the Restatement position on equal protection and due process grounds again can be found in the Bendix opinion. The Restatement position and the Bendix Court's premise necessarily approve jurisdiction that would be arbitrary and unjustified by legitimate state interests and, therefore, in violation of a foreign corporation's equal protection and due process rights.

101. See Western & S. Life Ins. Co. v. Board of Equalization, 451 U.S. 648 (1981). We consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose. Id. at 667-68.

102. See id. at 657-58. Some past decisions of this Court have held that a State may exclude a foreign corporation from doing business or acquiring or holding property within its borders. From this principle has arisen the theory that a State may attach such conditions as it chooses upon the grant of the privilege to do business within the State. While this theory would suggest that a State may exact any condition, no matter how onerous or otherwise unconstitutional, from a foreign corporation desiring to do business within it, this Court has also held that a State may not impose unconstitutional conditions on the grant of a privilege. Id. (citations omitted).

103. See, e.g., Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985). Under Commerce Clause analysis, the State's interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce. In the equal protection context, however, if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish. Id. at 881. See also Bendix, 108 S. Ct. at 2222 (footnote omitted) ("State interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny.").
D. The Restatement Position as a Violation of Equal Protection Rights

Prior to Bendix, the Court had upheld a similar limitations tolling provision against an equal protection challenge, in G.D. Searle & Co. v. Cohn. As in Bendix, in Searle the Court had before it a defendant that had not appointed a resident agent and, accordingly, was challenging the tolling of its limitations defenses. The Court found that “rational reasons support tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in [the state].” Those reasons included simplification of the problem of locating foreign corporations and avoidance of extra burdens a plaintiff faced in obtaining long-arm jurisdiction. In Searle, however, the Court declined to consider a due process challenge that might have more squarely presented the jurisdictional question.

A different equal protection issue is presented by an assertion of general jurisdiction over a corporation that in fact appoints a resident agent as a condition of doing business in the state than is presented by the tolling of limitations defenses of a foreign corporation that fails to appoint an agent. If the question is whether a state rationally can distinguish, for tolling purposes, a represented foreign corporation from an unrepresented one, the Court’s rejection of the

105. G.D. Searle, 455 U.S. at 410.
106. The burdens included the requirement that plaintiffs not resort to long-arm service until proper efforts to make in-state service had failed, and the burden placed by the long-arm provisions on the plaintiff “to gather sufficient information to satisfy a court that service is consistent with due process of law.” Id. (quoting Velmohos v. Maren Eng’g Corp., 83 N.J. 282, 296, 416 A.2d 372, 381 (1980), vacated, 455 U.S. 985 (1982) (quoting N.J. Ct. R. 1969 R. 4:4-4(c)(1))). Those were burdens, the Court stated, which “a plaintiff must bear when he sues a foreign corporation lacking a New Jersey representative that he would not bear if the defendant were a domestic corporation or a foreign corporation with a New Jersey representative.” G.D. Searle & Co., 455 U.S. at 410-11. Thus, the Searle Court’s assessment of the burdens relieved by an appointment requirement was based in part on the same jurisdictional reasoning followed in Bendix—that no showing of minimum contacts would be necessary to justify jurisdiction over a corporation that had appointed an agent.

107. Fearing that appointment of an agent might subject it to suit in New Jersey when there otherwise would not be the minimum contacts required for suit in that State under the Due Process Clause, petitioner insists that New Jersey law violates due process by conditioning the benefit of the limitation period upon the appointment of a New Jersey agent. Because petitioner did not present this argument to the Court of Appeals, we do not address it.

