of their intention, for the latter could indicate that the particular statute was not to be subject to the provisions of the Act; whereupon the Act would have no operation as to that statute.[66] Therefore the legislature of today is not determining the intent of the legislature of tomorrow.[67] Accordingly, it is well established that the legislature is competent to prescribe rules for the construction of statutes enacted subsequent to construction acts.[68]

Therefore, since all sections of the Act except sections 58 and 101 were evidently intended to apply to present statutes as well as to future enactments, and since operation upon present statutes would be unconstitutional, such sections should be held inoperative, at least insofar as they relate to present statutes.

A statutory construction act, if applicable to future enactments only, is a desirable piece of legislation, provided the rules which it propounds are based on sound principles. Such an act should reduce the burden of repeating interpretative provisions and should result in a higher degree of certainty as to the meaning of statutes.[69] However, it is evident that legislative intent is the primary consideration in the construction of a statute, and all rules of interpretation must give way to the ascertainment of such intention, since, when the meaning is obvious, construction is unnecessary.[70] Further, it should be borne in mind that a construction act does not sound a note of finality, but is itself an object of interpretation.[71] *R. J. B.*

NOTES

State Taxation of Domestic Corporations Engaged in Interstate Commerce and Extra-State Business

Although considerable literary effort has been devoted to the constitutional problems arising from states' attempts to tax corporations doing business within their jurisdictions, a majority of the commentators have limited their discussions to the taxability of foreign corporations.[1] The application of the Federal Constitutional provisions [2] to taxation of domestic corporations has been greatly neglected, probably because of the survival of the theory that a corporation is essentially a creature of the jurisdiction in which it is created [3] and is, therefore, sub-

66. Freund, *supra* note 58, at 216.

67. But see Mongeon v. People, 55 N. Y. 613 (1874); Phila. Legal Intelligencer, Oct. 23, 1937, p. 1, col. 2.

68. Chilsa v. Des Moines, 158 Iowa 343, 138 N. E. 922 (1912); Sutton v. Sutton, 87 Ky. 216, 8 S. W. 337 (1888); Commonwealth v. Sullivan, 150 Mass. 315, 23 N. E. 47 (1889); People v. Harrison, 194 Mich. 363, 160 N. W. 623 (1916); People v. New York Central R. R., 156 N. Y. 570, 51 N. E. 312 (1898); O'Connor v. State, 71 S. W. 409 (Tex. Civ. App. 1902); *In re* Garr's Estate, 31 Utah 57, 86 Pac. 757 (1906).

69. See Fertig, *supra* note 35 at 383; *Rep. of Comm. on Civil Law* (1936) 28 PA. BAR ASS'N Q. 396. See section 51 of the Act.

70. O'Brien v. Manchester, 84 N. H. 492, 152 Atl. 720 (1930); Beekman v. Third Ave. R. R., 13 App. Div. 279, 43 N. Y. Supp. 174 (1st Dep't, 1897), *aff'd*, 153 N. Y. 144, 47 N. E. 277 (1897). See 1. N. Y. CONS. LAWS ANN. (McKinney, 1916) § 51.

71. Freund, *supra* note 58, at 216.

1. The standard text on this subject is HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918). See also Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States* (1918) 31 HARV. L. REV. 321, 572, 721, 932, (1919) 32 HARV. L. REV. 234, 374, 634, 902; Powell, *Contemporary Commerce Clause Controversies Over State Taxation* (1928) 76 U. OF PA. L. REV. 773; Willis, *Corporations and the United States Constitution* (1934) 8 U. OF CIN. L. REV. 1; Colbert and Pyke, *Taxation of Foreign Corporations* (1931) 5 U. OF CIN. L. REV. 54.

2. The commerce clause, Art. I, § 8, cl. 3; the equal protection and due process clauses, Amend. XIV. For purposes of this note, cases involving conflict with the commerce clause have been largely selected.

3. For a discussion of the "restrictive" and "liberal" theories of corporations, see Henderson, *op. cit. supra* note 1, at 1.

ject to an almost unrestrained power to tax by that state.[4] In view of the present accepted differentiation in the application of constitutional limitations to taxes on domestic as opposed to foreign corporations, it is evident that considerable change in theory has occurred since the assertion by the Supreme Court in *Maine v. Grand Trunk Ry.*[5] that "as the granting of the privilege [of doing business as a corporation] rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy." No longer does a state have such broad latitude in the taxation of foreign corporations. It is the purpose of this discussion to indicate the divergence in the principles of taxing foreign and domestic corporations and the extent to which the domestic is still subjected to taxation from which the foreign corporation has been liberated, in an effort to determine whether there is any sound basis for this distinction.

