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California Code of Civil Procedure Section 351: Who's Really Paying the Toll

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California Code of Civil Procedure
Section 351: Who's Really Paying the Toll?

California Code of Civil Procedure section 351\(^1\) tolls a statute of limitations where either a defendant is not within the state when the cause of action accrues, or where a defendant leaves the state after the cause of action accrues.\(^2\) California courts, in interpreting section 351, have created an inconsistent body of law.\(^3\) The inconsistencies arise where the defendant is already amenable to alternative service of process\(^4\) or where the defendant has never been physically present in California.\(^5\)

Although these situations involve a broad application of section 351, the general trend has been to limit the scope of section 351.\(^6\) For example, courts have found that section 351 does not apply to

\(^1\) CAL. CIV. PROC. CODE § 351 (West Supp. 1992).
\(^2\) See also id. at 21 (explaining that a cause of action accrues when a suit may be maintained thereon).
\(^3\) Id.
\(^4\) See infra notes 69-87 and accompanying text (discussing the applicability of section 351 despite the fact that alternative service may have been available).
\(^5\) See infra notes 111-128 and accompanying text (discussing the tolling provision’s applications in situations where the defendant has never been physically present in the state).
\(^6\) See Abramson v. Brownstein, 897 F.2d 389, 393 (9th Cir. 1990) (holding section 351 unconstitutional in situations involving interstate commerce); Cardoso v. American Medical Systems, Inc., 183 Cal. App. 3d 994, 998-99, 228 Cal. Rptr. 627, 628-29 (1986) (stating that the section 351 tolling statute does not apply to foreign corporations); Epstein v. Frank, 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831, 835 (1981) (holding section 351 inapplicable to limited partnerships when the sole general partner is absent from the state); Bigelow v. Smik, 6 Cal. App. 3d 10, 15, 85 Cal. Rptr. 613, 616 (1970) (holding that the tolling statute does not apply to nonresident motorists).
cases involving defendant corporations\textsuperscript{7} and nonresident motorists.\textsuperscript{8} In addition, the statute's scope of application has been limited by Abramson v. Brownstein.\textsuperscript{9} In Abramson, the United States Ninth Circuit Court of Appeals found that the use of section 351 in cases involving interstate commerce is an unconstitutional violation of the Commerce Clause.\textsuperscript{10} The narrowed scope of section 351 illustrated by cases like Abramson is indicative of both the federal and California courts' recognition that the need for section 351 no longer outweighs the burden it places on defendants.

The California Legislature originally enacted section 351 to alleviate the adverse effect on resident plaintiffs created by the state courts' inability to assert in personam jurisdiction over out-of-state defendants.\textsuperscript{11} However, this purpose is now adequately served by state long arm statutes and alternative service of process.\textsuperscript{12} Long arm statutes\textsuperscript{13} and alternative methods of serving

\begin{itemize}
\item[7.] See Loope v. Greyhound, Inc., 114 Cal. App. 2d 611, 614, 250 P.2d 651, 653 (1952). See also infra notes 129-136 and accompanying text (discussing the inapplicability of section 351 to corporate defendants).
\item[8.] See Bigelow v. Smik, 6 Cal. App. 3d 10, 15, 85 Cal. Rptr. 613, 616 (1970) (holding that section 351 does not apply to nonresident motorists). See infra note 97-108 and accompanying text (discussing the inapplicability of section 351 to nonresident motorists).
\item[9.] 897 F.2d 389 (1990). See infra note 171-179 and accompanying text (discussing the Court's reasoning in Abramson).
\item[10.] Abramson v. Brownstein, 897 F.2d 389, 393 (9th Cir. 1990). See infra notes 171-179 and accompanying text (discussing the holding in Abramson v. Brownstein).
\item[11.] See Dew v. Appleberry, 23 Cal. 3d 630, 633-34, 591 P.2d 509, 511, 153 Cal. Rptr. 219, 221 (1979) (noting that the original purpose of section 351 was to protect resident plaintiffs from out of state defendants who could not be served with a summons and complaint in an in personam action). The court in Dew noted that despite the fact that the original purpose served by section 351 has been eliminated by subsequent law, the legislature may have reasonably determined that because it is more difficult to serve a defendant who is not physically present in the state, it would not be fair to force a resident plaintiff to pursue a defendant out of the state. Id. at 634-35, 591 P.2d at 512, 153 Cal. Rptr. at 221.
\item[12.] See International Shoe Co. v. Washington, 326 U.S 310, 316 (1945) (holding that a state court could subject a person outside the territorial limits of its borders to service of process if there was specified minimum contacts with the state such that traditional notions of fair play and substantial justice were served). See also infra notes 43-56 and accompanying text (discussing development of long arm statutes).
\item[13.] See J. FriEndenthal, M. Kane, A. Miller, Civil Procedure 139-40 (West Publishing Co. 1985). Long arm statutes assert jurisdiction over nonresidents based on whatever contacts the nonresident has with the forum, including the transaction of business in the state and the commission of any one of a number of acts usually set forth in the statute. Id. Some examples of acts referred to under the long arm statutes to determine if sufficient contacts exist with the forum state are the commission of a tort within the state or outside of the state but impacting people or property within

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process\textsuperscript{14} render section 351 an unnecessary burden on defendants who are outside of the state while the statute of limitations runs.\textsuperscript{15} In addition, plaintiffs have increasingly utilized section 351 in a manner inconsistent with its original purpose.\textsuperscript{16} For these reasons, section 351 should be repealed, or in the alternative, amended to avoid the problems resulting from its current application.\textsuperscript{17}

This Comment will discuss the problems created in the current application of section 351, and examine whether the California Legislature should repeal section 351 or amend it to avoid these problems. Part I provides the legal background of tolling statutes relating to out of state defendants.\textsuperscript{18} Part II analyzes the case law and legislative development of section 351.\textsuperscript{19} Part III focuses on the inequities inherent in various applications of section 351, and the affect of such applications on parties to the action.\textsuperscript{20} Finally, Part IV suggests that the legislature should repeal section 351, and proposes a statutory alternative.\textsuperscript{21}

\textsuperscript{14} See \textit{id.} at 164. The authors note that due process demands that defendant be given notice of the institution of proceedings against him or her, and then define process as the means by which a defendant is given notice and an opportunity to be heard. \textit{id.} Process generally consists of a summons, which directs the defendant to appear before the court under penalty of default, and a copy of the complaint. \textit{id.} at 165.

\textsuperscript{15} See infra notes 51-56, 188-196 and accompanying text (discussing how the necessity of section 351 is decreased by subsequently enacted legislation and case law). \textit{See also infra} notes 111-128, 197-199 and accompanying text (discussing the burden section 351 imposes on defendant by forcing them to be physically present in the state in order to be benefitted by a statute of limitations defense).

\textsuperscript{16} See O'Laskey v. Sortino, 224 Cal. App. 3d 241, 252, 273 Cal. Rptr. 674, 680 (1990) (noting that section 351 was "penalizing a defendant for having taken a legitimate four-day vacation out of state long before the statute ran... [and]... rewarding a tardy plaintiff who has failed to file an action within the statutory period").

\textsuperscript{17} See \textit{infra} notes 212-214 and accompanying text (discussing solutions to the problems created by section 351).

\textsuperscript{18} See \textit{infra} notes 22-56 and accompanying text.

\textsuperscript{19} See \textit{infra} notes 57-185 and accompanying text.

\textsuperscript{20} See \textit{infra} notes 186-211 and accompanying text.

\textsuperscript{21} See \textit{infra} notes 212-214 and accompanying text.
I. LEGAL BACKGROUND

To understand how developments in the law of in personam jurisdiction have eradicated the need for the section 351 tolling provision, it is important to analyze the statute of limitations defense and the reasons why statutes similar to section 351 were enacted. A statute of limitations is any statute defining a prescribed time period during which a litigant may file a substantive claim or enforce a specific right. The United States Supreme Court has noted that the basic policy underlying statutes of limitations is to further justice by preventing defendants from being surprised by the restoration of claims that have laid dormant until evidence has been misplaced, witnesses have disappeared, and facts have been forgotten. The theory behind a statute of limitations, according the Supreme Court, is that over time an aggrieved party's right to bring a law suit is outweighed by the strong policy against burdening a defendant with an ancient claim.

However, if the plaintiff is physically unable to bring his or her cause of action due to a disability, it would be unjust to extinguish the cause of action for the plaintiff's failure to comply


23. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944). The Court held that even when the plaintiff has a just claim, it is unjust not to put the defendant on notice within the limitations period. Id.

24. See Wood v. Carpenter, 101 U.S. 135, 139 (1879) (noting that by barring a party's cause of action, legislatures have determined that the right to be free of a stale claim outweighs the right to pursue that claim where a significant amount of time has passed). The Wood Court's holding relied on the policy that a statute of limitations promotes stability since a person can be secure that past claims, forgotten with the passage of time, will not surprise him or her at some point in the future. Id. at 139. Cf. Wooded Shores Property Owners Ass'n, Inc. v. Mathews, 37 Ill. App. 3d 334, 345 N.E.2d 186, 189 (1976) (stating that the defense of laches, similar to a statute of limitations, is based upon the notion that the law aids those who are timely in pursuing their rights and not those who slumber on their rights). But cf. Holmberg v. Armbricht, 327 U.S. 392, 396 (1946) (holding that the defense of laches is not like a statute of limitations because it does not deal with a mere time limitation but instead with a question of the inequity of permitting the claim to be enforced when some change in the conditions or relations of the property or the parties has taken place).

25. See BLACK'S LAW DICTIONARY 461 (6th ed. 1990) (defining disability as "[t]he want of legal capability to perform an act"). See also Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) (noting that a disability occurs when a plaintiff has not slept on his or her rights but, rather has been prevented from asserting them).
with the applicable statute of limitations.\textsuperscript{26} This idea has long been recognized by state legislatures, which have provided exceptions to the general time limitations where a plaintiff is unable to comply with the applicable statute of limitations because of a specified disability.\textsuperscript{27} For example, in California, section 351 considers a plaintiff to be under such a disability when the party against whom the plaintiff has a claim cannot be found within the plaintiff's state of residence.\textsuperscript{28} The key to understanding why the California Legislature considered a plaintiff to be under a disability if the defendant was not physically present in the state is found in a close analysis of state courts' jurisdiction at the time section 351 was enacted.

The purpose behind the tolling provision in California Code of Civil Procedure section 351 relates back to the doctrine introduced in \textit{Pennoyer v. Neff}.\textsuperscript{29} In \textit{Pennoyer}, the United States Supreme Court determined that no state could establish in personam jurisdiction over a party beyond its territorial limits.\textsuperscript{30} The

\textsuperscript{26} See generally Blankenship, \textit{For Whom the Statute Tolls--The Statute of Limitations as Applied to Foreign Defendants in Countries Which do not Permit Service by Mail}, 27 \textit{SANTA CLARA L. REV.} 765, 767-68 (1987) (noting that the policy behind statutes of limitations can only be served if the plaintiff has the ability to bring his or her cause of action).