G.D. Searle & Co., 455 U.S. at 412 n.7 (citation omitted).
equal protection challenge in Searle may make sense. Accepting the Searle Court's position that it is more burdensome to serve an unrepresented than a represented foreign corporation, a legitimate purpose might underlie the state's decision to toll limitations for the defendants who are harder to serve.\(^\text{108}\)

The state's interest in simplifying service of process, however, is markedly different than its interest in asserting personal jurisdiction over defendants with whom it lacks constitutionally sufficient contacts. In fact, simplifying service through the availability of appointed agents is the state's goal, assertions of general jurisdiction based on the appointment will undermine that goal—by discouraging foreign corporations from complying with qualification provisions in order to avoid the jurisdictional exposure. The state's interest in simplifying service would be fully served by requiring appointment of an agent to receive process in actions where the state otherwise has constitutionally acceptable jurisdiction over the defendant. When the state seeks to up the ante by using the appointment to alter the constitutional relationship between the state and the defendant, a "rational basis" inquiry can no longer focus on the state's interest in simplified process. Instead, the inquiry must ask whether the state's interest in requiring a resident agent is rationally related to its interest in asserting personal jurisdiction in the absence of minimum contacts.

A state and its residents might, of course, claim an interest in expanding jurisdictional power otherwise denied to the state by the Constitution. But the assumption that the defendant would not be subject to personal jurisdiction in the absence of appointment of an agent is, by definition, also a conclusion that the state's and plaintiff's interests in asserting jurisdiction over the defendant are insufficient to overcome the defendant's constitutionally protected interest in being free from the jurisdiction. That tautology results from the fact that the minimum contacts test takes account of the legitimate interests of the state and the plaintiff in deciding whether jurisdiction is constitutionally acceptable.\(^\text{109}\)

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108. As previously noted, the Court's equal protection analysis in Searle was infected by the jurisdictional premise adopted in Bendix. See supra note 106. Under the thesis of this Article, the only interest legitimately served by a tolling provision would be that of accounting for a plaintiff's increased difficulty in locating a foreign corporation for service of long-arm process in its home state when it lacked a resident agent. Arguably, however, even an interest that marginal could satisfy the Court's "rational basis" scrutiny.

109. A balancing of relevant state and individual interests is inherent in ju-
It therefore follows that use of a resident agent appointment as the basis for general jurisdiction in the absence of minimum contacts bears no rational relationship to furtherance of a legitimate state interest. If that action by the state operates unequally to the disadvantage of the foreign corporation, it will deny equal protection on its face.

E. The "Equal Treatment" Argument

A rationale occasionally advanced in support of appointed agent-based general jurisdiction contends that the jurisdiction does no more than treat foreign corporations engaging in intrastate business on equal footing with domestic corporations doing the same. By that rationale, domestic corporations are subject to the general jurisdiction of the state's courts and, accordingly, there is no discrimination against foreign corporations in treating them likewise. The argument has an appealing simplicity. Although it would not seem to answer a due process challenge, and although it was implicitly rejected by the Court in Bendix, if the argument is valid it would seem to

risdictional due process analysis. See, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several states in furthering fundamental substantive social policies."

Id. at 476-77 (quoting International Shoe, 326 U.S. at 320; World-Wide Volkswagen Corp., 444 U.S. at 292).

110. See, e.g., Goldman, 520 S.W.2d at 598 ("The rationale behind the theory of consent is that in return for the privilege of doing business in the state, and enjoying the same rights and privileges as a domestic corporation, the foreign corporation has consented to amenability to jurisdiction for purposes of all lawsuits within the state.") (citation omitted). See also Cowan, 694 F.2d at 105-06 (approving consent rationale).

111. The Bendix Court found that the Ohio tolling scheme discriminated against foreign corporations:

The Ohio statute of limitations is tolled only for those foreign corporations that do not subject themselves to the general jurisdiction of Ohio courts. In this manner the Ohio statute imposes a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of
answer an equal protection challenge to a required submission to
general jurisdiction.

However, the apparent simplicity of the argument conceals a
necessary, but erroneous, premise: that automatically subjecting a
registered foreign corporation to general jurisdiction treats the foreign
corporation equally, from a constitutional perspective, with domestic
corporations. Under current constitutional doctrine, "all assertions
of state-court jurisdiction must be evaluated according to the stan-
dards set forth in International Shoe and its progeny." If domestic
corporations are subject to general jurisdiction in their state of in-
corporation it is because they have contacts with the state that are
constitutionally sufficient to justify the jurisdiction. The "equal

foreign and domestic corporations to inconsistent regulations.