For the purposes of such limited consideration of the subject, the cases will be divided arbitrarily into those concerned with (1) property and income taxes and (2) privilege taxes. Such a classification is somewhat incomplete,[6] and consequently the measure of the tax will often be used in order further to differentiate the situations.[7] For instance, privilege taxes may be measured by the corporation's receipts, by capital stock, or by property. The methods of allocating receipts, capital stock, or property to intrastate, interstate, or extra-state business for purposes of taxation will appear to be of great importance in the cited cases,[8] yet it will be sufficient for this discussion to note whether in a given situation such allocation was made in the course of computing a tax.

Property and Income Taxes

In the case of taxes levied directly upon the tangible and intangible property of a domestic corporation, and upon the receipts from the business of such a corporation, the law is comparatively well settled. Tangible property located in the state and belonging to either domestic or foreign corporations is subject to a state property tax imposed by that jurisdiction,[9] even though that property is employed as an instrument of interstate commerce,[10] so long as the scheme is not arbitrary, nor the tax excessive. It appears that there are two main constitutional problems to be noted in each case: first, the taxation of property outside the taxing state which might involve violation of due process; and secondly, taxation of property

4. See *infra* note 5.

5. 142 U. S. 217, 228 (1891). "The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows." See Home Ins. Co. v. New York, 134 U. S. 594, 600 (1890); Horn Silver Mining Co. v. New York, 143 U. S. 305, 313 (1892).

6. See the divisions of the subject matter in Powell, *supra* note 1, 31 HARV. L. REV. 321, 572, 721, 932; Colbert and Pyke, *loc. cit. supra* note 1. There is also a very careful and ingenious classification into "horizontal" and "vertical" limitations in Note (1925) 38 HARV. L. REV. 361.

7. Further difficulty is encountered by the courts in determining whether a tax ostensibly valid is not actually levied upon that non-taxable subject by which it is measured. It seems once more to be unpredictable whether or not the court will "look through" the subject taxed to the property by which it is measured. See Note (1931) 15 MINN. L. REV. 561.

8. Hans Rees' Sons v. North Carolina, 283 U. S. 123 (1931); Huston, *Allocation of Corporate Net Income for Purpose of Taxation* (1932) 26 ILL. L. REV. 725; Note (1925) 38 HARV. L. REV. 361.

9. A state may tax only property within its jurisdiction. Union Transit Co. v. Kentucky, 199 U. S. 194 (1905) (under the due process clause, Amend. XIV).

10. Such a tax is held not to be laid upon interstate commerce. Union Tank Line Co. v. Wright, 249 U. S. 275 (1919); Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158 (1933); see Pullman's Palace Car v. Pennsylvania, 141 U. S. 18, 23 (1891).

engaged in interstate commerce which might burden commerce in violation of the commerce clause.

Intangible property, such as the good will of a going business and the other factors which raise the net worth of many corporations above the sum of their tangible assets, has been taxed both at the corporation's business situs and at the corporation's domicil.[11] If the intangibles are employed in interstate commerce, the taxing state in such a case would seem to encroach upon the limitation of the commerce clause. Yet in *Virginia v. Imperial Coal Sales Co.*,[12] the Court sustained an ad valorem property tax assessed upon the intangible property of a domestic corporation, although it was shown that the property was used solely in interstate commerce and that the corporation had no tangible property in the state. The Court held that the effect on interstate commerce was at most indirect and incidental,[13] and did not consider the applicability of the due process limitation.[14]

Income taxes[15] levied upon foreign and domestic corporations fall into two classes: those levied on gross receipts and those levied on net receipts. The due process limitation has prevented direct attempts at taxing income derived from business carried on entirely outside the taxing state. But interstate business has not escaped so lightly, and the outcome of the courts' attempts to define the line between taxes burdening and taxes not burdening interstate commerce is indicated by the above classification. In general, taxes on net profits have been sustained, even though profits from interstate business attributable to the taxing state have been included in the computation,[16] while taxes on gross receipts including re-

11. See Adams Express Co. v. Ohio, 165 U. S. 194, *rehearing denied*, 166 U. S. 185, 223, 224 (1897) (intangible property is distributed wherever tangible property is located and work is done); Cream of Wheat Co. v. Grand Forks, 253 U. S. 325 (1920) (Amend. XIV not applicable to intangible property, which is therefore taxable whether or not domestic corporation does business in taxing state and whether tax is privilege or property tax).

12. 293 U. S. 15 (1934), 23 GEO. L. J. 338. It is stated that there is no reason for requiring that the owner must have real estate or tangible property in the state in order to subject the intangible property to taxation. *Id.* at 20.