\textsuperscript{27} See e.g., \textsc{Cal. Civ. Proc. Code} § 337(3) (West Supp. 1992) (providing that when the plaintiff has not yet discovered the facts constituting the fraud or mistake which has been perpetrated against him or her, that plaintiff is under a disability and the statute of limitations is tolled); \textsc{Cal. Civ. Proc. Code} § 352(a) (West Supp. 1992) (providing that plaintiff is under a disability if he or she is under the age of majority, insane or imprisoned on a criminal charge, and the time in which they are under such a disability is not a part of the time limited for the instigation of their cause of action).

\textsuperscript{28} See \textit{id.} § 351 (West Supp. 1992) (providing that plaintiff is under a disability and the statute of limitations is tolled when a defendant cannot be found within the state).

\textsuperscript{29} Id. at 95 U.S. 714 (1877).

\textsuperscript{30} See J. Friedenthal, \textit{supra} note 13 at 98 (West Publishing Co. 1985) (defining in personam jurisdiction as jurisdiction over a person which allows a court to subject that person to its decision-making power). The \textit{Pennoyer} Court defined personal jurisdiction over a party, or an in personam action, as jurisdiction to determine the personal rights and obligations of that party. \textit{Pennoyer}, 95 U.S. at 722. The Court distinguished this from an in rem action which involves a proceeding where property is brought under the control of the court, or where the judgment is sought as a means of reaching such property or effectuating some interest therein. \textit{Id.} at 734.

\textsuperscript{31} \textit{Id.} at 722. \textit{Pennoyer} involved a suit brought in Oregon to recover legal fees allegedly owed to the plaintiff, a resident of Oregon, by the defendant, a nonresident owning land in Oregon. \textit{Id.} at 719-20. The defendant was served by publication and the plaintiff obtained a default judgment. \textit{Id.} at 720. The Oregon court ordered the defendant's land sold at a sheriff's sale to satisfy the judgment, and the plaintiff purchased the land at the sale. \textit{Id.} at 719. The defendant subsequently
Court reasoned that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory and therefore no state can exercise direct jurisdiction and authority over persons or property outside of its territory.\(^3\) Holding that process sent out of state to a nonresident is ineffective to confer in personam jurisdiction, the *Pennoyer* Court reasoned that in an action to determine a defendant's in personam liability, the defendant must be brought within the state court's jurisdiction by service of process within the state or by the defendant's voluntary appearance.\(^3\)

The holding in *Pennoyer* created a situation where a state resident was unable to pursue a cause of action against a nonresident, if the latter left the state after the cause of action accrued, because the state court could not obtain in personam jurisdiction over the nonresident.\(^3\) Without the enactment of tolling provisions such as section 351, a defendant could avoid liability by simply remaining outside the state where the cause of action accrued until the applicable statute of limitations ran, thereby escaping accountability for his or her conduct. This result left a resident plaintiff, often times unable or unwilling to pursue a defendant in that defendant's state of residence, without means of redressing the injury.\(^3\)

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32. *Id.* at 722. The *Pennoyer* Court ultimately held that although service of process by publication is effectual in a proceeding in rem, such service is ineffectual to confer jurisdiction over a nonresident defendant in an in personam action. *Id.* at 727. In applying the service of process rules to the facts of the case, the Court determined that although the suit ultimately involved the sale of property, the initial money judgment was rendered in an in personam action against the defendant, and therefore the publication of process was insufficient to give the state court jurisdiction over the defendant. *Id.* at 728.

33. *Id.* at 733. The Court held that without jurisdiction, due process is not satisfied and the action is constitutionally impermissible. *Id.* at 734.

34. *See id.* at 722 (holding that a party had to be physically present within the state for effective service of process).

35. *See Halper, Limitations of Actions—Absence of the Defendant: Tolling the Statute of Limitations on a Foreign Cause of Action, 1 UCLA L. REV. 619, 619-20 (1954) (noting that before enactment of tolling provisions like section 351, resident plaintiffs often could not maintain a legal action against a nonresident defendant before the applicable statute of limitations foreclosed that*
In essence, by not allowing a state court to extend its in personam jurisdiction outside of its borders, the holding in 
Pennoyer forced states to devise statutory provisions which preserved a resident plaintiff’s claim until it could be initiated.\textsuperscript{36} Section 351, and tolling provisions like it, served this need effectively by tolling statute of limitations until the state court could obtain in personam jurisdiction over the defendant, thereby allowing the plaintiff to initiate his or her action.\textsuperscript{37} By tolling a statute of limitations while a defendant was absent from the state, state legislatures were able to ensure that a resident of the state would not be denied his or her cause of action due to an inability to comply with a statute of limitations.

Nineteenth century America was very provincial and state-oriented in character, and the jurisdictional doctrine set forth in 
Pennoyer, which was based on a state’s power within its own territory, served the needs of that type of society relatively well.\textsuperscript{38} However, as time passed, and the United States moved into the twentieth century, society became more mobile and the focus in commerce and politics came to rest on the nation as a whole rather than on each individual state.\textsuperscript{39} The inflexible jurisdictional doctrine espoused in 
Pennoyer no longer met the needs of this changing society.\textsuperscript{40} The introduction of quicker, more efficient

\textsuperscript{36}See 
Pennoyer, 95 U.S. at 734. The Court held that before a state court can adjudicate a claim, due process of law requires appearance or personal service before the defendant can be personally bound by any judgment rendered. Id. The Court further held that such personal service must be made within the state to be valid. Id. at 733.

\textsuperscript{37}See 
Dew v. Appleberry, 23 Cal. 3d 630, 634, 591 P.2d 509, 511, 153 Cal. Rptr. 219, 221 (1979). The court noted that section 351 was enacted to prevent a claim from being barred simply because the defendant, being outside the state, could not be served with a summons and complaint in an in personam action. Id.

\textsuperscript{38}See J. 
Friedenthal, supra note 13, at 123 (noting that after 
Pennoyer, court began creating exceptions to the physical presence rule which “reflected judges’ attempts to tailor nineteenth century jurisdictional doctrine to fit the realities of the twentieth century”).

\textsuperscript{39}See 
Id. at 123 (discussing how changes in society caused emphasis to fall on the nation as a single economic entity rather than just a collection of individual state economies).

\textsuperscript{40}See 
Id. at 123 (discussing the United States Supreme Court’s recognition that the realities of twentieth century America rendered the 
Pennoyer rule an anachronism because the inflexible, territorial based jurisdiction rules could not adequately serve a society that was becoming interstate in character).
interstate transportation greatly increased travel between states as well as the volume of interstate business transactions. Such increases in interstate travel and commerce resulted in frequent contact between state residents and nonresidents, necessarily leading to increased incidents of the residents initiating legal actions against nonresidents in the resident's state courts. This increased litigation between residents and nonresidents created a greater need for state courts to obtain in personam jurisdiction over nonresidents.

In an effort to facilitate litigation, state legislatures enacted statutes allowing state courts to obtain in personam jurisdiction over nonresidents. One such statute implied the consent of a nonresident to a state official serving as an agent upon whom process could be served. Another provision that expanded a state's ability to obtain in personam jurisdiction over nonresident defendants was created when the United States Supreme Court upheld the validity of a Washington long-arm statute in *International Shoe Co. v. Washington*.

In *International Shoe*, the Supreme Court moved away from the concept developed in *Pennoyer* requiring physical presence within the state as a prerequisite for obtaining in personam jurisdiction.

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41. See id. at 123 (noting the increased mobility of society in the time period following the *Pennoyer* decision).

42. See id. at 102-104 (noting that exceptions to the rigid territoriality rule of *Pennoyer* became necessary to bring jurisdiction in line with changes occurring in the areas of transportation and communication and in the basic mode of transacting business).

43. See infra note 49 (setting forth various methods state legislatures used to bring nonresident defendants within the jurisdiction of the state courts).

44. See *Kane v. New Jersey*, 242 U.S. 160 (1916) (upholding a New Jersey statute requiring nonresidents to register with the Secretary of State designating such official as an agent upon whom process could be served in actions arising within the state); see also *Hess v. Pawloski*, 274 U.S. 352, 355-57 (1927) (finding that a statutory scheme in which simply by using the roads and highways of a state a nonresident motorist would be deemed to have consented to the appointment of a state official as an agent upon whom process could be served upon was not inconsistent with due process).

45. 326 U.S. 310 (1945).

46. *International Shoe*, 326 U.S. at 316. The case involved a Washington statute that set up a scheme of unemployment compensation which required contributions by employers. Id. at 311. The statute authorized the State Commissioner to issue an order and notice of assessment of delinquent contributions by mailing the notice to nonresident employers. Id. at 312. The defendant, a Delaware Corporation with its principal place of business in Missouri, employed between eleven and thirteen salespersons in Washington and had not been contributing to the state unemployment scheme. Id. at
In departing from the physical presence requirement, the Court established that a state court could subject a person outside the territorial limits of its borders to service of process if there were specified minimum contacts with the state,\textsuperscript{47} such that the maintenance of the suit did not violate ""traditional notions of fair play and substantial justice.""\textsuperscript{48} The Court in \textit{International Shoe} held that when these minimum contacts were established between a defendant and the state asserting jurisdiction, due process of law would not be violated by allowing alternative service of process\textsuperscript{49} upon a defendant not physically present in the state.\textsuperscript{50}

Long arm statutes and alternative methods of service of process increase the ability of state courts to obtain in personam jurisdiction over both nonresident individuals and foreign corporations, because defendants no longer have to be present within the state to be served with process.\textsuperscript{51} Moreover, long arm statutes increase a party's ability to litigate where constitutional

\textsuperscript{312-13}. In response to defendant's delinquent contributions, the plaintiff served notice of assessment upon one of defendant's salespersons, and a copy of the notice was sent by registered mail to defendant's Missouri address. \textit{Id.} at 312.

\textsuperscript{47}. \textit{Id.} at 318-19. The Court clarified the term \textit{minimum contacts} by adding that these contacts must be such as to make it reasonable, in the context of the federal system and due process of law requirements, to expect a defendant corporation to defend the suit brought in the state asserting jurisdiction. \textit{Id}. The \textit{International Shoe} Court further noted satisfaction of due process depends on the quality and nature of the activity in relation to the fair and orderly administration of the laws. \textit{Id.} at 319. Even single or occasional acts may, because of their nature, quality and circumstances, be deemed sufficient to render a corporation liable to suit. \textit{Id.} at 318.

