Qualification of Foreign Partnerships

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The rule [prematurity] was satisfactory in a day when the sentence imposed by the court was served in full. In this day of more enlightened penology, the rule will not work. It fails to take into consideration the modern usage of the indeterminate sentence, the fixing of the term by trained penologists after a study of the prisoner, the good conduct statutes and the more liberal use of supervised parole and probation.\textsuperscript{67}

These factors provide persuasive reasons for relaxing the requirement of prematurity. But they alone do not compel such a result. It is likely the influence of federalism has probably also had its effect. There can be little doubt that the integrity of the state judicial systems has suffered as a result of encroachment by the federal courts on the finality of state judgments. Herein, perhaps, lies the overall answer—pride rationalized by practicality may be prompting the states to regain ground previously lost to the federal courts.

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\section*{QUALIFICATION OF FOREIGN PARTNERSHIPS}


A recently-enacted New Hampshire statute requires foreign partnerships desiring to do business within the state to “qualify” by applying to the secretary of state for a certificate of authority.\textsuperscript{1} The state now demands virtually the same qualification procedure of partnerships as it requires of foreign corporations and may have provided a lead which other states will follow. The statute requires both initial registration and annual maintenance fees.\textsuperscript{2} The foreign partnership must maintain a registered office and appoint either the secretary of state or an individual resident or qualified corporation as its agent for the service of process within the state.\textsuperscript{3}

A foreign partnership may not maintain any action in the New Hampshire courts until it follows the specified procedure, but its contracts within the state are not made invalid.\textsuperscript{4} In addition, the attorney general may bring an equitable

\textsuperscript{67} Landreth v. Gladden, 213 Or. 205, 222, 324 P.2d 475, 483 (1958).
\textsuperscript{2} N.H. Rev. Stat. Ann. § 305-A:1 (Supp. 1965), which provides in part:
Every foreign partnership desiring to do business within this state, shall pay a registration fee of fifty dollars and an annual maintenance fee of twenty-five dollars to the secretary of state on the first business day of April following the date of registration and on the first business day of April thereafter and continuously maintain in this state: (a) a registered office which may or may not be the same as its place of business in the state; and (b) a register agent, which agent may be the secretary of state and its successor or successors in office, or an individual resident in or a corporation authorized to do business may act as such agent in this state. . . .
\textsuperscript{3} Ibid.
Failure to comply with the registration provision of this chapter shall not affect the validity of any contract with such partnership; but no action shall be maintained or recovery had in any of the courts of this state by any such foreign partnership so long as it fails to comply with the requirements of this chapter.
proceeding to restrain the partnership from transacting further business in the state, and fines up to $500 may be levied.\(^6\)

**Comparison of “Qualification” and “Long-Arm” Statutes**

Statutes which a state may use to control organizations doing business within its borders are of three basic types. They may be of the “qualification” type, the “long-arm” type, or may exist as a hybrid, having some of the features of both. The New Hampshire statute appears to be of the latter class, and as a result, confusion may arise in its application.

Qualification statutes are the means states first employed to obtain jurisdiction over foreign corporations. Jurisdiction under such statutes is obtained by the prior consent of the foreign corporation.\(^6\) Typically, they provide that as a condition precedent to doing business in a state, the corporation must “qualify,” i.e., register, with the secretary of state. In its application the corporation must either designate an agent within the state upon whom process may be served, or consent to service upon the secretary of state.\(^7\) Such statutes have been passed by every state.\(^8\)

When first enacted, qualification statutes were principally attacked as being violative of the privileges and immunities and the interstate commerce clauses of the Constitution.\(^9\) The Supreme Court, in *Paul v. Virginia*,\(^10\) held that since a corporation was not a “citizen” within the meaning of the privileges and immunities clause, it could not claim the protection which that clause afforded.\(^11\) The Court has consistently followed this decision.\(^12\) Objections based on the commerce clause were overruled if the foreign corporation was not engaged solely in interstate commerce.\(^13\)


\(^6\) The jurisdiction obtained may be narrow or broad. N.Y. Bus. Corp. Law § 1314 allows a resident of New York to bring an action against a foreign corporation regardless of where the cause of action arose. In contrast, N.Y. Ins. Law § 59 requires a foreign insurer to consent to New York jurisdiction only for causes of action arising out of “contracts delivered or issued for delivery” within New York.


\(^8\) 1 CCH, Corp. Law Guide ¶ 700, at 2421 (1963). The statutes of 45 states and the District of Columbia deny an unregistered foreign corporation recourse to their courts to enforce contracts made within the state in intrastate business. Corp. Trust Co., supra note 7, at 5.


\(^10\) 75 U.S. (8 Wall.) 168 (1868).