13. It has been held that the courts will not interfere with a state tax on the ground that it violates the commerce clause unless it appears that the burden is direct and substantial. United States Fidelity & Guaranty Co. of Baltimore v. Kentucky, 231 U. S. 394 (1913). It is difficult, however, to find a strict line of cleavage between taxes imposing direct and indirect burdens. For example, see Cudahy Packing Co. v. Hinkle, 278 U. S. 460 (1929), where the Court divided as to whether a license fee based on authorized capital stock, applicable to both foreign and domestic corporations, was a direct burden on interstate commerce. In holding that it was a direct burden, the majority stated that a tax burdening interstate commerce and reaching property outside the state would not be sustained even if relatively small. Justice Brandeis, in a dissenting opinion, held that the tax was indirect and that "when the burden is indirect, even a large burden upon interstate commerce does not render a tax void." *Id.* at 470. It is probable that in the ultimate analysis, the question is whether or not the burden on interstate commerce is slight or severe. See the criticism of Anglo-Chilean Nitrate Corp. v. Alabama, 288 U. S. 218 (1933), 46 HARV. L. REV. 1024, *overruled in* Southern Natural Gas Corp. v. Alabama, 57 Sup. Ct. Rep. 696 (1937), in Brown, *State Taxation of Interstate Commerce, and Federal and State Taxation in Intergovernmental Relations—1932-1935* (1936) 24 GEO. L. J. 584.

14. See Cream of Wheat Co. v. Grand Forks, 253 U. S. 325 (1920). In connection with the property taxes, it is to be noted that some states, for purposes of taxation, have treated franchises as property belonging to the corporations, and have taxed the franchises directly as property, and not in the form of taxes upon the privilege of doing business in corporate form within the taxing state. See Home Ins. Co. v. New York, 134 U. S. 594, 601 (1890); Atlantic & Pac. Tel. Co. v. Philadelphia, 190 U. S. 160, 163 (1903).

15. Privilege taxes measured by income will be discussed *infra* p. 200. These cases purport to concern neither franchise nor property taxes.

16. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 120 (1920). This case discussed allocation of profits to the taxing state and concluded (1) that the method employed was not arbitrary and did not violate due process and (2) that it is settled law that a tax measured by net profits is valid even if the profits come from interstate commerce, whether

ceipts from interstate business have been held invalid.[17] The early case of *State Tax on Railway Gross Receipts*[18] upheld a state tax on the gross receipts of a domestic corporation engaged in intrastate and interstate business upon the tenuous theory that interstate commerce is no longer concerned with the "fruits of transportation" after they have been mingled with the general property of the carriers. This case was expressly disapproved in *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania,*[19] where a tax on the gross receipts of a domestic corporation engaged solely in interstate and foreign commerce was held invalid as imposing essentially a tax on that commerce and thereby violating the commerce clause.

The actual ground for the distinction between net receipts from interstate commerce and gross receipts from the same source as a basis for determining the constitutionality of income taxes in the light of the commerce clause has been set out clearly in *United States Glue Co. v. Town of Oak Creek,*[20] in which a net income tax levied on a domestic corporation, in the computation of which income received from interstate commerce was included, was held valid. The Court pointed out[21] that a tax on net income would not affect interstate commerce unless a profit had been made from that interstate business, in which event it would be no burden and hence should have no deterrent effect upon interstate cammerce; on the other hand, a tax on gross receipts would affect each transaction whether profitable or not, and thereby might have a deterrent effect upon the continued pursuance of ventures in interstate commerce. There is no difficulty in agreeing with the Court that this distinction "affords a convenient and workable basis of distinction between a direct and immediate burden . . . and a charge that is only indirect and incidental."[22] In the application of this general rule, the courts have not discriminated in their treatment of domestic as opposed to foreign corporations;[23] the commerce clause limitation prevents the levying of direct income taxes on the profits of domestic and foreign corporations alike when engaged solely in interstate business, while the due process limitation forbids the levying of such taxes on income not attributable to the taxing state.

Privilege Taxes

The taxes to be discussed under this heading are levied on the privilege of doing business in corporate form within the jurisdiction.[24] The measures used

the tax is called a franchise or property tax. The tax involved was on net income, apportioned to tangible property or receipts depending on the source of the corporation's principal income. See also Norfolk & Western R. R. v. North Carolina, 297 U. S. 682 (1936). In Atlantic Coast Line v. Daughton, 262 U. S. 413 (1923), a tax levied on "net operating income" including receipts from interstate commerce was held valid as being, if not an income tax strictly, at least not a gross receipts tax and therefore not a direct burden on interstate commerce. The distinction between taxes on gross and net income was conceded.

17. See Atlantic Coast Line v. Daughton, 262 U. S. 413, 422 (1923); East Ohio Co. v. Ohio Tax Comm., 283 U. S. 465, 470 (1931). But *cf.* Great Northern Ry. v. Minnesota, 278 U. S. 503 (1929).

18. 15 Wall. 284 (U. S. 1872).

19. 122 U. S. 326, 341 (1887).

20. 247 U. S. 321 (1918).

21. *Id.* at 328.

22. *Ibid.*

23. There is a dictum in Matson Nav. Co. v. State Board, 297 U. S. 441, 444 (1936) to the effect that a state may tax the net income from a domestic corporation's business, intrastate, interstate and foreign, but that statement has no support elsewhere. The Court indicates a distinction between a direct income tax and a privilege tax measured by net income, by adding to the above dictum, "And net income justly attributable to all classes of business done within the state may be used as the measure of a tax imposed to pay the state for the use therein of the corporate franchises granted by it."