Bendix, 108 S. Ct. at 2222.

Although the Court was speaking of the discriminatory effect of the tolling
 provision rather than disparate jurisdictional treatment of foreign and domestic
corporations, its finding necessarily assumed discrimination in the jurisdictional
treatment as well, because the Court's decision in Bendix makes sense only if a
foreign corporation's submission to general jurisdiction imposes a burden on the
foreign corporation that is unreasonable in relation to the jurisdictional burden
faced by domestic corporations. If the Court accepted the argument described in
the text, that the submission to general jurisdiction would merely treat foreign and
domestic corporations equally, it would follow that the foreign corporation would
assume no discriminatory burden by submitting to general jurisdiction in order to
avoid the tolling provision.

112. Shaffer, 433 U.S. at 212.

113. It is tempting to accept the existence of general jurisdiction in the state
of incorporation as a given, and certainly the corporate decision to obtain legal
existence by virtue of a state's laws is a weighty purposeful contact with the forum
state, one which arguably could support general jurisdiction in all cases. Com-
mentators have, however, questioned whether incorporation in a state should always
support general jurisdiction. See, e.g., Werner, Dropping the Other Shoe: Shaffer v.
Heitner and the Demise of Presence-Oriented Jurisdiction, 45 BROOKLYN L. REV. 565, 596
(1979) (questioning whether assumption of validity of general jurisdiction in state
of incorporation is justifiable, when many corporations have no other significant
contact with that state). Cf. Twitchell, The Myth of General Jurisdiction, 101 HARV.
L. REV. 610, 676-80 (1988) (arguing for use of general jurisdiction only at cor-
poration's "home base"—either its state of incorporation or principal place of
business—to serve interest in certainty by providing at least one place where any
corporation can be sued; requiring a connection between the litigation and the state
for all other assertions of jurisdiction).

Prior to the remake of jurisdictional doctrine in International Shoe, the validity
of general jurisdiction in the state of incorporation would have been answered by
the fact that the corporation was "present" there. But International Shoe itself rec-
ognized that assertions of jurisdiction by the state of incorporation also are subject
to minimum contacts requirements:

Since the corporate personality is a fiction, although a fiction intended to
treatment’’ argument simply disregards the fact that the domestic corporation’s due process interests are preserved while the foreign corporation’s are ignored.114

Thus, the Bendix Court correctly sensed that coercing a foreign corporation’s submission to general jurisdiction in the absence of necessary contacts results in discrimination in favor of domestic corporations; it failed, however, to draw the necessary connection between that conclusion and the validity of its jurisdictional premise. Because the assertion of jurisdiction would discriminate against foreign corporations without rational justification, it would violate their equal protection rights.

F. The Restatement Position as a Due Process Violation

If the Bendix Court had recognized the due process issue raised by its jurisdictional premise and had properly addressed it, the Court necessarily would have concluded that an assertion of general jurisdiction based on an agent appointment also would violate a foreign

be acted upon as though it were a fact, it is clear that unlike an individual its “presence” without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far “present” there as to satisfy due process requirements, for purposes of . . . the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms “present” or “presence” are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process. International Shoe, 326 U.S. at 316-17 (citation omitted) (emphasis added).

114. Many state provisions for registration of foreign corporations require registration, and appointment of an agent, only if a corporation engages in something more substantial than isolated local business activity. See, e.g., Model Business Corp. Act § 15.01(b) (Supp. 1988) (describing activities that do not constitute “transacting business” requiring registration). For those states there is some built-in mitigation of unconstitutional assertions of general jurisdiction because the kind of local activity that would require the appointment of an agent will be closer to the kind that also would satisfy due process requirements for general jurisdiction. See infra note 115 (discussing constitutional requirements for general jurisdiction).