\textsuperscript{48}. \textit{Id.} at 316. The Court found that given the facts of the case, the defendant's activities were both systematic and continuous and it's obligations arose out of these activities. \textit{Id.} at 320. Therefore, these activities were adequate to establish sufficient contacts to make it reasonable to permit plaintiff to enforce the obligations defendants incurred in Washington. \textit{Id.} at 321.

\textsuperscript{49}. \textit{J. FRIEDENHAL, supra} note 13, at 169. Alternative or constructive service of process, not requiring that the defendant be personally served with process, can satisfy due process requirements. \textit{Id.} Forms of alternative service of process include leaving the process at the defendant's home, mailing the process to the defendant, or in some circumstances, publishing the contents of the summons in a newspaper for a prescribed number of times. \textit{Id. See also infra} note 75 and accompanying text (setting out the California statutory scheme that provides for alternative service of process).

\textsuperscript{50}. \textit{International Shoe}, 326 U.S. at 316. \textit{See U.S. CONST. amend. XIV, § 1} (providing that no state may ""deprive any person of life, liberty, or property, without due process of law").

\textsuperscript{51}. \textit{International Shoe}, 326 U.S. at 316.
proscription of extraterritorial service of process, as established in Pennoyer, previously prevented such litigation.\(^2\)

In cases following International Shoe, the Supreme Court further refined the constitutional limits of long arm statutes by clarifying what contacts were required between a state and a nonresident defendant in order for the state to assert in personam jurisdiction.\(^3\) The International Shoe decision, and the cases that followed,\(^4\) validated the expansion of state court jurisdiction, and motivated state legislatures to enact extensive jurisdictional legislation based on the defendant's activities in, or contacts with, the forum state.\(^5\) The prevalence of long arm statutes in state statutory law and the expanded jurisdiction of state courts that such statutes confer, in conjunction with the development of alternative service of process, significantly decreased, or even eliminated, the

52. See Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts, 25 U. CH. L. REV. 569, 586 (1958) (noting the expansion in a resident plaintiff's ability to sue out-of-state defendants since the Supreme Court’s holding in International Shoe).

53. See Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987) (holding that a substantial connection between defendant and the forum state must come about by action of the defendant purposefully directed toward the forum state in order to satisfy the minimum contacts requirement set forth in International Shoe); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (holding that even though a defendant could foresee the entry of its product into Oklahoma, this was not enough without evidence that the defendant had availed herself of the privileges and benefits of the forum state’s law, to establish minimum contacts with Oklahoma, despite the fact that the cause of action arose in Oklahoma); Kulko v. Superior Court, 436 U.S. 84, 94-96 (1978) (holding that the defendant's act of sending his daughter to California to live with her mother connoted neither intent to obtain nor expectation to receive any benefits of California’s laws, therefore no minimum contacts existed with California); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (holding that the unilateral act of the settlor of a trust exercising her power of appointment in Florida, was not enough to create sufficient contacts with Florida for the purpose of obtaining jurisdiction over the trustee); McGee v. International Life Insurance Company, 355 U.S. 220, 226 (1957) (holding that for the purposes of due process, a suit based on a single contact which had substantial connection with the state's courts was sufficient to satisfy the minimum contacts requirement).

54. See supra note 53 (identifying the cases following International Shoe that developed the constitutional limits of long-arm statutes and refined the rule created by the Supreme Court in International Shoe).

55. See J. FRIEDENTHAL, supra note 13, at 139-40 (discussing the increased use of long arm statutes by state courts). See also infra note 74 (providing California’s long-arm statute).
need for statutes which toll a statute of limitations during the time in which a defendant is not present within the forum state.  

II. CASE LAW AND LEGISLATIVE HISTORY OF SECTION 351

Section 351 provides that when a cause of action accrues against a party, and that party is not in the state or leaves the state after the action accrues, the statute of limitations is tolled. As a result, a defendant asserting a statute of limitations defense may not include the time he or she was absent from the state as part of the time prescribed in the statute of limitations. For the purposes of section 351, a defendant is outside of the state not only where the defendant resides outside of California, but also during brief trips outside of the state. In addition, the general language of section 351 does not limit the statute’s application to any one class of defendant or cause of action. However, in applying section 351, courts have distinguished between individual, or non-corporate defendants, and corporate defendants.

56. See infra notes 188-214 and accompanying text (discussing the decreasing need of section 351 in California and proposing solutions to the problems created by section 351). See Mounts v. Uyeda, 272 Cal. Rptr. 876, 881 (1990) (King, J., concurring), reh’g granted, 277 Cal. App. 3d 111, 277 Cal. Rptr. 730 (1991). The concurring opinion notes that a California statutory provision tolling the statute of limitations during the period when a defendant was out of state may have been logical when long-arm statutes did not exist and a resident plaintiff could not serve an absent defendant by substituted service or by publication. Id. The concurrence further indicated that today section 351 makes no sense and should be repealed. Id.


58. Id.

59. See Mounts v. Uyeda, 227 Cal. App. 3d 111, 114, 277 Cal. Rptr. 730, 732 (1991) (tolling the statute of limitations for a four day period in which the defendant traveled outside of California); O’Laskey v. Sortino, 224 Cal. App. 3d 241, 245-46, 273 Cal. Rptr. 674, 676 (1990) (tolling the statute of limitations for a two week period in which the defendant was vacationing in Las Vegas); Dew v. Appleberry, 23 Cal. 3d 630, 633, 591 P.2d 509, 510-11, 153 Cal. Rptr. 219, 221 (1979) (tolling the statute of limitations for a five week period in which the defendant was in Ohio visiting his parents).

60. CAL. CIV. PROC. CODE § 351 (West 1982 & Supp. 1991). The language of section 351 does not distinguish between non-corporate and corporate defendants, or between resident and nonresident defendants. Id. Additionally, section 351 does not specify what type of statute of limitations or cause of action it applies. See id.

61. See infra notes 129-136 and accompanying text (discussing section 351 inapplicability to corporate defendants).
A. Section 351 Applied to Individual Defendants

In the case of non-corporate defendants, section 351 tolls the statute of limitations while the individual, or non-corporate entity, is outside of the state. However, section 351 will not toll a statute of limitations for nonresident motorists, limited partnerships, and non-corporate parties involved in interstate commerce. Other than these exceptions, California courts have consistently upheld the propriety of section 351 in cases involving non-corporate defendants. The expansion of state courts' ability to assert in personam jurisdiction as developed by the Supreme Court since Pennoyer however, caused the California Supreme Court, in Dew v. Appleberry, to review the continued validity of section 351.

62. CAL. CIV. PROC. CODE § 351 (West Supp. 1992). See Dew, 23 Cal. 3d at 637, 591 P.2d at 514, 153 Cal. Rptr. at 223-24 (holding that in cases involving non-corporate defendants, the time in which a defendant is absent from the state is not part of the time limited for the commencement of the action). See also infra notes 63-128 and accompanying text (discussing the application of section 351 to individual defendants).

63. See Bigelow v. Smik, 6 Cal. App. 3d 10, 15, 85 Cal. Rptr. 613, 616 (1970) (holding that section 351 does not apply to nonresident motorists). See also infra notes 97-108 and accompanying text (discussing the inapplicability of section 351 to nonresident motorists).

64. See Epstein v. Frank, 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831, 835 (1981) (holding section 351 inapplicable to limited partnerships when the sole general partner is absent from the state). See also infra notes 137-141 and accompanying text (discussing the inapplicability of section 351 to a limited partnership).

65. See Abramson v. Brownstein, 897 F.2d 389, 393 (9th Cir. 1990) (holding section 351 unconstitutional in situations involving interstate commerce). See infra notes 171-179 and accompanying text (discussing the Ninth Circuit Court of Appeals finding that section 351 is an impermissible burden on interstate commerce).

66. See, e.g., Mounts v. Uyeda, 277 Cal. App. 3d 111, 122, 277 Cal. Rptr. 730, 738 (1991) (applying section 351 in a case involving a state resident who left the state for a four day period); O'Laskey v. Sortain, 224 Cal. App. 3d 241, 251-52, 273 Cal. Rptr. 674, 680 (1990) (applying section 351 in a case involving a defendant who was absent from the state for two weeks during the running of the statute of limitations); Kohan v. Cohan, 204 Cal. App. 3d 915, 921 251 Cal. Rptr. 570, 573-74 (1988) (upholding the applicability of section 351 in a case involving a claim which arose in a foreign country); Dew v. Appleberry, 23 Cal. 3d 630, 637, 591 P.2d 509, 513, 153 Cal. Rptr. 219, 223-24 (1979) (applying section 351 in a case involving a defendant who left the state for a five week period during the running of the statute of limitations).


68. See id. at 636, 591 P.2d at 513, 153 Cal. Rptr. at 223 (holding that a defendant's amenability to service of process was irrelevant to the application of the section 351 tolling provision). See infra note 69-87 and accompanying text (discussing the reasoning behind the holding in Dew).
1. Effect of Expansion of State Court Jurisdiction on the Applicability of Section 351

*Dew* involved a personal injury claim in which the plaintiff was injured in a fall on the defendant's property on September 23, 1973. The plaintiff did not file suit until September 24, 1974, a year and one day after the cause of action accrued. The defendant's answer to the plaintiff's complaint asserted that the claim was barred by the one year statute of limitations applicable to negligence actions. During the pleading stage of the action, the defendant admitted to being outside of California on a five week vacation during the year in which the statute of limitations was running. However, at all times during that one year period, including the five week absence from the state, the defendant was amenable to alternate service of process and a personal judgment could have been obtained against him.