24. Note the distinction made above between these taxes and taxes on the franchise as the property of the corporation. Some of the cases cited involving foreign corporations con-

to ascertain the amount of this indirect tax are varied; the problem is to find a satisfactory way of determining that portion of the going business which is taxable by the state. This problem has been recognized clearly with respect to foreign corporations, and it should be regarded as existing equally in the case of domestic corporations. With respect to the latter, there is a conflict between constitutional limitations and the extent to which the taxing state may exercise the power derived from its control over the creation of the corporation, which is essentially similar to the conflict between constitutional limitations and the extent to which the taxing state may impose conditions upon the entry of a foreign corporation. It will be seen that constitutional objections have been raised with little success against certain taxes levied upon domestic corporations; yet the same taxes have been invalidated when imposed on foreign corporations. The question to be determined is whether or not a state should be enabled by its power to deny corporate existence, so like the equally absolute power to deny entrance to a foreign corporation for the purpose of doing intrastate business, to impose upon a domestic corporation a tax which, but for that power, would be unconstitutional in its application.

Certain principles enunciated by the courts will be well borne in mind throughout the examination of the problem. In *Allen v. Pullman's Palace Car Co.*,[25] a case involving a foreign corporation and concerned with the commerce clause limitation, it was stated that a privilege tax must be limited to the business done within the taxing state. This rule clearly brings into operation also the due process limitation. A subsequent limitation was imposed by *New York v. Latrobe*,[26] which held that a franchise tax must bear "some real and reasonable relation to the privilege granted or to the protection of the interests of the state." [27] The question is thereby raised as to whether a tax obviously in conflict with constitutional provisions when applied to other than domestic corporations might under any circumstances bear a reasonable relationship to the privilege of being clothed with corporate attributes. It can scarcely be contended that a privilege tax need bear no such relationship in this situation. A further case which involved the commerce clause, *Cooney v. Mountain States Tel. Co.*,[28] enunciated the following principles in determining the existence of a burden upon interstate commerce: "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business." [29] These declarations of policy with regard to taxes levied upon foreign corporations are significant in view of the treatment of domestic corporations engaged in interstate or out-of-state business.

Before a discussion of the measures of privilege taxes as applied to foreign and domestic corporations, it should be noted that the unquestioned validity of taxes imposed on the tangible property within the jurisdiction, of foreign and domestic corporations alike, has led the courts by an ingenious device to validate "privilege" or "income" taxes which might otherwise have been declared unconstitutional as imposing a burden on interstate commerce. In *Postal Telegraph*

cern license taxes imposed on the entry of a foreign corporation to do intrastate business in a state. No tax may be levied on a foreign corporation merely for the privilege of doing interstate business. Pensacola v. Western Union Tel. Co., 96 U. S. 1 (1878).

25. 191 U. S. 171 (1903).
26. 279 U. S. 421 (1929).
27. *Id.* at 427.
28. 294 U. S. 384 (1935).
29. *Id.* at 393.

Cable Co. v. Adams,[30] a "privilege" tax of one dollar per mile of interstate telegraph line in the state was levied on a foreign corporation engaged in interstate and intrastate business. The court said that although the state could not levy a tax on the property used in interstate commerce and then add the tax in question, this tax alone was "substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce";[31] the tax was upheld as being "in lieu of all other taxes". In *United States Express Co. v. Minnesota,*[32] a tax on gross receipts imposed on a foreign company was sustained on similar reasoning, as being a just equivalent of property taxes. It is certain that the burden of such a tax on interstate commerce will vary directly with the amount of property owned by a corporation in a state, and that the corporation with few tangible assets in the jurisdiction will suffer; such a corporation will be taxed often on its receipts or privilege in a greater amount than would be assessed under the usual ad valorem property tax. The scheme appears to be equally burdensome to foreign and to domestic corporations. It would be difficult to judge the weight of the burden placed upon interstate commerce by isolating one case where fortuitously the property that might be subjected to taxation was sufficient to counterbalance the assessment of the "in lieu" tax.

The first measure to be considered as the basis of a privilege tax is that of the total authorized stock of the corporation. The history of this form of tax is exceedingly interesting, but it is concerned primarily with the taxation of foreign corporations,[33] and the law is well settled with regard thereto. A tax based on the total authorized stock of a foreign corporation, whether or not it be apportioned to the property or business within the state, has been declared invalid.[34]

30. 155 U. S. 688 (1895). It seems that the commerce clause objection has alone been considered in these "in lieu" cases, but the reasoning would seem applicable to any other constitutional objection.