\(^12\) Liberty Warehouse Co. v. Burley Tobacco Growers’ Ass’n, 276 U.S. 71, 89 (1928); Selover, Bates & Co. v. Walsh, 226 U.S. 112, 126 (1912); Western Turf Ass’n v. Greenberg, 204 U.S. 359, 363 (1907); Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373, 374-75 (1903).

\(^13\) Real Silk Hosiery Mills v. City of Portland, 268 U.S. 325, 335 (1925) (license fee unconstitutional as applied to company doing purely interstate business); Sioux Remedy Co. v. Cope, 235 U.S. 197, 202-03 (1914); International Textbook Co. v. Peterson, 218
By comparison, long-arm statutes theoretically provide a different basis for jurisdiction over the corporation. Unlike qualification statutes, they are not based upon actual consent to jurisdiction. Long-arm statutes were first interpreted as meaning that by doing business within a state a foreign corporation had given its "implied consent" to be bound by the jurisdiction of that state's courts. More recently, the act of transacting business within a state has been found, by itself, sufficient to establish the jurisdictional basis, and the implied consent fiction has been largely abandoned.

There are very real differences between the effects the two types of statutes may have on a nonresident. A qualification statute is more burdensome. Papers must be filed and a fee must be paid. Access to the state's courts may be temporarily or permanently barred to a corporation which has failed to meet its requirements. In some states contracts entered into before qualification are void. Because of the more burdensome nature of qualification statutes, a foreign corporation must be doing more business to be forced to qualify than is necessary to authorize service under the long-arm statutes.

Whether the New Hampshire statute is meant to be a qualification or a hybrid statute is unclear. The title and most of its provisions seem to indicate that it is intended only to be a qualification statute. But in section 305-A:6 it provides that when a foreign partnership transacting business in the state has failed to qualify as required, the secretary of state is deemed to have been authorized by the partnership to serve as its agent to receive process. Furthermore, New Hampshire has no long-arm statute applicable generally to individuals. The state has made such statutes applicable only to foreign corporations, nonresident motorists, and insurers. If New Hampshire has any long-arm statute enforceable against the individual members of a foreign partnership, therefore, it must necessarily be found in chapter 305-A.

Long-arm intent may also be found in the interpretation the New Hampshire courts have placed upon their statute requiring qualification of foreign corpora-

U.S. 664 (1910) (per curiam); International Textbook Co. v. Pigg, 217 U.S. 91, 94 (1910); International Text Book Co. v. Tone, 220 N.Y. 313, 318, 115 N.E. 914, 915 (1917).

It has been recently suggested that the state's police power may be used to require even corporations engaging in entirely interstate business to qualify. See Henn, supra note 9, § 93, at 116; Comment, "Doing Business": Jurisdiction, Qualification and Taxation Applications," 11 U.C.L.A. Rev. 259, 270-71 (1964). Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961), by dictum, makes this questionable. Citing the first International Textbook case with approval, the Court said: "It is well established that New Jersey cannot require Lilly to get a certificate of authority to do business in the state if its participation in this trade is limited to its wholly interstate sales to New Jersey wholesalers." Id. at 278.


See 1 CCH, Corp. Law Guide, § 820 (1962), listing at least four states with such a provision.

International Text Book Co. v. Tone, supra note 13, at 318, 115 N.E. at 915; Corp. Trust Co., supra note 7, at 1-2; Henn, supra note 9, § 93, at 116. For a statute which has both long-arm and qualification features, see Cal. Corp. Code § 15700. In Lewis Mfg. Co. v. Superior Court, 140 Cal. App. 2d 245, 295 P.2d 145 (Dist. Ct. App. 1956), where the statute was construed, it was unnecessary to classify it either as a long-arm or a qualification statute.


tions. The corporate-qualification statute was probably used as a model for the new act, since the form and wording of the statutes are virtually identical.21 Section 300:11(c), very similar to section 305-A:6, has been given a long-arm interpretation.22

Thus, the statute’s application is in doubt. Is the provision applicable only to foreign partnerships which have done sufficient business to be required to qualify but which have failed to do so? Or, is it available as an independent long-arm statute to submit foreign partnerships doing sufficient business to authorize substituted service (but not enough to be forced to qualify) to the personal jurisdiction of the New Hampshire courts?