Such statutory limitations are not, however, a counterpart for the due process analysis. The constitutional prerequisites of a state’s power to require registration of a foreign corporation are considerably more relaxed than the prerequisites for a permissible assertion of general jurisdiction. See, e.g., Eli Lilly & Co. v. Sav-On Drugs, Inc., 366 U.S. 276 (1961) (maintenance of agents in state to promote local sales, among third parties, of foreign corporation’s products sufficient to justify required registration in state). Thus, a foreign corporation’s activities in a state, sufficient to require registration, may not be of the magnitude to justify amenability to unlimited jurisdiction in the state under minimum contacts analysis.
corporation's due process rights. Once again, the *Bendix* opinion itself provides the basis for that conclusion.

No elaborate minimum contacts analysis is necessary\(^{115}\) because the *Restatement* position on its face approves jurisdiction in the absence of constitutionally sufficient minimum contacts. That result is illustrated by *Bendix*, in which the Court stated that "\([t]\)he designation of an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts in matters to which Ohio's tenuous relation would not otherwise extend,"\(^{116}\) and that the appointment of an agent would require the corporation to defend "all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction."\(^{117}\)

The interests of Ohio in asserting jurisdiction over the *Bendix* defendant could not justify that jurisdiction. As previously discussed,

\(^{115}\) The minimum contacts requirements for general jurisdiction are not without ambiguity, but the controlling principles are reasonably clear. The Court has never approved general personal jurisdiction on a showing of single or occasional contact between a defendant and the forum. Instead, the Court has required a showing of "continuous and systematic" forum state activities by a defendant as a condition of general jurisdiction. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952). See also *Helicopteros Nacionales de Colombia, S.A.*, 465 U.S. at 416 (rejecting general jurisdiction based on single forum state contact by the defendant).

*Perkins* and *Helicopteros* are the only decisions to date in which the Supreme Court has directly confronted assertions of general personal jurisdiction. However, in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), the Court suggested that even continuous and systematic activities in the forum may be insufficient to justify general jurisdiction unless the activities are a substantial and, perhaps, principal part of a defendant's overall activities. *Id.* at 779-80 & n.11. *Keeton* was a libel action brought in New Hampshire by a nonresident plaintiff against a nonresident defendant. The defendant had a monthly circulation of 10,000 to 15,000 copies of its publication within the forum. The plaintiff claimed to have been libeled in five separate issues of the magazine over a nine month period. *Id.* at 772. The defendant's activities in the forum were therefore both "continuous" and "systematic." Nonetheless, the Court indicated doubt that those activities would have justified an assertion of general jurisdiction against the defendant, stating that the defendant's "activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities." *Id.* at 779. The Court distinguished *Perkins* because there

[t]he company's files were kept in Ohio, several directors' meetings were held there, substantial accounts were maintained in Ohio banks, and all key business decisions were made in the State. In those circumstances, *Ohio was the corporation's principal, if temporary, place of business* so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State.

*Id.* at 780 n.11 (citation omitted) (emphasis added).

\(^{116}\) *Bendix*, 108 S. Ct. at 2221.

\(^{117}\) *Id.*
the *International Shoe* minimum contacts test itself pre-factors the balancing of individual and state interests that would be involved in deciding whether due process permits suit against a foreign corporation. To say that the appointment of the agent can justify jurisdiction when the defendant lacks the contacts otherwise constitutionally required for jurisdiction necessarily is to say that, under the circumstances, the state's interest in asserting jurisdiction is constitutionally outweighed by the defendant's interest in avoiding it.

It therefore follows that the *Restatement* position, and the *Bendix* premise, would compromise the due process interests of a foreign corporation without serving a legitimate state interest. When that result would flow from an agent appointment required by the state as a condition of doing local business, the jurisdiction would impose an unconstitutional condition on the corporation, unless the corporation's acquiescence in the condition by appointment of an agent could validate the compromise of its rights.

**G. The Invalidity of "Consent" As a Justification for the Restatement Position**

The *Restatement*’s approval of agent-based general jurisdiction is based on the theory that the appointing corporation has consented to the jurisdiction. Justice Kennedy’s opening remarks in *Bendix* left no doubt that the Court’s jurisdictional premise also rested on the theory of consent:

Ohio recognizes a four-year statute of limitations in actions for breach of contract or fraud. The statute is tolled, however, for any period that a person or corporation is not "present" in the state. To be present in Ohio, a foreign corporation must appoint an agent for service of process, *which operates as consent to the general jurisdiction of the Ohio courts*.