31. *Id.* at 698. In the process of invalidating a gross receipts tax in Galveston, H. & S. A. Ry. v. Texas, 210 U. S. 217 (1908), the court distinguished a similar tax held valid in Maine v. Grand Trunk Ry., 142 U. S. 217 (1891), on the ground that the latter tax, while nominally a franchise tax, was a property tax, receipts being used to value the property. Unfortunately, in the *Galveston* case an ad valorem property tax was already in existence, while no such tax appeared in the record of the *Maine* case.

32. 223 U. S. 335 (1912). In Meyer v. Wells Fargo & Co., 223 U. S. 298 (1912), a gross receipts tax declared by statute to be in addition to an ad valorem tax on property and assets was held invalid, as levied on a corporation engaged in interstate and intrastate business, even though apportioned to business within the state.

33. The cases delineating the history of privilege taxes measured by authorized capital stock are: Western Union Tel. Co. v. Kansas, 216 U. S. 1 (1910); Atchison, T. & S. F. Ry. v. O'Connor, 223 U. S. 280 (1912) (tax on "total capital stock"); Baltic Mining Co. v. Massachusetts, 231 U. S. 68 (1913) (validity upheld probably because of maximum limit established); Looney v. Crane, 245 U. S. 178 (1917) (tax on "capital, surplus and undivided profits" held unconstitutional after removal of maximum limit); International Paper Co. v. Massachusetts, 246 U. S. 135 (1918) (tax sustained in *Baltic* case held invalid after removal of maximum limit); Cheney Bros. v. Massachusetts, 246 U. S. 147 (1918); General Ry. Signal Co. v. Virginia, 246 U. S. 500 (1918) (tax with graded maxima held valid, the Court admitting the case to be "on the borderline"); Cudahy Packing Co. v. Hinkle, 278 U. S. 460 (1929) (overruling *Baltic* case theory that tax is valid if maximum is stated); see Commonwealth v. Standard Oil Co., 101 Pa. 119 (1882); Atlantic Refining Co. v. Virginia (1937) 5 U. S. L. WEEK 220, *aff'g* 165 Va. 492, 183 S. E. 243 (1936) (tax measured by authorized capital upheld).

34. Airway Electric Corp. v. Day, 266 U. S. 71 (1924). In this case a foreign corporation with all of its property within the taxing state but only 28% of whose business was local, the balance being interstate commerce, was purportedly taxed on the authorized stock represented by property and business in the taxing state. The tax was levied on all authorized stock, which consisted of eight times as many shares as were outstanding. The court held that the tax was necessarily a direct burden on all property and business including interstate commerce, and that it denied equal protection in that the act in practical operation did not require like fees for equal privileges held by foreign corporations under the same circumstances in the taxing state.

Such a tax has been held to be a direct burden on the corporation's property and business represented by the stock, and if the corporation is engaged in interstate commerce, the limitation of the commerce clause is applicable. The due process limitation is likewise invoked when the stock taxed represents property or business carried on without the taxing state.[35] These constitutional objections have not been applied at all with regard to similar privilege taxes imposed on domestic corporations.[36] It may be granted that the taxing state has power over the authorization of stock issues in the case of a domestic corporation which it lacks with respect to foreign corporations, and which may remove the objection raised by the equal protection argument in *Airway Electric Corp. v. Day*,[37] that differing fees are required for equal privileges granted to foreign corporations under the same circumstances. But the problem still exists as to the application of the due process and commerce clause limitations where the stock used to measure the tax on the domestic corporation represents business and property outside the taxing state or interstate commerce. Is a constitutional result attained by saying that since a state has granted the privilege of issuing stock, it may tax on the basis of that stock regardless of constitutional limitations otherwise presumably applicable?

A similar situation exists in respect to privilege taxes measured by issued capital stock. As to foreign corporations, a tax on issued capital stock proportioned to property and business in the state is valid, so long as no burden is placed on interstate commerce or due process is not violated by inclusion of stock representing extra-state business or property.[38] When a similar tax is levied upon domestic corporations a discrepancy at once appears; there need be no allocation to intrastate and interstate or out-of-state business. The Court conven-

35. Western Union Tel. Co. v. Kansas, 216 U. S. 1 (1910); Atchison, T. & S. F. Ry. v. O'Connor, 223 U. S. 280 (1912). *Contra:* Baltic Mining Co. v. Massachusetts, 231 U. S. 68 (1913). In many of the cases involving foreign corporations cited *supra* note 33, the corporations were engaged in extra-state business, but the courts' decisions were based on the commerce clause or the equal protection clause, with no regard for due process.

36. See Ashley v. Ryan, 153 U. S. 436 (1894) (incorporation fee on total capital charged consolidated company embracing corporations of other states). Justice Brandeis, in his dissent in Cudahy Packing Co. v. Hinkle, 278 U. S. 460 (1929), where he urged the validity of filing and license fees applied to a foregn corporation and based on authorized capital stock, pointed out in support of his argument that domestic corporations were likewise subject to the tax.

37. 266 U. S. 71 (1924).