The Privileges and Immunities Clause: Corporations as “Citizens”

A “citizen” is protected by the privileges and immunities clauses of the Constitution23 and of the fourteenth amendment from unreasonably discriminatory state laws operating against nonresidents because of their status as such.24 A nonresident “citizen,” by being forced to qualify under the threat of fine or loss of access to the state’s courts, clearly experiences discrimination because of his status as an alien in the state. This seems to have been recognized by the Supreme Court, at least impliedly, in Paul v. Virginia25 and more recently in Eli Lilly & Co. v. Sav-on-Drugs, Inc.26

Since an individual cannot constitutionally be excluded from doing business within a state, a state may not condition his entrance upon his having qualified. A corporation, on the other hand, is viewed for this purpose as an entity apart from its individual stockholders. It is not entitled to the protection of the privileges and immunities clause because it is not a “citizen” within the meaning of that clause.27 It may be completely prevented from doing intrastate business if the state so desires.28 A state may, therefore, prohibit a corporation’s entrance until it has met any reasonable conditions the state desires to impose.29 A qualification statute is such a condition. The New Hampshire statute now includes general partnerships as businesses which the state may exclude entirely or admit subject to compliance with qualification requirements. The

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23 U.S. Const. art. IV, § 2.
29 See Henn, supra note 9, § 93, at 115 n.4 (1961) for a list of conditions upon entrance which are “unreasonable.” These include agreements not to resort to federal courts and conditions which would violate a corporation’s right to due process or equal protection of the laws.
procedure demanded of partnerships is virtually identical to that required of corporations.30

Whether the New Hampshire statute will be held constitutional would seem to depend to a large extent upon whether or not a partnership will be viewed as an "entity" apart from its individual partners or as an "aggregate" composed of them. If viewed as an entity, it would probably be denied the protection of the privileges and immunities clause; if viewed as an aggregate composed of its partners, it would probably be entitled to the protection of the clause. Both state common law and the Uniform Partnership Act31 may indicate the manner in which a federal inquiry into the fundamental nature of a partnership might be resolved.

At common law, a partnership was viewed as an aggregate composed of its members and not as a legal entity.32 But the Uniform Partnership Act casts a different light on the nature of a partnership. Under the act, a partnership is considered to be an entity for certain purposes33 and an aggregate for others.34 Thus the act would seem to furnish little assistance in deciding the fundamental constitutional question. It does not deal with the qualification issue.35 Any attempt to frame an argument that the act's basic intent was to adopt either an entity or aggregate approach could probably be met with equally strong counter-arguments.36

Most of the earlier decisions in the state courts attempted to delineate a partnership as an entity or aggregate for all purposes.37 Later, the states began to realize that a partnership was incapable of being logically grouped among any of the then-existing business types. Instead a separate body of law developed, which treated a partnership as either an entity or an aggregate, depending upon the particular purpose for which the classification was made.38

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30 See note 21 supra.
31 The act has been adopted in 41 jurisdictions and is applicable to most of the more than one million partnerships in the United States. Mersky, "The Literature of Partnership Law," 16 Vand. L. Rev. 389, 390-91 (1963).
33 The following sections of the UPA contain references to a partnership as an entity: 2, 8, 9, 10, 12, 13, 14, 15, 18, 19, 21, 24, 25, 26, 27, 28, 30, 35(1) (b), 40(a)(II), 40(h)-(i). Jensen, supra note 32, at 379. See also Note, 27 Tenn. L. Rev. 304, 306 (1960).
35 It could be argued that the act's basic definition of a partnership in § 6, excluding any "association . . . formed under . . . authority . . . other than the authority of this state" as a partnership, expressly excludes any consideration of foreign partnerships from its scope; see Note, "Qualification of Partnerships," 24 Corp. J. 267, 269 (1965).
36 Although the original intent of the committee which framed the act was to consider the partnership as an entity, a split among the draftsmen resulted in a compromise. Crane, "Twenty Years Under the Uniform Partnership Act," 2 U. Pitt. L. Rev. 129, 132 (1936).
As the states began to extend their regulation to other forms of businesses, the Supreme Court began to place less emphasis upon the formalistic question of whether or not the particular enterprise should be considered a "citizen" for purposes of application of the privileges and immunities clause. In Hemphill v. Orloff, the Court announced a new idea: "Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers of a state concerning it. . . . If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment." In that case a Michigan statute included all "associations, partnership associations and joint stock companies having any of the privileges of corporations, not possessed by individuals or partnerships . . . ." within the term "corporations" and required them to qualify. The Supreme Court found it constitutional as applied to the defendant, which was a "Massachusetts" or "business" trust.

The court in Hemphill defined its test for deciding if a business should be classified as a corporation as whether it has the "ordinary functions and attributes of a corporation." The fact that the trustees were elected in biannual stockholders' meetings, were exempt from personal liability, and were authorized to distribute the proceeds of operations to stockholders in their discretion indicated to the court that the trust was similar to a corporation. It apparently considered only the "internal affairs" of the business, not concerning itself with the "external appearance" a business may present within a state. In deciding, under this approach, whether a foreign partnership can be required to qualify, it seems irrelevant whether it does the same amount of business within a state as a foreign corporation or has an equal number of offices and agents. The states have followed the Hemphill approach.