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118. See *supra* note 109 and accompanying text (interest balancing inherent in jurisdictional due process analysis).

119. *Restatement (Second) Conflict of Laws* § 44 comment a (1971) provides: "The rule of this Section is based upon consent. This consent is effective even though no other basis exists for the exercise of jurisdiction over the corporation."

120. *Bendix*, 108 S. Ct. at 2219 (emphasis added).
The *Restatement* position and *Bendix* thus present the question whether a foreign corporation’s actual appointment of a resident agent can operate as a consent to what otherwise would have been an unconstitutional condition. In other words, does the validity of an unconstitutional condition turn on whether it has been accepted by the person whose rights are affected?

The intuitively correct response would seem to be that it cannot—that an unconstitutional bargain offered by the state cannot be redeemed by an individual’s acceptance of a bargain the state lacked the power to offer. That conclusion is supported by the Court’s past formulations of the unconstitutional conditions doctrine, which often have been stated in terms of the invalidity of a required waiver or relinquishment of rights,121 have acknowledged the Hobson’s Choice underlying a submission to a condition required by the state,122 or

121. See, e.g., Terral v. Burke Constr. Co., 257 U.S. 529 (1922). The Court held:

> The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation’s doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not.

*Id.* at 532. In Pullman Co. v. Kansas, 216 U.S. 56 (1910), the Court stated:

> [T]he State could no more exact [a waiver of the constitutional exemption from state taxation of interstate business] than it could prescribe as a condition of the company’s right to do local business ... that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law.

*Id.* at 63. See also *Frost & Frost Trucking Co.*, 271 U.S. at 593-94 ("*[T]he power of the state ... is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights*").

122. See *Frost & Frost Trucking Co. v. Railroad Comm’n of Cal.*, 271 U.S. 583 (1926). There Justice Sutherland, for the majority, held:

> [T]he power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert [that power], separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock
have held that a person can receive the unconstitutionally conditioned benefit without validating the condition.\textsuperscript{123}

It has been suggested, however, that a proper analysis of unconstitutional conditions should take into account whether the rights

\\[\text{and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.}\]

Id. at 593 (Sutherland, J.).

Although Justice Holmes was the leading critic of the unconstitutional conditions doctrine, when confronted with a condition he found unconstitutional Justice Holmes recognized the weakness of consent reasoning. In Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67 (1918), Justice Holmes reversed the Missouri Supreme Court, which had held that a railroad could not complain of the exaction of a substantial fee for a certificate authorizing the issuance of bonds, where the railroad had applied for the certificate and paid the fee. The Missouri court had held "that the application . . . was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation." Id. at 69. Holmes disagreed:

\[\text{[A]s conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary . . . .}\]

\[\ldots \text{It is always in the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.}\]

Id. at 70 (Holmes, J.).

\text{123. At the inception of the unconstitutional conditions doctrine, the Court recognized that a recipient's acceptance of an unconstitutional condition could not validate the condition. In Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874), the Court found unconstitutional a state's refusal to permit a foreign corporation to remove a case to federal court, even though the corporation had agreed to forego removal as a condition of doing local business. The Court held that "[t]he agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed." Id. at 458. The dissent in Morse would have validated the condition on consent reasoning: "This insurance company accepted [the condition that it agree to be treated as a domestic corporation and thereby forego removal] and was thus enabled to make the contract sued upon. Having received the benefits of its renunciation the revocation comes too late." Id. at 459 (Waite, C.J., dissenting).}\]

\text{See also United States v. Chicago, Milwaukee, St. Paul & Pac. R.R., 282 U.S. 311 (1931), where the Court held that}\n
\[\text{[i]t long has been settled in this court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant. . . . Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution.}\]

Id. at 328-29 (citations omitted).
subject to the condition are alienable, and should honor, in appropriate cases, an individual’s decision to relinquish a constitutional right. The right to jurisdictional due process is subject to waiver, and jurisdictional objections can be waived by conduct amounting to a submission to jurisdiction.