38. In Horn Silver Mining Co. v. New York, 143 U. S. 305 (1892), a tax on the total issued capital stock of a foreign corporation was sustained on the ground that a state may impose such conditions as it chooses upon the admission of a foreign corporation. Due process, commerce clause, and equal protection arguments were defeated. This argument has since been overthrown by a long series of cases. See Williams v. Standard Oil Co. of La., 278 U. S. 235, 241 (1929) (". . . the state may not impose conditions which require the relinquishment of rights guaranteed by the Federal Constitution"). The present view was stated in St. Louis Southwestern Ry. v. Arkansas, 235 U. S. 350 (1914). In Western Cartridge Co. v. Emmerson, 281 U. S. 511 (1930), a similar tax was sustained although interstate business was included in its computation, the factor of interstate commerce having little effect on the amount levied.

The distinction between the Court's attitude toward taxes on the privilege of doing business and toward taxes on doing business was brought out in two cases involving a tax on issued capital stock. In Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218 (1933), a tax declared by the State Supreme Court to be on the doing of business in Alabama was held invalid; subsequently, after the Alabama court had reconstrued the law as a tax on the privilege of doing business in the state, the tax was upheld. Southern Natural Gas Corp. v. Alabama, 57 Sup. Ct. 696 (1937). See Lowndes, *The Supreme Court on Taxation, 1936 Term* (1937) 86 U. OF PA. L. REV. 1, 24.

Another interesting problem arises in the case of taxes measured by issued capital stock when the stock has no par value. See New York v. Latrobe, 279 U. S. 421 (1929); International Shoe Co. v. Shartel, 279 U. S. 429 (1929).

iently finds that there is no purpose to or necessary effect that will burden interstate commerce,[39] or holds that the tax is not necessarily invalid because measured by capital stock which in part represents property not subject to the state's taxing power.[40] The chief ground in every case for sustaining such a tax is that the state has the power to tax the franchise it grants to the corporation. The outstanding case where a tax of this character was upheld as a franchise tax is *Cream of Wheat Co. v. Grand Forks,*[41] in which a tax on the market value of a domestic corporation's outstanding capital stock was sustained although all manufacturing and business was carried on beyond the state's borders. It seems that even though a domestic corporation may thus be taxed on its intangible property in the state of its incorporation and again at its business situs,[42] such a tax is not commensurate with and does not bear a reasonable relation to the privilege granted to the corporation by the state.[43] Furthermore, this privilege of incorporation is not of value sufficiently greater than that of the privilege granted to foreign corporations to do intrastate business, to justify the power of the state to tax not only the corporate business within its jurisdiction and indirectly the interstate business thereto allocable, but also the entire interstate and extra-state business of the corporation by means of the tax on the privilege of entering into corporate existence.

The distinction between taxes measured by gross and net receipts of the corporations is generally the same as that outlined in the preceding section on income taxes. Franchise taxes on the gross receipts of foreign corporations, even if proportioned to property or business in the state, have been held invalid.[44] With regard to similar taxes levied on domestic corporations, there is likewise no doubt of the invalidity of the tax if it reaches receipts from interstate or extra-state business. In *Galveston H. & S. A. Ry. v. Texas,*[45] a tax on gross receipts of railways whose lines lay entirely within the state but which did considerable business with other lines outside the state was invalidated as a burden on interstate commerce. The Court in that case stated that "it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State." [46] In *The Ohio Tax Cases,*[47] a tax on gross earnings, expressly excluding earnings wholly from interstate commerce, was sustained, the Court finding no sinister purpose to tax forbidden sources. In addition it was expressly declared that although one tax was paid with respect to property and another with respect to privilege which was measured by that same property, the taxation was in no sense double.[48] In *New Jersey Bell Telephone Co. v. State Board of Taxes,*[49] a gross receipts tax proportioned on the miles of line in New Jersey to all the line used by the corporation was held unconstitutional as being levied directly on the corporation's

39. Kansas City, M. & B. R. R. v. Stiles, 242 U. S. 111, 119 (1916).
40. Kansas City, F. S. & M. Ry. v. Botkin, 240 U. S. 227 (1916).
41. 253 U. S. 325 (1920).
42. *Id.* at 328.
43. See *supra* p. 201, referring to the statement quoted from New York v. Latrobe, 279 U. S. 421, 427 (1929).
44. The early case of Maine v. Grand Trunk Ry., 142 U. S. 217 (1891) held *contra* to this present view, but the case was decided prior to the birth of the doctrine of "unconstitutional conditions" which achieved its present eminence in Terral v. Burke Constr. Co., 257 U. S. 529 (1922) (involving denial to foreign corporations of access to the federal courts). See New Jersey Bell Tel. Co. v. State Bd. of Taxes, 280 U. S. 338 (1930).
45. 210 U. S. 217 (1908). The tax was laid in addition to an ad valorem property tax.
46. *Id.* at 228.
47. 232 U. S. 576 (1914). Commerce clause, due process and equal protection objections were all rejected.
48. *Id.* at 594.
49. 280 U. S. 338 (1930), 14 MINN. L. REV. 811, 39 YALE L. J. 750.