The New Hampshire statute seems to go much further than the Michigan statute considered in Hemphill. It requires all partnerships to qualify, regardless of whether they have "any of the powers or privileges" of corporations. Since a partnership is vitally different from a corporation in many of the aspects the Supreme Court seems to consider determinative, an extension of Hemphill would seem required in order to uphold the New Hampshire Act.

The State Police Power

Recent Developments. Lately, foreign unincorporated associations, partnerships, and individuals have been increasingly regulated by state statutes. Regu-
lation, and even exclusion, of foreign security brokers and dealers, liquor salesmen, and insurance agents has been upheld. These regulations have been justified as valid exercises of the state police power. Perhaps the New Hampshire qualification statute could be similarly justified. But this is at least doubtful, since the regulations held constitutional seem to have been designed to prevent a much larger danger to the residents of a state than would be presented by an ordinary business partnership doing a small amount of business.

If a partnership were found to be within the protection of the privileges and immunities clause, a balancing of a state's power to regulate under its police power against the protections the Constitution affords to "citizens" would seem to be necessary. Discrimination against the nonresident seems slight since the inconvenience and burden on the foreign partnership is relatively small; the registration procedures involve only minor technical requirements and the fees are minimal. The rationale often used to sanction long-arm statutes could easily be extended to this area: if a partnership desires to take advantage of a state's facilities it ought to be willing to answer complaints concerning business conducted there.

Exclusion as a Means of Regulation Under the Police Power. As previously noted, a state may be able to compel a foreign partnership to qualify as a reasonable means of regulation under its police power, even if the partnership is considered a "citizen" protected by the privileges and immunities clause. However, the New Hampshire statute not only requires a foreign partnership to qualify but also provides that one which has failed to do so may be excluded from the state. Use of the state police power to exclude, rather than to place reasonable regulations upon the conducting of a business, seems less justified.

In Flexner v. Farson, the Supreme Court, in speaking of the defendant partnership, said: "The State had no power to exclude the defendants ..." Although this decision has been criticized, the criticism has been of its long-arm ramifications. One such critic said:

In suits against foreign corporations substituted service of process may be imposed as a condition to admission to do business within the State; the

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47 Rippey v. Texas, 193 U.S. 504 (1904).
49 It should be noted that all these occupations are ones which contain a potential of great harm to the citizens of a state. Further, in SEC v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65, 68-69 (1959), the Supreme Court stated: "the regulation of 'insurance,' though within the ambit of federal power ... has traditionally been under the control of the States."
50 For suggestions that "balancing" in this field is in order, see Henn, supra note 9, § 93, at 116; Comment, 11 U.C.L.A. Rev. 259, 270-71 (1964). But see Eli Lilly & Co. v. Say-on-Drugs, Inc., 365 U.S. 276 (1961).
53 248 U.S. 289 (1919).
State has power to admit or exclude on such terms as it sees fit. The *Flexner* case can be taken simply as a denial that non-resident individuals may be excluded from doing business on the same basis. In other words, the non-resident individual has rights of doing business within the State, rights guaranteed by the Constitution, which the foreign corporation does not have.\(^5\)

The distinction which this critic has made is exactly the one which New Hampshire seems to have blurred. Although reasonable regulation through the police power may perhaps be justifiable, total exclusion must stand on a different footing. To deny totally the right of an individual, or of a group of individuals, to enter a state is a more serious burden than to allow them to transact business under reasonable regulation. A state could justify the latter as a reasonable use of its police power to provide its residents with a convenient forum. But to justify the former on the basis of state police power, it seems that the state's interest would have to be more substantial than the mere convenience of its residents.

**CONCLUSION**

New Hampshire has passed a statute requiring virtually the same qualification procedure of foreign partnerships as it demands of foreign corporations. The statute is also probably intended to function as a long-arm statute—in light of the interpretation which the New Hampshire courts have given to their corporate statute and in the absence of any other applicable long-arm statute.

The chief constitutional objection to the statute is that it denies partnerships the protections of the privileges and immunities clause. That clause is not applicable to corporations. If a partnership is defined as an entity, as is a corporation for this purpose, the partnership would similarly be denied its protection. A partnership is no longer classified as either an entity or aggregate for all purposes, especially where the Uniform Partnership Act has been adopted. Rather than decide the issue as a matter of labels, the Supreme Court, if it were to rule in such a case, would probably compare the internal structure of a partnership with that of a corporation to determine if a partnership is entitled to the protection of the privileges and immunities clause.

Even if it should be decided that a partnership is protected by the Constitution, reasonable regulation by a state through its police power would still seem possible. Such regulation seems justified if it reasonably regulates business within the state. However, to completely exclude a foreign partnership which has not complied with this regulation is a severe abridgement of individual rights, and the protection such a regulation would afford the residents of a state is probably less significant than the rights sacrificed in gaining it.

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56 Id. at 919-20. [Footnotes omitted.]