The plaintiff argued that, pursuant to section 351, the time the defendant was absent from the state after the cause of action accrued was not part of the time provided for in the applicable statute of limitations. Addressing plaintiff's contention, the defendant argued that section 351 should not apply to the pending action because California legislation passed after the enactment of section 351 provides for alternate methods of service sufficient

69. *Dew*, 23 Cal. 3d at 632-33, 591 P.2d at 511, 153 Cal. Rptr. at 220.
70. Id.
71. Id. at 633, 591 P.2d at 511, 153 Cal. Rptr. at 220. See CAL. CIV. PROC. CODE § 340 (West Supp. 1992) (providing, in part, that the statute of limitations for an injury caused by the wrongful act or neglect of another is one year).
72. *Dew*, 23 Cal. 3d at 633, 591 P.2d at 511, 153 Cal. Rptr. at 221.
73. Id. at 633-34, 591 P.2d at 511, 153 Cal. Rptr. at 221. The defendant was a permanent resident of California residing in San Francisco with his wife and children at the time of, and for the entire year following, the accident and owned property where the accident occurred. Id. at 633. Furthermore, during the defendant's brief absences from the state of California, he maintained the same business and residential address as he had at the time of the accident. Id.
74. Id. at 633, 591 P.2d at 511, 153 Cal. Rptr. at 220-221.
75. Several statutes have been enacted in California providing for alternative methods of service of process on a defendant who is absent from the state. See CAL. CIV. PROC. CODE § 415.20 (West Supp. 1992) (providing that a summons and complaint may be served by leaving a copy at the office, dwelling house, usual place of abode or usual place of business of the person to be served); id. §§ 415.30, 415.40 (West Supp. 1992) (providing that a summons and complaint may be served
to confer jurisdiction upon the court to enter a personal judgment against a defendant who cannot be found within the state. 76 The defendant contended that the alternate methods of service available to a plaintiff negated the underlying policy, and therefore, the necessity of section 351. 77

The California Supreme Court affirmed the plaintiff's use of section 351, holding that section 351 was not dependant on the availability of alternative service on a defendant. 78 The court reasoned that the legislature may have reasonably concluded that a plaintiff may be impeded by a defendant's absence from the state, and that it would be inequitable to compel a plaintiff to pursue that defendant out of state in order to comply with the applicable statute of limitations. 79 For this reason, the court found that the defendant's amenability to service of process is irrelevant in the determination of whether section 351 should be applied. 80 Therefore, the Dew court concluded that there was not an irreconcilable conflict between section 351 and the statutes governing substituted service. 81 The court harmonized section 351 with the statutes governing substituted service by concluding that

by mailing a copy to the party within or without the state); id. § 415.50 (West Supp. 1992) (providing that a summons and complaint may be served by publication "in a named newspaper, published in this state, that is most likely to give actual notice to the party to be served"); id. § 410.10 (West Supp. 1992). (setting forth the California long arm statute which provides for the exercise of jurisdiction on any basis not inconsistent with the state or federal constitution).

76. Dew, 23 Cal. 3d at 633-34, 591 P.2d at 511-12, 153 Cal. Rptr. at 221-222.

77. Id. at 633, 591 P.2d at 511, 153 Cal. Rptr. at 221. See Schneider v. Schneider, 82 Cal. App. 2d 860, 862, 187 P.2d 459 (1947) (noting that the policy underlying section 351 was to prevent the statute of limitations from barring a claim simply because the plaintiff was unable to serve the defendant with process due to the defendant's absence from the state).

80. Dew, 23 Cal. 3d at 635-36, 591 P.2d at 513, 153 Cal. Rptr. at 222-23. See Garcia v. Flores, 64 Cal. App. 3d 705, 709, 134 Cal. Rptr. 712, 714 (1976) (holding that a court should look at whether the defendant is physically present in California, rather than whether the defendant is amenable to service of process, in determining the applicability of section 351).

81. Dew, 23 Cal. 3d at 635-36, 591 P.2d at 513, 153 Cal. Rptr. at 222-23. See supra note 49 and accompanying text (discussing various types of substituted service of process).
the latter was simply an effort by the legislature to encourage a plaintiff to adjudicate his or her claim promptly if possible.\textsuperscript{82}

In addressing the defendant's argument that section 351 was an unconstitutional infringement upon the right to travel freely, the \textit{Dew} court relied on an analogy to section 802 of the California Penal Code,\textsuperscript{83} which is a tolling provision similar to section 351 that applies to criminal proceedings.\textsuperscript{84} In \textit{Scherling v. Superior Court},\textsuperscript{85} the court found that because the section 802 tolling provision did not subject a criminal defendant to an enhanced penalty, section 802 in no way impinged on a defendant's right to travel freely.\textsuperscript{86} The court in \textit{Dew} found that section 351, like section 802, did not subject defendants to an enhanced penalty if they left the state after the cause of action accrued, therefore section 351 did not impinge on the constitutional right to free travel.\textsuperscript{87} The \textit{Dew} decision focused on section 351 when used by a plaintiff in a state action, however, the applicability of section 351 has been at issue in actions based in federal law as well.

\begin{itemize}
\item \textsuperscript{82} \textit{Dew}, 23 Cal. 3d at 636, 591 P.2d at 513, 153 Cal. Rptr. at 223. The \textit{Dew} court determined that the statutes governing substituted service of process lessen the need for section 351, but do not eliminate the need. \textit{Id}. The court further noted that the statutes governing substituted service are primarily an effort by the legislature to ensure the plaintiff a quick adjudication if possible, and were by no means enacted to repeal section 351. \textit{Id}.
\item \textsuperscript{83} \textit{See CAL. PENAL CODE} § 803(d) (West Supp. 1992) (providing that if a criminal defendant is out of state when or after an offense is committed, the time during which he or she is absent is not to be computed as part of the limitations period).
\item \textsuperscript{84} \textit{Dew}, 23 Cal. 3d at 636, 591 P.2d at 513, 153 Cal. Rptr. at 223. \textit{See L. Tribe, AMERICAN CONSTITUTIONAL LAW} 528-530 (The Foundation Press, Inc. 1988) (discussing the privileges and immunities clause of Article IV, § 2 of the United States Constitution and its guarantee of the fundamental right of a citizen of one state to pass through or reside in any other state).
\item \textsuperscript{85} 22 Cal. 3d 493, 585 P.2d 219, 149 Cal. Rptr. 597 (1978).
\item \textsuperscript{86} \textit{Id}. at 502, 585 P.2d at 224, 149 Cal. Rptr. at 602. The California Supreme Court held that section 802 did not substantially impinge on the fundamental right to travel freely because the defendant was not subjected to a greater penalty, he was only faced with a tolled statutory period of limitations. \textit{Id}. at 500, 585 P.2d at 223, 149 Cal. Rptr. at 601.
\item \textsuperscript{87} \textit{Dew}, 23 Cal. 3d at 636-37, 591 P.2d at 513, 153 Cal. Rptr. at 223. The California Supreme Court noted that section 351 is identical to section 802 in that it does not subject the defendant to a greater penalty if he or she leaves California, it merely tolls the statute of limitation. \textit{Id}. \textit{See also} Kohan v. Cohan, 204 Cal. App. 3d 915, 923, 251 Cal. Rptr. 570, 575 (1988). The court in \textit{Kohan} noted that section 351 does not deprive nonresidents of the benefits of the statute of limitations. \textit{Id}. Rather, the court felt that it excludes from computation the time during which any defendant, resident or nonresident, may have been out of the state. \textit{Id}.
\end{itemize}
2. Viability of Section 351 in Actions Based on Federal Law

The application of section 351 in actions based on federal law has also been found to be valid, in spite of arguments that a defendant's amenability to alternate service of process should render section 351 inapplicable. The general rule regarding the application of section 351 to cases involving federal claims against non-corporate defendants, is that section 351 must be applied by federal courts when such application is consistent with constitution or other federal law.

In Maurer v. Individually and as Members of Los Angeles County Sheriff's Department, the Court of Appeals for the Ninth Circuit was presented with the issue of whether section 351 could be applied in a federal civil rights action. Upholding the use of section 351, the court found that the purpose behind section 351 was not inconsistent with the policies of deterrence and compensation embodied in the civil rights laws, 42 U.S.C. 1983.

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88. "Actions based on federal law" as used in this section refers to claims based on federal statutory law. See Black's Law Dictionary 610 (6th ed. 1990) (defining federal acts as statutes enacted by Congress, relating to matters within authority delegated to the federal government by the United States Constitution).
89. See Maurer v. Individually and as Members of Los Angeles County Sheriff's Department, 691 F.2d 434, 436-37 (9th Cir. 1982) (upholding validity of section 351 in an action for damages for an alleged violation of defendants civil rights under 42 U.S.C. §§ 1983 and 1985).
90. See Board of Regents v. Tomanio, 446 U.S. 478, 484-85 (1980) (holding that a federal court must uphold state tolling provisions, where applicable and where they are not inconsistent with the Constitution or other federal law).
91. 691 F.2d 434 (9th Cir. 1982).
92. Id. at 436. The plaintiff in Maurer was allegedly assaulted by members of the Los Angeles Police Department during an arrest. Id. at 435. After being acquitted on the charges that arose from his arrest, the plaintiff filed a complaint under 42 U.S.C. §§ 1983 and 1985(3) against the police officers involved in his arrest, seeking damages for a violation of his civil rights. Id. The district court dismissed the action against the police officers on the ground that it was "barred by California's three-year statute of limitations governing actions founded on a liability created by statute." Id. The plaintiff asserted that the statute of limitations was tolled under section 351 due to the absence of a defendant from the state. Id. at 436. The district court refused to apply section 351 because it concluded that "a state statute that tolled the limitations period for a defendant who was continuously available for substituted service of process was inconsistent with the policies underlying section 1983 as an independent federal remedy." Id.
93. Id. at 436. See 42 U.S.C. § 1983 (1982) (providing that any person who is denied any rights, privileges, or immunities secured by the Constitution and laws under the color of any statute, ordinance, regulation, custom, or usage, of any state, shall have an action at law, suit in equity, or other proper proceeding for redress).
The court in *Maurer* recognized that federal courts' reliance on state tolling provisions may eliminate nation-wide uniformity in federal decisions relating to the application of state tolling provisions, but the court upheld California's determination that the defendant's amenability to service of process was irrelevant under section 351.94

Both *Maurer* and *Dew* expressly upheld the broad language of section 351 through their validation of the use of the tolling provision, despite a defendant's amenability to service of process.95 Although this broad language has remained unchanged since the enactment of section 351 in 1892, the legislature has recognized that the application of section 351 is inequitable in certain situations and has, through subsequent legislation, eliminated the use of section 351 in cases involving nonresident motorists.96

3. Section 351 Applied to Nonresident Motorists

In *Bigelow v. Smik*,97 the California Second District Court of Appeal found that the application of section 17454 of the California Vehicle Code98 effectively eliminated the need for the


95. Both *Maurer* and *Dew* based their respective holdings on the rationale that the California Legislature may have found there is a need for section 351 despite the alternative methods of serving process. See *Dew*, 23 Cal. 3d at 636, 591 P.2d at 513, 153 Cal. Rptr. at 223 (noting that the legislature may have justifiably have concluded that defendant's physical absence impedes the defendant's availability for suit, and that it would be inequitable to force a claimant to pursue the defendant out of state in order effectively to commence an action within the limitations period).

96. See *Dew*, 23 Cal. 3d at 634-35, 591 P.2d at 512, 153 Cal. Rptr. at 222 (noting that the California Legislature passed legislation that has, in effect, rendered section 351 inapplicable to nonresident motorists). See also infra notes 98-101 and accompanying text (laying out the applicable section of the California Vehicle Code that renders section 351 inapplicable to nonresident motorists).