gross receipts from interstate commerce. But where the receipts taxed are clearly in no way attributable to interstate commerce or out-of-state business, a gross receipts tax will be upheld.[50] On the other hand, where the receipts are held to be wholly derived from interstate commerce, there is no doubt concerning the unconstitutionality of a tax measured by gross receipts.[51]

It seems safe to conclude that taxes on both foreign and domestic corporations, measured by gross receipts which include receipts from interstate commerce are generally invalid, unless the court wishes to sustain them on the practical ground that they are too slight to constitute a burden on interstate commerce. With regard to net income, it seems that such receipts are a proper standard for taxation of both foreign and domestic corporations.[52]

A long line of decisions has protected foreign corporations whose business is limited to interstate or out-of-state business, from the attempts of the states to tax their business,[53] directly or indirectly.[54] Ingenious arguments have arisen, but have not met with success. One of these is of sufficient importance to merit notice here. In the dissenting opinion in *Anglo-Chilean Nitrate Sales Corp. v. Alabama,*[55] Justice Cardozo proposed that since the foreign corporation had obtained the franchise to do intrastate business, that franchise could be taxed by the measure of capital employed in the state even though the corporation was actually engaged solely in interstate business. Such a theory seems to fall in line with the late Chief Justice Holmes' dissent in *New Jersey Bell Tel. Co. v. State Board of Taxes,*[56] that a tax upon a domestic corporation measured by gross receipts including receipts from interstate commerce is valid as a "price for a privilege";[57] but is it not likely that such prices as those suggested by Justice Cardozo are too high and that they bear no reasonable relation to the value of the unexercised privilege conferred upon the corporation by the state? Logically, and

50. East Ohio Co. v. Ohio Tax Comm., 283 U. S. 465 (1931). The corporation brought gas into Ohio which it sold to its consumers. The court held that the gross receipts were derived wholly from intrastate business notwithstanding the fact that the gas used had moved in interstate commerce.

51. See Fisher's Blend Station, Inc. v. State Tax Comm., 297 U. S. 650 (1936). A state occupation tax, levied on radio stations within the state, was held invalid as being levied entirely on interstate commerce. *Cf.* Detroit International Bridge Co. v. Corporation Tax App. Board, 287 U. S. 295 (1932), 294 U. S. 83 (1935).

52. In Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm., 266 U. S. 271 (1924), a privilege tax, levied on a foreign corporation, on net income measured by the proportion of assets in the state to the total assets, was sustained. Due process and commerce clause objections were overruled. See Matson Nav. Co. v. State Board, 297 U. S. 441, 444 (1936) to the effect that a state may tax the net income of the domestic corporation's business, whether intrastate, interstate, or foreign.

53. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885) (capital stock tax levied on interstate ferry having no Pennsylvania property or intrastate business); Cheney Bros. v. Massachusetts, 246 U. S. 147 (1918) [tax measured by authorized capital stock, sustained in Baltic Mining Co. v. Massachusetts, 231 U. S. 68 (1913), held invalid as foreign corporation was doing only interstate business]; see Matson Nav. Co. v. State Board, 297 U. S. 441, 446 (1936); Atlantic Lumber Co. v. Commissioner of Corp. & Tax., 298 U. S. 553, 555 (1936).

54. Such controversy as exists on this is largely as to whether the tax burdened interstate commerce. In Ozark Pipe Line Corp. v. Monier, 266 U. S. 555 (1925), Justice Brandeis, in the dissenting opinion, stated that a franchise tax on the privilege of doing business in a corporate form was as indirect and valid as a property tax levied on a pipe line used in interstate commerce. He likewise dissented from the majority in Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203 (1925), which invalidated a privilege tax measured by corporate excess levied on a foreign corporation with no property in Massachusetts and engaged solely in interstate commerce. See also Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218 (1933), and especially the dissenting opinion of Justice Cardozo, in which Justices Brandeis and Stone concurred.

55. 288 U. S. 218 (1933). See also the reasoning in Detroit International Bridge Co. v. Corporation Tax App. Bd., 287 U. S. 295 (1932).

56. 280 U. S. 338 (1930).

