

PREYING ON THE WEB: TAX COLLECTION IN THE VIRTUAL WORLD

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PRELUDE

Sy Burr-Naughton knew he was in Heaven: Suspended a few centimeters above the warm sands of Bora Bora. Shaded by gently swaying boobum trees. To the far right, a slow-motion sunset behind the rugged Pamirs. The latest release of the Leyden Jar Lids (this hour’s hottest music) vibrating everything at 121 dB. Watching his bank balance swell on the video hanging over the waves as hundreds of music lovers simultaneously downloaded digital tracks from his Web site in Ulaan Batur.

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Heaven departed abruptly when the bank-balance screen went black, expanded to block out the ocean, then came back to life with a vision of Tax Farmer Aiya Havya in her favorite persona—shiny black body with bright red figure-eight spots and eight long green legs. Her virtual authorization document scrolled down a side screen in seven languages. Very quietly, but with finality, the surround-sound speakers conveyed her message: “You’re busted. The Icecap County consumption tax for seventeen of the last 21,354 downloads was not transferred within the required 73.6 seconds. You’re down as of NOW.”

A jabba subroutine shot out a virtual white sticky line that grabbed Sy’s leg and pulled him into—Tax Court. The collection clerks chatted in a language he did not recognize as the ALJ sent the command to subtract the tax and a quintuple fine from Sy’s account.

Within seconds, Sy was asking the nonvirtual blank basement wall in Brasilia: “Where the h*** is Icecap County?”

Reality? No. Probability? Maybe. Possibility? Definitely.

I. INTRODUCTION

The evolution of “The Internet” is engendering debates in a multitude of realms—economic, intellectual, moral, political, legal, tangible, virtual, and others. Many, if not most, of these debates are based on the premise that the Internet is something *sui generis*, totally new in the universe.¹ As they do with any person, event, or thing, political governments seek to impose their authority on the Internet and persons interacting with and through it.

Even while contending that the Internet is a new thing, those governments (not often prone to innovation) are refurbishing old rules and arguments.² In significant ways, those efforts must fail due to inherent characteristics of the Internet, principally its diffuse nature and the functional irrelevance of political boundaries. Regulating the Internet presents governments with a unique dilemma. Any measure that might effectively limit access and flexibility affects everyone, even governments—and governments may be more dependent on the communications infrastructure than any other person, entity, or group. Unfortunately, this internal conflict of interest has not fostered entirely rational responses.

1. See, e.g., Marcelo Halpern & Ajay K. Mehrotra, *From International Treaties to Internet Norms: The Evolution of International Trademark Disputes in the Internet Age*, 21 U. PA. J. INT’L ECON. L. 523, 534 (2000) (discussing the debate that exists about whether to apply traditional legal concepts or new legal analysis in light of the new technology).

2. See generally Yocahi Benkler, *How (If at All) to Regulate the Internet: Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203 (2000) (discussing congressional attempt to regulate the internet).

Collecting taxes is a traditional government activity. Tax revenue is a subject near and dear to every politician, government official, and bureaucrat. With few exceptions, taxation is the means whereby governments confiscate desired resources. Tax proceeds pay elected officials' and bureaucrats' salaries, build edifices and monuments, fund government programs and, in general, make government functions possible. This extraction of wealth, quite naturally, tends to irritate those who create the wealth that is extracted, that is, the taxpayers. Thus governments (and particularly elected officials) constantly seek new and better³ means of extracting the maximum amount of wealth with the minimum amount of taxpayer irritation. As any basic text teaches, any thing or event can be used as a basis for taxation. Therefore, it should be no surprise that the evolution of the Internet has drawn the attention of those who benefit from increased tax collections.

Debates concerning taxation and the Internet may not be as generally publicized as debates concerning Internet pornography and censorship (publicity is not something tax collectors generally seek), but the tax issues are perhaps more serious and may have greater long-term impacts. Despite the potential for long-term effects, to date the controversies over taxes and the Internet have exponentially produced more heat than light.

This Article reviews the legal background and milieu of the current debates in the United States in relation to taxation and Internet-mediated transactions.⁴ Part II provides a brief, nontechnical overview of the Internet and Internet-mediated activities. Part III discusses the history and current status of legal restraints on tax collecting within the United States.⁵ Part IV discusses the application of the state use-tax rules to Internet-mediated transactions. Internet-related tax issues may have far-reaching results, not because of any inherent importance, but because of the perceived impact of Internet commercial transactions on state tax revenues and the precedent that might be established for other types of Internet regulation. Part V concludes that there is more than one potential solution, each with negative aspects.