Whatever the validity of a respect for individual choice in circumstances where the individual and state have equivalent bargaining power, a substantively different question is presented when the

124. See Kreimer, supra note 46, at 1382-93.
Professor Rodney Smolla also has suggested that recognition of an individual’s right to choose may justify honoring the individual’s consent to diminished procedural protections: “If the validity of the condition turns on balancing the government interest against the individual right involved, there is nothing wrong with ‘devaluing’ the individual interest when it is voluntarily bartered for a benefit.” See Smolla, supra note 46, at 114.


126. In Insurance Corp. of Ir. v. Compagnie des Bauxites de Guine, 456 U.S. 694 (1982), the Court approved, against a due process challenge, the assertion of personal jurisdiction over a defendant based on an implied waiver of jurisdictional objections—a waiver that clearly was not voluntary under the circumstances. In Ireland the Court upheld personal jurisdiction over a defendant that had failed to comply with a discovery order related to the establishment of jurisdictional facts. For the majority, Justice White wrote:

In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual. The plaintiff’s demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law—i.e., certain factual showings will have legal consequences—but this is not the only way in which the personal jurisdiction of the court may arise. The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.

Id. at 704-05 (emphasis added). Justice White illustrated that principle by the example of a defendant who involuntarily submits to jurisdiction by failing to make a timely objection to jurisdiction. Id. at 705.

127. To illustrate a situation where individual choice should be honored, Professor Smolla offered the example of government employment conditioned on limited procedural protections for discharge. He noted that when the government shifts into its proprietary capacity, it must compete with the private sector for the same workers. These employees will decide whether to accept private sector or government jobs based on the relative benefits offered, including salary as well as procedural and substantive job security. . . . Thus, competition in the job market provides a rational basis for government to create positions without procedural protection. Government employment at will is not unconscionable because free market
consent or waiver in question is extracted by a state as a precondition of a benefit over which the state has monopolistic control. There the recipient’s weak bargaining position, the result of a lack of alternative sources of the benefit, means that the recipient’s power to forego the benefit serves as an illusory check on abuse of the conditioning power by the state. Honoring the recipient’s election to relinquish rights in exchange for the benefit in such transactions will accord false dignity to the recipient’s position and may tolerate unconscionable governmental conduct. In such circumstances, the unconstitutional conditions doctrine properly steps in to prohibit the state from taking unfair advantage of its superior bargaining position.\(^ {128}\)

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competition can be trusted to give employees the leverage to extract from government whatever additional procedural guarantees the political and economic marketplace will bear.

Smolla, supra note 46, at 114-15. Professor Epstein, whose analysis of the unconstitutional conditions doctrine proceeds from economic principles, has similarly concluded that a condition on government employment may be justifiable because the government and the prospective employee share bargaining power with respect to the condition. See Epstein, supra note 23, at 67-73. Epstein argues that it is important to ask in each individual case whether the restriction in question represents a strategic gambit by the state, or whether it is designed to counter a parallel gambit by the individual worker. . . . It is very hard to create monopolies in labor markets without explicit government intervention to block free entry. It follows therefore that the law should find fewer occasions to invoke the unconstitutional conditions doctrine in the context of government employment than in other contexts, and it does. Id. at 68.

128. Professor Epstein sees that function of controlling monopolistic abuses as one of the proper functions of the unconstitutional conditions doctrine:
In some markets the government has a high degree of monopoly power. It may be the only party that can operate the public roads, issue building permits, or allow firms to do business in corporate form. Unlike the private monopolist, its power cannot be eroded by the entry of new firms, but it is perpetuated by a legal prohibition against entry by new rivals. The risks of resource misallocation identified in private transactions carry over to the political area as well. There is an obvious need for limitations on the direct use of coercion. By the same token, if the monopoly and necessity cases are any guide, there are obvious reasons to limit the capacity of the government to bargain with its individual citizens.

Epstein, supra note 23, at 22. Epstein identified two additional justifications for the doctrine. The first is to prevent “collective action problems” when the state extracts waivers of rights from disorganized individuals who would refuse to waive the rights if they could act collectively. Id. The second is to protect against “the problem of externalities” that can arise from majoritarian imposition of conditions that create a preferred position for favored factions. Id. at 22-24.