57. *Id.* at 350.

without regard to the power reserved by the state to itself in the creation of a domestic corporation, such a corporation whose business is limited to interstate business should also be protected from taxation on its business by the state of incorporation. In fact such protection to domestic corporations was hinted in *Ozark Pipe Line Corp. v. Monier.*[58] In that case a tax levied on a foreign corporation doing only interstate business was held unconstitutional, the Court stating that it was an attempt to exercise "an authority, denied by Federal Constitution, to regulate interstate commerce. The State has no such power even in the case of domestic corporations." [59] Despite this expression with regard to domestic corporations, the doctrine of *Cream of Wheat Co. v. Grand Forks,*[60] discussed in a prior section, remains to support the proposition that the state granting the privilege of corporate form thereby acquires the right to tax that franchise in any of the indirect methods which have been indicated.[61]

Conclusion

It is evident that the logical position of the domestic corporation when engaged in interstate commerce or extra-state business is squarely on a level with the foreign corporation admitted to do business in the state. Both are persons within the meaning of the equal protection clause of the Constitution [62] and should they not receive equally the protection of the due process and commerce clause? If submission to an unconstitutional condition may not be required of a foreign corporation before license is granted to enter into intrastate business,[63] why should a state be permitted to impose such a condition, that is, submission to taxation of interstate as well as intrastate business, upon a group of persons seeking the privilege of corporate form for doing business? In view of the increasing limitations on the states' taxing power, the constitutional protection granted to foreign corporations should be extended to cover domestic corporations engaged in interstate commerce or out-of-state business. Practical difficulties and the

58. 266 U. S. 555 (1925).

59. *Id.* at 567. This provoked from Justice Brandeis in the dissenting opinion the statement that under the rule enunciated by the majority, every tax on the franchise of a domestic or foreign corporation must be void where the corporation is engaged exclusively in interstate commerce. Inasmuch as such taxes seem inevitably to burden such commerce, no matter how indirect they may be termed, such a rule of law does not seem impossible, even though the Court has not seen fit further to advocate it. See also F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 415 (1920).

60. 253 U. S. 325 (1920).

61. Certain measures of taxation are prohibited, as the privilege or occupation tax measured by gross receipts. Fisher's Blend Station, Inc. v. State Tax Comm., 297 U. S. 650 (1936). For what appears to be an interesting manner of evading this problem, see Detroit International Bridge Co. v. Corporation Tax App. Bd., 287 U. S. 295 (1932), 294 U. S. 83 (1935). At the first trial, a franchise tax levied on a corporation whose sole asset was a bridge between the United States and Canada, was sustained because of the failure of the corporation to show that it had no power to carry on any business not within the protection of the commerce clause. The corporation at once amended its articles so as to limit its powers to engage in interstate commerce, and once more brought an appeal to the Court, which thereupon held that ownership of the bridge was not "engaging in foreign commerce" but merely furnished a means for others to do so.

62. See Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 189 (1888) (Amend. XIV); Home Ins. Co. v. New York, 134 U. S. 594, 606 (1890); Southern Ry. v. Greene, 216 U. S. 400, 412 (1910); see Isaacs, *The Federal Protection of Foreign Corporations* (1926) 26 COL. L. REV. 263, 266. If a corporation is a person in that its right to resort to the federal courts is protected by the Constitution, should it not be so treated with respect to other rights guaranteed by the Constitution? See Willis, *op. cit. supra* note 1, at 6. On the adoption of the liberal theory of corporations, see Note (1931) 79 U. OF PA. L. REV. 956, 1119.

63. See Hale, *Unconstitutional Conditions and Constitutional Rights* (1935) 35 COL. L. REV. 321; Isaacs, *op. cit supra* note 62, at 277 *et seq.;* Merrill, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879; Note (1929) 42 HARV. L. REV. 676; *Developments in the Law, Conflict of Laws—1935-1936* (1937) 50 HARV. L. REV. 1119, 1176.

objections of the states that their sovereignty is attacked no doubt stand in the way.[64] Yet the recent attitude of the Supreme Court toward multiple taxation [65] leads to the question whether or not a corporation will indefinitely be held to be taxed rightfully both by the state of incorporation, upon its entire business, and by other states in which it does business, upon its property and business within those states. Such taxation by the state of incorporation will inevitably place a burden upon the conduct of interstate business, and violate the protection given by the due process clause to property situated and business carried on outside the taxing state.

R. N. C.

64. For a defense of the State's powers and an exposition of the compromise view of "reasonable adjustment", see Brown, *State Taxation of Interstate Commerce and Federal and State Taxation in Intergovernmental Relations—1930-1932* (1933) 81 U. OF PA. L. REV. 247.

65. It is interesting to note that the idea of double taxation has changed considerably since the statement of the Court in The Ohio Tax Cases, 232 U. S. 576 (1914), that no double taxation in the legal sense exists unless two taxes are levied upon the same property in the same jurisdiction. For a thorough discussion of the recent trend in cases involving multiple taxation, see Brown, *Multiple Taxation—What Is Left of It?* (1935) 48 HARV. L. REV. 407. Considerable revision of constitutional interpretation has taken place since the terse statement by the Court in Cream of Wheat Co. v. Grand Forks, 253 U. S. 325, 330 (1920), that "the Fourteenth Amendment does not prohibit double taxation". See also Hart, *Social Justice and Business Costs—A Study in the Legal History of Today* (1936) 49 HARV. L. REV. 593, 596.