98. See CAL. VEH. CODE § 17454 (West Supp. 1992). The statute provides that, in situations involving a plaintiff's claim against a nonresident motorist:

*service of process shall be made by leaving one copy of the summons and complaint in the hands of the director or in his office at Sacramento or by mailing either by certified or registered mail, addressee only, return receipt requested, the copy of the summons and
application of section 351 in situations involving nonresident motorists by subjecting the defendant motorist to alternative service of process despite his or her absence from California. In Bigelow, the plaintiffs were injured in an automobile accident in Los Angeles, California, on August 20, 1963. A few days after the accident the defendant, a resident of Ohio, left California and did not return. On October 8, 1964, the plaintiffs filed suit in a California district court against the defendant and served the defendant with process in the manner provided by Vehicle Code section 17454. However, because the action was not commenced within the one year period prescribed by the appropriate statute of limitations, plaintiffs relied on section 351 in an effort to excuse the failure to comply with the statute of limitations.

The Bigelow court rejected the plaintiff's argument, stating that because a nonresident defendant has an agent authorized to accept process on his behalf in California, there was no reason for suspending the period of limitations for commencing an action against the defendant. The Bigelow court reasoned that because


100. Bigelow, 6 Cal. App. 3d at 12, 85 Cal. Rptr. at 614.

101. Id. at 12, 85 Cal. Rptr. at 614. See CAL. VEH. CODE § 17450 (West Supp. 1992) (defining nonresident, for the purposes of the vehicle code, as a person who is not a resident of the state of California at the time the accident or collision occurs).

102. Bigelow, 6 Cal. App. 3d at 12, 85 Cal. Rptr. at 614. See supra note 98 (providing the language in section 17454 of the California Vehicle Code).

103. Bigelow, 6 Cal. App. 3d at 12, 85 Cal. Rptr. at 614. See CAL. CIV. PROC. CODE § 340(3) (West Supp. 1992) (providing a one year statute of limitations in actions for the injury to, or for the death of, one caused by the wrongful act or neglect of another).

104. Bigelow, 6 Cal. App. 3d at 12, 85 Cal. Rptr. at 614.

105. Id. at 13-14, 85 Cal. Rptr. at 615-16. The court relied on Solot v. Linch, 46 Cal. 2d 99, 105, 292 P.2d 887, 890 (1956), where the California Supreme Court held that the statutory scheme providing for substitute service of process in cases involving nonresident motorists had the same legal force and validity as personal service of process within the state. Id. See Scorza v. Deatherage, 208 F.2d 660, 662 (8th Cir. 1953). The Eighth Circuit found that service on an agent authorized to accept such service is equivalent to personal service upon the principal of that agent. Id. The court in Scorza

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substitute service of process on a nonresident motorist was available through section 17454 of the California Vehicle Code, the legislature must have concluded that exceptions to section 351 would be implied automatically in all instances where statutory provisions had been made for alternative service of process within the state. The court added that if the legislature had provided an express statutory exception from the suspension provisions of section 351 for one group of defendants, it may have been misinterpreted by courts to exclude other groups of nonresidents susceptible to service of process within the state from being similarly excepted.

The effect of the court's decision in Bigelow is that nonresident motorists are considered to be amenable to service of process within the state, and therefore the period of limitations is not tolled because section 351 does not apply. California courts have refused, however, to apply the logic used in Bigelow, that amenability to service of process renders section 351 inapplicable to out-of-state defendants, in cases not involving nonresident motorists. In some instances, California courts have even expanded the application of section 351 to encompass situations

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107. Id. at 14-15, 85 Cal. Rptr. at 616. The court noted that the legislature may well have concluded that exceptions to the suspension provision of section 351 would be implied automatically in all instances where statutory provision had been made for service of process within the state. Id. The reason for this may have been that the legislature may have feared that an express statutory exception from the suspension provisions of section 351 for one group might carry implications that other groups of nonresidents susceptible to service of process within the state had not been similarly excepted. Id. at 15, 85 Cal. Rptr. at 616.

108. Id. at 15, 85 Cal. Rptr. at 616.

109. See, e.g., Mounts v. Uyeda, 227 Cal. App. 3d 111, 115, 277 Cal. Rptr. 730, 732 (1991) (holding that defendant, a resident motorist who was absent from California for a four day period, was subject to the section 351 tolling provision despite his amenability to service of process during his absence from the state); Dew v. Appleberry, 23 Cal. 3d 630, 637, 591 P.2d 509, 514, 153 Cal. Rptr. 219, 223-24 (1979) (holding that a defendant who was amenable to service of process during his one month absence from the state, was nevertheless subject to the section 351 tolling provision).
where the defendant has never been physically present in California.\textsuperscript{110}

4. Section 351 Applied to Defendants Who Have Never Been Physically Present in the State

California courts have consistently held that section 351 tolls a statute of limitations in cases where the defendant is out of state when the cause of action accrued.\textsuperscript{111} Recently, section 351 was extended to apply to situations in which all parties, both plaintiff and defendant, were residing out of state at the time the cause of action accrued and only subsequently moved to California.\textsuperscript{112} In \textit{Kohan v. Cohan,}\textsuperscript{113} the California Second District Court of Appeals addressed the issue of whether section 351 applied to situations in which \textit{all} parties resided outside of California at the time the cause of action accrued.\textsuperscript{114}

In \textit{Kohan}, three brothers began a partnership in Iran in 1961, and successfully transacted business in that country until the Iranian Revolution of 1978-79, at which time the brothers immigrated to California.\textsuperscript{115} In 1982, two of the brothers,
dissatisfied with the third brother's accounting of the business assets, filed suit against the third brother in California for declaratory and injunctive relief, dissolution of partnership, accounting, breach of contract and breach of fiduciary duty. The defendant brother argued that the applicable four year statute of limitations barred plaintiffs' action, because the cause of action accrued in 1976, when the defendant withdrew from the partnership. The plaintiffs countered by asserting that section 351 tolled the statute of limitations until the parties moved to California in 1979. In response to this claim, the defendant argued that section 351 was inapplicable to the pending action because section 351 uses the words "return to the State," and therefore, has no application to a nonresident defendant who was never in California. In addition, the defendant argued that section 351 should apply only where a defendant's absence from California deprives the plaintiff of a meaningful opportunity to sue the defendant, or where the cause of action sued upon has a nexus with California sufficient to justify providing a California forum.

In its holding, the Kohan court relied on a prior California appellate court decision determining that the term "return to California Code Civil Procedure Section 351
the State," as used in section 351, cannot be construed as limiting the application of the tolling provision to defendants that once were residents of California.122 Because the application of section 351 was not limited to residents and past residents of California, the Kohan court held that the plaintiffs' cause of action was tolled while the defendant was out of the state, despite the fact that at the time the cause of action accrued, all of the parties were residing in Iran and only subsequently moved to California.123 In addressing the defendant's second argument, the court pointed out that there is no language in section 351, or in the cases interpreting that section, which limits its applicability to situations where a plaintiff is deprived of an opportunity to sue due to defendant's absence, or where the cause of action has a nexus with California.124 The Kohan decision expanded the application of section 351.125 However, courts dealing with the application of section 351 have also limited its scope in other areas.126 The narrowed

where the defendant was once a resident of the state and leaves it, but also where the defendant has never been in California until the filing of the complaint. Id. at 399, 99 P.2d at 575.

122. Kohan, 204 Cal. App. 3d at 920-21, 251 Cal. Rptr. at 573-74. But see McCormick v. Blanchard, 7 Or. 232, 237 (1879) (holding that an Oregon statute tolling the statute of limitations until the defendant returns to the state is not applicable in actions where the parties were never physically present in the state prior to the filing of the claim); Snoddy v. Cage 5 Tex. 106, 111-12 (1849) (holding that a tolling provision, similar to section 351, could not be applied to toll the running of a statute of limitations in actions where the defendant was not physically present in Texas when the cause of action accrued and had never been in Texas prior to that time).

123. Kohan, 204 Cal. App. 3d at 921, 251 Cal. Rptr. at 574.

124. Id. at 923, 251 Cal. Rptr. at 575. The court held that defendant's argument to limit the scope of section 351 was misguided because a broad application of the tolling provision served an important state purpose. Id. The court relied on the finding in Dew v. Appleberry, 23 Cal. 3d at 630, 636, 591 P.2d 509, 513, 153 Cal. Rptr. 219, 223 (1979), that the legislature may have justifiably concluded that section 351 still served an important purpose in California law despite the introduction of extraterritorial service of process. Id. See supra note 69-87 and accompanying text (discussing court's reasoning in Dew).

125. See Kohan, 204 Cal. App. 3d at 921, 251 Cal. Rptr. at 573. The holding expanded the class of defendants to which section 351 may be applied to include defendants who have never been physically present in California. Id.

126. See Abrams v. Brownstein, 897 F.2d 389, 393 (9th Cir. 1990) (holding section 351 unconstitutional in situations involving interstate commerce); Cardoso v. American Medical Sys., Inc., 183 Cal. App. 3d 994, 998-99, 228 Cal. Rptr. 627, 629-30 (1986) (stating that the section 351 tolling statute does not apply to causes of action involving foreign corporations); Epstein v. Frank, 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831, 835 (1981) (holding section 351 inapplicable to limited partnerships when the sole general partner is absent from the state); Bigelow v. Smik, 6 Cal. App. 3d 10, 15, 85 Cal. Rptr. 613, 616 (1970) (holding that the tolling statute does not apply to
scope of application is evident in various courts' refusal to apply section 351 to certain classes of defendants, such as nonresident motorists.127 As discussed below, courts have also refused to apply section 351 to corporate defendants.128

B. Section 351 Applied to Both Foreign and Resident Corporate Defendants

California courts treat foreign corporate defendants in much the same manner as they treat nonresident motorists129 because, like nonresident motorists, statutory regulation of foreign corporations provide that a foreign corporation must have an agent in the state to receive process.130 Due to this statutory scheme, courts have found that section 351 is inapplicable to foreign corporate defendants.131 The California Fourth District Court of Appeal analyzed the issue of whether section 351 was applicable to foreign corporations in Loope v. Greyhound.132

In Loope, the court analyzed the statutory scheme providing service of process on foreign corporations, noting that service of process can be made on a designated agent of the corporation, or on the Secretary of State if no agent exists, and judgment can be

nonresident motorists).

127. See supra notes 97-108 and accompanying text (discussing section 351 as applied to nonresident motorists).

128. See infra notes 129-136 and accompanying text (discussing the California courts refusal to apply section 351 to corporate defendants).