Professor Smolla also concluded that while recognition of individual choice
A state’s power to prohibit foreign corporations from doing local business presents a clear example of state monopoly power and unequal bargaining positions. The foreign corporation wishing to transact local business has no alternative but to accept the conditions established by the state, and the corporation’s “consent” to the conditions can add nothing to the constitutional validity of the condition. To address the validity of a required submission to general jurisdiction in terms of “consent” or “waiver” simply begs the question whether the state is constitutionally permitted to enforce a consent or waiver it extracted as a condition of a benefit; under the unconstitutional conditions doctrine a required consent or waiver is ineffective if the requirement is arbitrarily imposed. For reasons

might justify a condition in an equal bargaining power context, see supra note 127, it fails as a justification when the state holds unequal bargaining power over the benefit:

Even if one concedes that a bargaining element is relevant to determining the appropriate level of procedural protection for public largess, that element is absent in the context of many kinds of public benefits. For example, welfare recipients and school children have no realistic alternative sources for the benefits they seek.

While government employees can extract procedural protections because of competition in the job market, there is an effective government monopoly over the dispensation of benefits such as education and welfare. Since these recipients of public largess lack the bargaining power enjoyed by prospective public sector employees, they cannot be said to have contracted away their right to procedural protection.

Smolla, supra note 46, at 116 (footnote omitted). Where equal bargaining power does not exist, Professor Smolla would no longer honor the individual’s acceptance of the bargain, and instead would demand that the state justify the condition on independent grounds: “To the extent that the contractual element in public largess supplies a rational basis for diminished procedural protection, the absence of equal bargaining power should force the government to justify procedural limitations on other grounds.” Id.

See also Rosenthal, supra note 46, at 1153 (validity of consent as basis for upholding conditions on government economic largess should depend on availability of alternatives to recipient).

129. See Epstein, supra note 23, at 31 (control over entry of foreign corporations as state monopoly).

130. As applied to the jurisdictional question addressed in this Article, the consent or waiver argument gains no support from the Court’s approval of a defendant’s involuntary submission to jurisdiction in Ireland. See supra note 126 (discussion of Ireland holding). The defendant’s conduct in question there, an excused failure to respond to discovery of jurisdictional facts, did not involve a relinquishment of rights imposed by the government as a condition on a government-provided benefit, and thus raised no unconstitutional conditions question. Moreover, the waiver there arose from conduct which reasonably supported the conclusion that the defendant in fact had due process-sufficient contacts with the forum, and
previously discussed, an automatic assertion of unlimited jurisdiction based on a foreign corporation’s required appointment of an agent would be arbitrary on its face, and thus could gain no validity from a corporation’s submission to the requirement.

IV. Conclusion

The Bendix jurisdictional premise rests in precedential limbo. The holding controlled the Court’s decision and therefore was not dictum, as that term normally is used.131 If the Bendix Court’s jurisdictional premise was meditated it was a significant departure from the doctrine of unconstitutional conditions, endorsing a state’s power to arbitrarily extract a relinquishment of constitutional rights as a condition of doing business in the state. It appears more likely that Bendix only illustrates the extent to which the Court is dependent on the facts of a case to frame, and the parties to identify and focus, constitutional issues. Although the jurisdictional question was central to the Court’s resolution of Bendix, it addressed a factual circumstance that was not presented by the position of the parties in the case and, as a result, raised the risk of inadequate development of the issue that in part underlies the suspect authority accorded dictum.

There is every reason to believe that that risk infected the jurisdictional premise of Bendix. Because of the setting of the juris-

thus that the jurisdiction would not infringe the defendant’s constitutional rights.

The Ireland Court held that the enforcement of the involuntary submission to jurisdiction was subject to a due process test, a test described in Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909). There the Court had held that a state court had not violated due process by striking the answer and entering the default of a defendant who failed to comply with a pretrial discovery order. The Court had reasoned that "the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." Id. at 351. Accordingly, the Ireland Court held that "[d]ue process is violated only if the behavior of the defendant will not support the Hammond Packing presumption." Ireland, 456 U.S. at 706. The Court found the Hammond Packing presumption satisfied because the discovery sanction rule, Fed. R. Civ. P. 37(b)(2)(A), "itself embodies the standard established" in Hammond Packing. Ireland, 456 U.S. at 705.

131. See Black’s Law Dictionary 409 (rev. 5th ed. 1979):

Dictum

. . .

The word is generally used [to describe] an observation or remark . . . concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination . . . .

Id. (emphasis added).
diectional issue, the party whose rights would be affected by the jurisdiction was not contesting the validity of general jurisdiction based on the appointment; instead, that party’s interests were served by a holding that it would, by appointing an agent, have submitted to otherwise unconstitutional jurisdiction. Nor did the Bendix plaintiff present the contrary argument. Not surprisingly, the plaintiff’s arguments in the case were directed at the circumstance of the defendant, which had not appointed an agent, rather than the circumstance of a hypothetical corporation which had made an appointment.\textsuperscript{132}

Thus, in Bendix the Court did not face the jurisdictional question as it would have been developed by a party against whom the jurisdiction was being asserted, and whose constitutional interests were thereby threatened. The apparent consequence was that the Court failed to recognize either the significance or the complexity of the controlling assumption on which it based its decision. The Court’s failure to seriously consider the validity of its jurisdictional premise is, however, less excusable in light of the fact that the Court had seen the premise challenged, albeit indirectly, in \textit{G.D. Searle \& Co. v. Cohn},\textsuperscript{133} a decision the Court cited in Bendix.\textsuperscript{134} Moreover, Justice Stevens, in dissent in Searle, had seemed to recognize that an assertion of general jurisdiction against a registered corporation that lacked minimum contacts with the state would violate due process.\textsuperscript{135}

\begin{quote}
\textsuperscript{132} Telephone interview with Noel C. Crowley (Jan. 25, 1989). Mr. Crowley briefed and argued Bendix before the Court for Bendix Autolite Corporation, the plaintiff. Mr. Crowley assumed that appointment of an agent would be a submission to unlimited jurisdiction. To his recollection, the possibility that appointment of an agent would not submit a foreign corporation to Ohio’s general jurisdiction was never suggested in the oral arguments of either party or in a question or comment from any member of the Court during the oral argument. \textit{Id.}

\textsuperscript{133} 455 U.S. 404 (1982). \textit{See supra} note 107 and accompanying text (discussing due process challenge raised in Searle).

\textsuperscript{134} \textit{See Bendix}, 108 S. Ct. at 2222 \& n.3 (citing and discussing Searle).

\textsuperscript{135} \textit{See G.D. Searle \& Co.}, 455 U.S. at 421 n.4 (Stevens, J., dissenting): I do not understand the Court to be holding that New Jersey has a legitimate interest in attempting to require all corporations to submit in all cases to the jurisdiction of its courts, and that discrimination against unregistered foreign corporations is justified by the State’s desire to accomplish this purpose. Since a State may not enact a law that prohibits a foreign corporation from asserting a due process defense to an exercise of personal jurisdiction by a state court, I do not believe that the State may justify a classification that disfavors unregistered foreign corporations on the ground that they refused to take action that would accomplish the same purpose.

\textit{Id.}
\end{quote}
The *Restatement*, *Bendix*, and the other decisions in accord with the *Restatement* position are in error. If a foreign corporation appoints a resident agent for service of process within a state in response to a state’s requirements for qualification to do business, the unconstitutional conditions doctrine precludes the state from asserting jurisdiction over the corporation based on that appointment in the absence of constitutionally sufficient minimum contacts with the state. Absent those contacts, the state’s assertion of jurisdiction will arbitrarily infringe the corporation’s rights to due process and equal protection of the law. Moreover, if a foreign corporation is engaged solely in interstate commerce in a state and appoints an agent to avoid negative consequences imposed by the state in the absence of an appointment, the assertion of jurisdiction will unconstitutionally burden interstate commerce as well.