129. See supra notes 97-108 and accompanying text (discussing section 351 as applied to nonresident motorists).


131. See Cardoso v. American Medical Systems, Inc., 183 Cal. App. 3d 994, 998, 228 Cal. Rptr. 627, 628-29 (1986) (holding that a one year limitations period applicable to consumer's action for personal injury is not tolled under section 351 where manufacturer was a foreign corporation amenable to substitute service of process); Rios v. Torvald Klavness, 2 Cal. App. 3d 1077, 1080, 83 Cal. Rptr. 150, 152 (1969) (holding that section 351 is inapplicable where plaintiffs have effective means of obtaining personal jurisdiction over corporation by substituted service); Loope v. Greyhound Lines, Inc., 114 Cal. App. 2d 611, 614, 250 P.2d 651, 652 (1952) (holding that section 351 is inapplicable to foreign corporations who are subject to alternative service of process in California).

rendered against the absent foreign corporation.\textsuperscript{133} Therefore, the court in \textit{Loope} determined that the statutory provisions provide amenability to suit rendering section 351 inapplicable to foreign corporations.\textsuperscript{134} The court also noted that section 351 was inapplicable to resident corporations, because resident corporations cannot depart from or be absent from the state of their residency.\textsuperscript{135} The result of the \textit{Loope} holding was to eliminate both resident and foreign corporations from the scope of application of section 351.\textsuperscript{136}

Subsequently, in \textit{Epstein v. Frank},\textsuperscript{137} a California appellate court applied the same reasoning found in \textit{Loope}, that a corporate entity's amenability to service and judgment while not within the state renders section 351 inapplicable, to conclude that limited partnerships are also not subject to the section 351 tolling provision.\textsuperscript{138} The \textit{Epstein} court contended that a limited partnership is similar to a corporation in that it is permanently within the state regardless of the location of its principals.\textsuperscript{139} Therefore, the court in \textit{Epstein} reasoned that the statute of limitations on claims against a limited partnership is not tolled by section 351 when the general partner is absent from the state.\textsuperscript{140}

As a result of \textit{Epstein}, limited partnerships, like corporations and nonresident motorists, are not subject to the tolling provision

\begin{itemize}
\item \textsuperscript{133} \textit{Id.} at 614, 250 P.2d at 653. \textit{See} \textsc{Cal. Corp. Code} § 2105 (West Supp. 1992) (providing that in order for a foreign corporation to transact business in California, it is required to obtain a certificate of qualification from the Secretary of State). Section 2105(a) further provides that in order to obtain a certificate of qualification, a corporation must designate an agent within the state upon whom process directed to the corporation may be served. \textit{Id.} \textit{See} \textsc{Cal. Corp. Code} § 2110 (West Supp. 1992) (providing that service of process may be made upon a foreign corporation by hand delivery of a copy of the process to an officer of the corporation or to any person or corporation designated by the foreign corporation as its agent in the state pursuant to section 2105(a)). \textit{See} \textsc{Cal. Corp. Code} § 2111 (West Supp. 1992) (providing that if service of process cannot be completed pursuant to section 2110, and plaintiff proves this to the satisfaction of the court, service may be made by personal delivery to the Secretary of State or to an assistant or deputy secretary of state).
\item \textsuperscript{134} \textit{Loope}, 114 Cal. App. 2d at 614, 250 P.2d at 652.
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{See id.} at 614, 250 P.2d at 652 (holding that section 351 is inapplicable to both foreign and resident corporations).
\item \textsuperscript{137} 125 Cal. App. 3d 111, 177 Cal. Rptr. 831 (1981).
\item \textsuperscript{138} \textit{Id.} at 120, 177 Cal. Rptr. at 835.
\item \textsuperscript{139} \textit{Id.} at 120-121, 177 Cal. Rptr. at 835-36.
\item \textsuperscript{140} \textit{Id.} at 120, 177 Cal. Rptr. at 835.
in section 351 because they are amenable to service of process even if they are absent from the state.\textsuperscript{141} However, individual defendants, despite being amenable to service of process when they cannot be found within the state, are not excluded from the scope of section 351.\textsuperscript{142} The application of section 351 to individual defendants is, however, precluded in the context of interstate commerce.\textsuperscript{143}

C. Section 351 Applied to Interstate Commerce

The commerce clause grants Congress the power to regulate commerce between the individual States.\textsuperscript{144} If Congress has not used that power to legislate on a subject, the commerce clause is said to be dormant on that subject.\textsuperscript{145} Even though the commerce clause appears to be merely a grant of power to Congress, the United States Supreme Court has held that the dormant commerce clause restrains the states from imposing an undue burden on interstate commerce.\textsuperscript{146}

Under general commerce clause analysis, where the burden of a state regulation falls on interstate commerce, restricting its flow in a manner not applicable to local business and trade, there may be a discrimination that renders the regulation unconstitutional

\textsuperscript{141} See id. at 120, 177 Cal. Rptr. at 835 (holding that section 351 is inapplicable to limited partnerships when the general partner is absent from the state).

\textsuperscript{142} See infra notes 186-214 and accompanying text (discussing the inequity inherent in differing applications of section 351).

\textsuperscript{143} See Abramson v. Brownstein, 897 F.2d at 389, 393 (1989) (holding that section 351 is an unconstitutional burden on interstate commerce). See infra notes 171-179 and accompanying text (discussing the Ninth Circuit Court of Appeal's holding that section 351 is an impermissible burden on interstate commerce in Abramson v. Brownstein).

\textsuperscript{144} U.S. Const. art. I, § 8, cl. 3.

\textsuperscript{145} See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1894). The United States Supreme Court first gave recognition to the dormant commerce power in the language "[the commerce power] can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant." Id. See generally Breker-Cooper, The Commerce Clause: The Case for Judicial Non-Intervention, 69 Or. L. Rev. 895, 895-96 (1990) (discussing the dormant commerce clause doctrine).

\textsuperscript{146} See Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (holding that a state regulation that imposes an undue burden on interstate commerce is an unconstitutional violation of the commerce clause).
If the burden does not rise to the level of discrimination, a court may balance the state’s putative interests against the interstate restraints to determine if the burden imposed outweighs any state interests served by the regulation. If a court finds either a discrimination against interstate commerce, or finds that the burden on interstate commerce outweighs the state’s interest in the regulation, the regulation will be found unconstitutional. Recently, in *Bendix Autolite Corp. v. Midwesco Enterprises*, the Supreme Court analyzed the burden placed on interstate commerce by a statute that tolled a statute of limitations during the period in which a defendant was not within the state.

I. Bendix Autolite Corp. v. Midwesco Enterprises

In *Bendix*, the defendant, an Illinois corporation, entered into a contract for delivery and installation of a boiler system at the plaintiff’s Ohio facility. The plaintiff was a Delaware corporation with its principle place of business in Ohio. A dispute arose over the contract and the plaintiff filed a diversity action in federal court in the Northern District of Ohio in

147. See *id.* at 576 (noting that the focus of a dormant commerce clause analysis is on the extraterritorial effects of the statute at issue). See also L. Tribe, *American Constitutional Law* 408-413 (2d ed. 1988). Professor Tribe describes discrimination in terms of a commerce clause analysis as being regulations which unjustifiably benefit local commerce at the expense of out-of-state commerce. *Id.* at 453-454.

148. *Bendix Autolite Corp. v. Midwesco Enterprises*, Inc., 486 U.S. 888, 891 (1988). Justice Kennedy, relying on a proposition set forth in *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986), noted that the Ohio statute before the Court might have been held to be an impermissible discrimination without more. *Id.* However, the Court in *Bendix* chose to assess the interests of the state to demonstrate that the statute’s legitimate sphere of regulation does not significantly advance the state interest while interstate commerce is subject to substantial restraints. *Id.*

149. *Bendix* 486 U.S. 888, at 891.


151. See *id.* at 893 (holding that a statute that tolls a statute of limitations for any period that a person or corporation is not "present" in the state violates the commerce clause). Under the statute, to be present in the state, a foreign corporation must appoint an agent for service of process, which operates as consent to the general jurisdiction of the Ohio courts. *Id.* at 892.

152. *Id.* at 889.

153. *Id.* at 890.
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The defendant immediately asserted an Ohio statute of limitations as a defense. However, the plaintiff responded by claiming that the limitations period had not elapsed, because under an Ohio tolling provision, a statute of limitations is tolled for claims against corporations that are not present in Ohio and have not designated an agent for service of process.

The Supreme Court held that the Ohio tolling statute violated the commerce clause. The Court reasoned that by forcing a defendant to obtain a resident agent for service of process in Ohio and become subject to general jurisdiction of Ohio courts, the statute compelled foreign corporations to make a choice between exposure to the general jurisdiction of Ohio courts, or relinquishment of the use of the statute of limitations as a defense causing the corporation to be subject to suit in Ohio in perpetuity. The Bendix Court found this created a situation in which the Ohio statutory scheme imposed a greater burden on out-of-state companies than it did on Ohio companies, subjecting the

154. Id.
155. Id. See Ohio Rev. Code Ann. tit. 13 § 1302.98(a) (Anderson Supp. 1992) (providing that an action for breach of a sales contract must be commenced within four years from the date the cause of action accrued).

[w]hen a cause of action accrues against a person, if he is out of the state... the period of limitation for the commencement of the action... does not begin to run until he comes into the state... After the cause of action accrues if he departs from the state... the time of his absence... shall not be computed as any part of a period within which the action must be brought.

Id.
157. Bendix, 486 U.S. at 890. The district court dismissed the action, finding that the Ohio tolling statute constituted an impermissible burden on interstate commerce in violation of the commerce clause. Id. at 888.
158. Id. at 894. The Court noted that in situations where a state denies the statute of limitations defense to out-of-state persons or corporations engaged in interstate commerce, such regulation will be reviewed under the commerce clause to determine whether it constitutes an unconstitutional infringement upon interstate commerce. Id. at 893.
159. Id. at 891-93. The Court determined that to gain the protection of the limitations period, the defendant would have had to appoint a resident agent for service of process in Ohio and subject himself to the general jurisdiction of the Ohio courts. Id. See Ohio Rev. Code Ann. § 1703.04.1 (Anderson 1985) (providing that every foreign corporation licensed to transact business in the state must appoint an agent for service of process). Section 1703.04.1 further provides the manner in which the service shall be made on the agent. Id.
activities of foreign and domestic corporations to inconsistent regulations.\footnote{161}{Id. at 894. The Court determined that because the Ohio statute of limitations was tolled only for those foreign corporations that did not subject themselves to the general jurisdiction of Ohio courts, the tolling statute imposed a greater burden on foreign companies than it did on Ohio companies. \textit{Id}.}

Moreover, the Court in \textit{Bendix} stated that where a state regulation affects interstate commerce in such a way as to discriminate against non-local business, a court may either find discrimination that renders the regulation invalid without more, or balance the state’s putative interests against the burden on interstate commerce to determine if that burden is an unreasonable one.\footnote{162}{Id. at 891.} In choosing to balance the burden on interstate commerce against the state’s interest,\footnote{163}{See \textit{id}. Justice Kennedy, writing for the majority, noted that the burden on interstate commerce was very significant because the statute forced a corporation to either subject itself to the general jurisdiction of the Ohio courts\footnote{164}{\textit{Bendix}, 486 U.S. at 892-93. The Court noted that the burden of being subject to a state’s general jurisdiction would be significant because such jurisdiction would extend to any suit against the defendant, regardless of whether the transaction in question had any connection with Ohio. \textit{Id}. However, Justice Scalia noted that the majority’s labeling of a defendant corporation being subject to general jurisdiction as a significant burden on commerce may be questionable. \textit{Id}. at 895-96 (Scalia, J., concurring). Justice Scalia asserted that there was no evidence before the Court that would indicate whether such a burden would be significant or negligible. \textit{Id}. (Scalia, J., concurring).} or face the possibility of remaining subject to suit indefinitely in Ohio.\footnote{165}{\textit{id}. at 892. On the other hand, Justice Scalia noted that it was hard to assess the significance of the burden. \textit{Id}. at 896 (Scalia, J., concurring). Justice Scalia further noted that the majority seemed to be under the impression that anything that is theoretically perpetual is a significant burden. \textit{Id}. (Scalia, J., concurring).} The \textit{Bendix} Court reasoned that Ohio’s interest in the enactment of
the tolling provision was relatively weak because the state could execute service of process through the use of a long arm statute on foreign corporations and entities outside the state. Balancing the state's interest against the burden on the plaintiff, the Court in Bendix concluded that the burden on interstate commerce outweighed Ohio's interest in the statute, thereby violating the commerce clause. This same balancing test was used by the Ninth Circuit Court of Appeals in Abramson v. Brownstein to determine whether section 351 was an impermissible burden on interstate commerce.

2. Abramson v. Brownstein

In Abramson, the Ninth Circuit Court of Appeals addressed whether section 351 was an impermissible burden on interstate commerce. The plaintiff, a California resident, agreed to purchase gold coins and currency from the defendant, a Massachusetts resident. Plaintiff paid $56,600, but the defendant never delivered the goods as provided by the contract. The district court dismissed the plaintiff's complaint on the grounds that the statute of limitations had run on his cause of action. On appeal, the plaintiff argued that section 351

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166. See OHIO REV. CODE ANN. § 2307.38.2 (Anderson 1981) (setting forth the Ohio long arm statute).

167. Bendix, 486 U.S. at 894. But see G.D. Searle Co. v. Cohn, 455 U.S. 404 (1982) (holding that for Equal Protection purposes, a state rationally may make adjustments for the fact it is more difficult to serve a nonresident corporation by curtailing limitations protection for absent foreign corporations).


170. See id. at 393 (holding that section 351 was an impermissible burden on interstate commerce). See also infra notes 171-179 and accompanying text (discussing the holding in Abramson).

171. Abramson, 897 F.2d at 390.

172. Id. at 390-91.

173. Id.

174. Id. at 391. Plaintiff admitted in the pleadings that all of the relevant California limitations periods had expired at the commencement of his lawsuit. Id. at 391 n.1.
tolling the statute of limitations and thus the district court's dismissal was in error.\textsuperscript{175}

The Ninth Circuit held in \textit{Abramson} that section 351 violated the commerce clause of the United States Constitution.\textsuperscript{176} The court reasoned that the statute was an impermissible burden on interstate commerce because section 351 required a person engaged in interstate commerce to be in California for the appropriate limitations period in order to avoid the application of section 351.\textsuperscript{177} The court recognized that section 351 forced nonresident individuals engaged in interstate commerce to choose between being present in California for the time prescribed by the appropriate statute of limitations, or remain subject to suit in California in perpetuity.\textsuperscript{178}

The \textit{Abramson} decision resulted in confusion regarding whether the court was declaring section 351 unconstitutional per se and therefore totally invalid, or whether the court was making a more narrow holding that section 351 was only unconstitutional when applied in situations involving interstate commerce. The confusion stemmed from apparently contradictory statements made by the court in separate portions of the opinion.\textsuperscript{179} This confusion was

\begin{footnotesize}
\begin{enumerate}
\item[175.] \textit{Id.} at 391.
\item[176.] \textit{Id.} at 393. The court relied on the determination in \textit{Bendix v. Midwesco}, 486 U.S. 888, 893 (1988), that in situations where a state denies ordinary legal defenses to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the commerce clause to determine whether the denial is discriminatory on its face, or an impermissible burden on commerce. \textit{Id.} at 392.
\item[177.] \textit{Id.} The court noted that defendant was engaged in interstate commerce and because of his status as a nonresident, he was barred from using the statute of limitations as a defense. \textit{Id.}
\item[178.] \textit{Id.} In balancing the burden imposed on interstate commerce against the state's interest in the statute, the court noted that the state's interest as articulated in \textit{Dew v. Appleberry}, 23 Cal. 3d 630, 636, 591 P.2d 509, 513, 153 Cal. Rptr. 219, 223 (1979), was to alleviate any hardship that would result by compelling plaintiff to pursue defendant out of state. \textit{Id.} The court determined however, that this interest was relatively weak because of alternative methods of service of process available to the plaintiff, and that the state's interest in no way supported the corresponding burden on interstate commerce created by section 351. \textit{Id.}
\item[179.] See \textit{Id.} at 392. The court determined that on its face, section 351 is non-discriminatory because it treats alike residents and nonresidents of California. \textit{Id.} However, later in the opinion, the court expressly holds that section 351 is unconstitutional, which would imply that the tolling provision is unconstitutional per se. \textit{Id.} at 393.
\end{enumerate}
\end{footnotesize}
clarified in the subsequent California Court of Appeals case, *Mounts v. Uyeda.*

3. *Mounts v. Uyeda*

*Mounts* involved a personal injury claim between two residents of California, in which the plaintiff asserted the section 351 tolling provision to prevent her claim from being barred by the one year statute of limitations. The court in *Mounts* upheld the use of section 351, finding that the application of the tolling provision in the case at bar was not an unconstitutional infringement on interstate commerce because the commerce clause was not implicated by the facts of the case.

In reconciling this holding with the finding in *Abramson* that section 351 was unconstitutional, the *Mounts* court noted that the facts of the case at bar indicated no interaction between section 351 and the commerce clause, and therefore section 351 could be applied without violating the commerce clause. Since section 351 can be applied in a variety of situations that do not involve interstate commerce, the court interpreted the *Abramson* holding to mean section 351 was only unconstitutional as applied to interstate commerce.

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181. *Id.* at 114, 277 Cal. Rptr. at 732. The defendant, a California resident, pointed a gun in a threatening manner at the plaintiff, also a California resident, while driving on the freeway. *Id.* Four days after the applicable one year statute of limitations had run, the plaintiff filed a claim against defendant for inflicting severe emotional distress as a result of the incident. *Id.* The plaintiff asserted that the statute of limitations was tolled during the defendant's four day absence from California and therefore the plaintiff's claim was not barred by the statute of limitations. *Id.*
182. *Id.* at 122, 277 Cal. Rptr. at 737-38. The court's finding in *Mounts,* that the use of section 351 did not impinge on interstate commerce, necessarily implied that the *Mounts* court read *Abramson* to hold that section 351 was unconstitutional as applied to interstate commerce, rather than unconstitutional per se. *Id.* at 122, 277 Cal. Rptr. at 737. *See also supra* note 179 and accompanying text (discussing the lack of clarity in the *Abramson* opinion as to whether section 351 was unconstitutional per se, or simply unconstitutional as applied to interstate commerce).
183. *Mounts,* 227 Cal. App. 3d at 123, 277 Cal. Rptr. at 737-38. In reconciling *Abramson* with the holding in *Mounts,* the court emphasized that in *Mounts* both parties were local residents, and the alleged injury did not involve interstate commerce. *Id.*
Accordingly, both the Abramson and Mounts decisions seemingly remove parties involved in interstate commerce from the legitimate scope of section 351. The narrowed scope of application of section 351, evidenced by Abramson and Mounts, and the lack of necessity for section 351, have brought more focus on the inequities inherent in the continued use of section 351, and have led to the questioning of the section's continued vitality.

III. INEQUITIES INHERENT IN SECTION 351 AND PROPOSED SOLUTIONS

The purpose behind the enactment of section 351 no longer exists in California, and the continued application of section 351 is repugnant to the policies underlying the statute of limitations defense. The basic policy behind any statute of limitations is that the defendant's right to be free of stale claims takes precedence over the plaintiff's right to prosecute the claim. In order to ensure fairness in the application of any statute of limitations, if a prospective plaintiff is under a disability, the statute of limitations will be tolled.

184. Id. at 122, 277 Cal. Rptr. at 737-38. See In re Marriage of Siller 187 Cal. App. 3d 36, 48-49, 231 Cal. Rptr. 757, 764-65 (1986). The Siller Court determined that a statute is not facially unconstitutional simply because it may not be constitutionally applied to some persons or circumstances. Id. Unless it is in conflict with the constitution, any overbreadth may be remedied in a case by case analysis. Id. See also Thornhill v. Alabama, 310 U.S. 88, 101-106 (1940) (holding that a statute is invalid on its face and wholly void only when incapable of any valid application); County of Sonoma v. State Energy Resources Conservation 40 Cal. 3d 361, 368, 708 P.2d 693, 698, 220 Cal. Rptr. 114, 119 (1985) (noting that to determine a statute's constitutionality, the court must uphold it unless it is in clear and unquestionable conflict with state or federal constitutions); Pacific Legal Foundation v. Brown 29 Cal. 3d 168, 180-81, 624 P.2d 1215, 1221, 624 Cal. Rptr. 487, 493 (1981) (stating that a challenge to a statute's constitutionality must demonstrate that its provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions).

185. See supra notes 51-56 and accompanying text (discussing the decreased necessity of section 351 following the development of long-arm statutes and alternative service of process).

186. See supra notes 43-56 and accompanying text (discussing how developments in alternative service of process and long arm statutes have eliminated the underlying purpose of section 351).

187. See supra notes 22-24 and accompanying text (defining a statute of limitations and describing a statute of limitations policy basis of promoting justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared).

188. See supra note 25-28 and accompanying text (discussing disabilities as they relate to the tolling of a statute of limitations).
In 1892 when section 351 was enacted, the California Legislature considered a plaintiff to be under a disability if the defendant was absent from the state because such an absence made it almost impossible for a plaintiff to instigate a claim against that defendant. The tolling provision of section 351 is no longer necessary to serve this interest because the interest has been eliminated by subsequent legislation. Long arm statutes and substituted service of process now allow a plaintiff, who in the past would have been under a disability because of a defendant's absence from California, to pursue a defendant out of the state and make him or her subject to in personam jurisdiction in California courts.

California courts have held that because nonresident motorists, corporations and limited partnerships are amenable to alternative forms of service of process, they are excepted from the provisions of section 351. Yet these courts found the same rationale did not apply to individual defendants, even though individuals are subject to the same substitute form of service of process. A question arises as to why amenability to

189. See supra notes 28-56 and accompanying text (discussing the policy considerations underlying section 351).

190. See CAL. CIV. PROC. CODE §§ 415.20-415.50 (West 1982 & Supp. 1992) (providing alternative methods of service of process in California); id. § 410.10 (West 1973) (setting forth the California long arm statute which provides for the exercise of “jurisdiction on any basis not inconsistent with the state or federal constitution”). See also supra notes 41-56 and accompanying text (discussing the effect the California long arm statute and alternative methods of service of process have on a state court's jurisdictional scope).

191. See supra notes 41-56, 75-77 and accompanying text (discussing the effect the California long arm statute and alternative methods of service of process have on a resident plaintiff's ability to pursue a cause of action against a out-of-state defendant).


194. See Epstein v. Frank, 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831, 835 (1981) (holding section 351 inapplicable to limited partnerships when the sole general partner is absent from the state). See supra notes 137-141 and accompanying text (discussing the holding in Epstein).

195. See supra notes 69-87 and accompanying text (discussing section 351 as it applies to individual defendants with a focus on the relevancy of a defendant's amenability to service of process).
service of process renders section 351 inapplicable in cases involving nonresident motorists, foreign corporations and limited partnerships, while the same amenability to service of process has no effect on the application of section 351 in cases involving individual defendants.

The argument offered by the court in Dew v. Appleberry was that the legislature may justifiably have concluded that a defendant’s physical absence impedes his availability for suit, and that it would be unfair to force a resident plaintiff to pursue the defendant out of state in order to commence an action before the statute of limitations runs. It would seem that a resident plaintiff’s inconvenience is not, by itself, enough to justify a provision that, in effect, enables a party to stall in filing a claim, which is in direct conflict with the policy behind a statute of limitations. If the inconvenience rose to the level of a disability, then such a statute could be justified. However, because of the availability of alternative service of process and long arm statutes, no disability occurs when defendant leaves the state. Therefore, section 351 cannot be justified as a protecting resident plaintiffs against disabilities.

Despite the lack of need for section 351, some courts have expanded the tolling provision’s application to encompass claims that have no legal nexus with California. As held in Kohan v. Cohan, section 351 can be utilized to toll a statute of limitations even if, at the time the cause of action accrued, the parties were residing outside the state and subsequently moved into the state. This creates situations where a cause of action, which

196. Dew v. Appleberry, 23 Cal. 3d 630, 636, 591 P.2d 509, 514, 153 Cal. Rptr. 219, 223-24 (1979) (holding that in situations involving a non-corporate defendant, defendant’s amenability to service of process was irrelevant to the application of the section 351 tolling provision). See supra notes 69-87 and accompanying text (discussing the holding in Dew).

197. See supra notes 25-28 and accompanying text (discussing disabilities as they relate to the tolling of a statute of limitations).


199. See Kohan, 204 Cal. App. 3d at 921, 251 Cal. Rptr. at 574. See supra notes 111-128 and accompanying text (discussing the holding in Kohan).
has no legal nexus with California, other than the parties being residents of the state, may be brought in California an indefinite amount of time after it accrued. In addition, the *Kohan* decision exposes a defendant who is currently a resident of California, to virtually unending liability on claims that arose in foreign jurisdiction by not running the statute of limitations until that defendant moves to California.\(^{200}\)

California attempted to solve this problem through legislation which prohibits a plaintiff from bringing a claim in California which would be barred by the statute of limitations in the state where the cause of action arose.\(^{201}\) This statute is not completely effective however, because it would have no effect at all if the state in which the cause of action arose also tolls the statute of limitations in the defendant's absence.\(^{202}\) One possible solution to the problems created by the *Kohan* decision would be to expressly limit the application of section 351 to causes of action that accrue in California, or causes of action involving at least one California resident.\(^{203}\)

Additionally, the narrowed scope of section 351 indicates that both the legislature and the courts are slowly recognizing that section 351 burdens out-of-state defendants, and creates great opportunity for misuse by delinquent plaintiffs, without serving a legitimate purpose. The *Abramson* decision's most significant impact on section 351 is that it drastically limits the scope of the

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200. See Halper, *supra* note 35, at 621 (noting that a person who moves to California may be subject to liability for stale claims that arose during his or her residence in a foreign jurisdiction due to the tolling of the statute of limitation by section 351).

201. See *CAL. CIV. PROC. CODE* § 361 (West 1982). The statute provides:

> When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued.

*Id.*

202. See Halper, *supra* note 35, at 620-21 (noting that section 361 would be of no practical effect if the state whose statute of limitations is borrowed tolls the statute of limitations during the defendant's absence).

203. See *id.* at 621 (arguing that the legislature should consider the enactment of express limitations on section 351 in order to avoid the unsatisfactory result extending section 351 to cases that have no legal nexus with California).
tolling provision. Prior to the Ninth Circuit in Abramson finding section 351 unconstitutional as applied to interstate commerce, section 351 had already been significantly limited in its application to foreign corporations, nonresident motorists, and limited partnerships. Currently, the only class of defendants that section 351 still applies to is individual resident defendants and nonresident defendants, not including nonresident motorists, involved in claims arising from transactions other than those involving interstate commerce.

Section 351 tends to be applied most frequently in cases where both the plaintiff and the defendant are residents of California. With resident defendants, the most typical application of section 351 is where the defendant temporarily leaves the state with the intent to return. In these cases, it is hard to see the need for the tolling provision in section 351 because such individuals are already amenable to service of process if not personally, then through delivery to a family member, registered mail or publication. This creates a situation where the defendant is penalized for taking a legitimate vacation out of state, often times

204. See Abramson v. Brownstein, 897 F.2d 389, 393 (9th Cir. 1990) (holding section 351 unconstitutional in situations involving interstate commerce). See supra notes 171-179 and accompanying text (discussing the Abramson court's decision to eliminate application of section 351 in cases involving interstate commerce).

205. See Abramson, 897 F.2d at 393 (holding that section 351 is unconstitutional as applied to interstate commerce). See also supra notes 180-185 and accompanying text (discussing the Abramson holding and the Mounts interpretation of Abramson which limited the Abramson holding to applications of section 351 involving interstate commerce).


209. See CAL. CIV. PROC. CODE §§ 415.20-415.50 (West 1982 & Supp. 1992) (providing alternative methods of service of process in California); id. § 410.10 (West Supp. 1992) (setting forth the California long arm statute which provides for the exercise of "jurisdiction on any basis not inconsistent with the state or federal constitution"). See supra notes 43-56, 69-87 and accompanying text (discussing the availability of alternative methods of service of process and state courts extended jurisdiction).
long before the statute of limitations has run.\(^1\) Such an absence rewards a tardy plaintiff who has failed to file an action within the statutory period.\(^2\)

The problems inherent in the application of section 351 must be addressed with affirmative steps by the legislature, as the courts have declared themselves unwilling to make the changes needed.\(^3\) One possible solution to the problems created by the application of section 351 would be to repeal the section entirely. This would allow the legislature a clean slate on which to formulate a more narrowly tailored statute to respond to any problems that may be created by the absence of such a tolling provision. One legitimate interest that may be left unprotected without section 351 would be situations in which the defendant goes into hiding or somehow disappears, and is no longer amenable to service of process. This interest could be better protected by a statute that tolls the statute of limitations when a defendant is not amenable to service of process.

Another solution would be to amend section 351 to read that no person shall be considered to be out of the state when that person is subject to the jurisdiction of the California courts. Other states, including Illinois, have implemented this statutory approach.\(^4\) Such an amendment would allow section 351 to protect plaintiffs

\(^1\) See, e.g., Mounts, 227 Cal. App. 3d at 114, 277 Cal. Rptr. at 732 (tolling the statute of limitations for a four day period in which the defendant had travelled outside of California); O'Laskey, 224 Cal. App. 3d at 245-46, 273 Cal. Rptr. at 676 (tolling the statute of limitations for a two week period in which the defendant was vacationing in Las Vegas); Dew, 23 Cal. 3d at 633, 591 P.2d at 510-11, 153 Cal. Rptr. at 221 (tolling the statute of limitations for a five week period in which the defendant was in Ohio visiting his parents).

\(^2\) See O'Laskey, 224 Cal. App. 3d at 244, 273 Cal. Rptr. at 675. In O'Laskey the plaintiff hired a private investigator to find out whether the defendant had been absent from the state during the period the statute of limitations was running. Id. Upon finding that the defendant had been absent from the state on a two-week vacation to Las Vegas, the plaintiff attempted to use the tolling provision in section 351. Id.

\(^3\) See Dew, 23 Cal. App. 3d at 637, 591 P.2d at 514, 153 Cal. Rptr. at 223-24. The court stated that if it is advisable that the statute be changed to accommodate more modern concepts of service of process, the legislature has the power to effect such changes, but it is not the role of the court to do so. Id.

\(^4\) See Ill. Ann. Stat. ch. 110, para. 13-208(b) (Smith-Hurd Supp. 1991) (providing that no person is considered to be out of the state when he or she is subject to the jurisdiction of the courts of Illinois).
from defendants who conceal themselves or somehow disappear to avoid being sued. This purpose is not already covered by state long arm jurisdiction and alternative service of process, so section 351 would no longer overlap these provisions.214

CONCLUSION

Section 351 of the California Code of Civil Procedure was enacted over one hundred years ago, and since that time, changes in the law and society have rendered it an unnecessary, if not unjust, statute. The primary purpose behind the enactment of section 351 has long since been eliminated by changes in jurisdictional doctrine,215 and any legitimate purpose left would be better served by a more narrowly tailored statute. Moreover, plaintiffs utilizing the tolling provision are often times not doing so because they were unable to serve process on the defendant during the prescribed statutory period, but instead because the plaintiff's themselves were negligent in not complying with the applicable statute of limitations.216 The continued use of section 351 unduly burdens defendants who travel outside of California during the running of a statute of limitations, while not serving a legitimate purpose. This fact alone should encourage the California Legislature to take action to correct the abuse of Section 351.

Gregory J. Livingston


215. See supra notes 43-56, 69-87 and accompanying text (discussing the changes in the law of personal jurisdiction and the effect these changes had on statutes that toll a statute of limitations during a defendant's absence from the state).

216. See supra notes 186-211 and accompanying text (discussing the abuse to which section 351 is subjected by negligent plaintiffs).