3. "Better" in this context means less frequently noticed by voters.

4. The term "Internet-mediated" activities is used here to describe all activities that persons carry on, in whole or in part, using the Internet as a communications medium. "Internet transactions" or "Internet-related transactions" seems to emphasize the medium over the message. It is the actions of persons and entities that are at the center of controversy.

5. The current U.S. tax debate essentially ignores the fact that the Internet is a global phenomenon. Any U.S.-based solution will eventually have to take that reality into account. Acknowledging that this narrow focus is a shortcoming, no matter what proposals may be made on an international scale, they must be acceptable under U.S. law before they can be implemented in the United States. Therefore, the international scene is generally left for discussion in other articles.

No matter which potential solution or combination of solutions is chosen, it will have impacts far beyond use-tax collections. The participants in the current political debate, particularly state tax officials, must look beyond their narrow, short-term agendas. If they do not, the result will have a negative, long-term impact that will soon eliminate any short-term gains and may cause the revenue losses they are trying to prevent.

II. THE CONTEXT

A. *The Communication Web—Reality and Virtual Reality*

The evolving communications medium commonly known as the Internet has been described in many places.⁶ It is beyond the scope of this Article (and its author's competence) to provide a technical description of the Internet's components and system. However, a lay-person-level description is necessary for the following discussion. Some of the terms (jargon) used in the Internet context are casually defined in Appendix A. However, it is important to note that the term "browser" has two meanings, one being a computer program that allows a person to access the Web and the other being the person using the program.⁷ This discussion concerns interactions by persons rather than computer programs, so "browser" will be used in the second sense.

The history of the Internet is relatively short and well documented.⁸ The Internet evolved from a U.S. Defense Department project, which had as one purpose the protection of government computer systems and communications in the event of nuclear war.⁹ One of the essential characteristics of the desired system was survivability, that is, that the loss or destruction of any particular part or parts of the system would not disable the entire system.¹⁰ At least in retrospect, a highly decentralized system was the most obvious and logical choice. Thus, the system that evolved into the Internet does not have a central control point, or even a limited number of major control points.¹¹

6. See, e.g., JANE ABBATE, *INVENTING THE INTERNET* (1999); J.P. CHRISTOS MOSCHOVITIS ET AL., *HISTORY OF THE INTERNET: A CHRONOLOGY, 1843 TO THE PRESENT* 151-236 (1999). See generally CHARLES JONSCHER, *THE EVOLUTION OF WIRED LIFE: FROM THE ALPHABET TO THE SOUL-CATCHER CHIP—HOW INFORMATION TECHNOLOGIES CHANGE OUR WORLD* (1999) (providing a broader history of communication and related technology); see also *Reno v. ACLU*, 521 U.S. 844, 849-53 (1997).

7. See *infra* Appendix A.

8. See sources cited *supra* note 6.

9. See ABBATE, *supra* note 6, at 8-9.

10. See *id.*

11. See *Reno v. ACLU*, 521 U.S. at 853; see also ABBATE, *supra* note 6, at 113, 127-30, 156-61.

Instead, it is a "system of systems" through which a communication from one point to any other point may take an essentially infinite number of paths, bypassing any disruptions or roadblocks.¹² In fact, a single communication is divided into a number of discrete portions ("packets"), each of which may take a different route from origin to destination.¹³ This is really the heart and genius of the system. A message traversing the Internet goes through a number of switching points.¹⁴ At each point, the message is passed on toward its destination via one of the routes available from that particular point.¹⁵ If one route is unavailable or overloaded, another route is automatically chosen.¹⁶ Since the Internet operates at near-light speed and very high information-content levels, a route unavailable one moment may be available the next.¹⁷

There are a number of potential analogies to the Internet network. One that should be readily comprehensible to a majority of persons is a city street grid. Assume for the moment that there is a city that has a total of forty two-way streets, twenty that run north and south, parallel to each other, and twenty that run east and west, parallel to each other and perpendicular to the other twenty streets. The outermost streets in each direction (numbers one and twenty) form a closed square. Each of the twenty north-south streets intersect with each of the twenty east-west streets, creating 400 intersections, most with four potential entrance and exit routes.

Now assume that there is a traveler at the far northeast corner of the street grid who wishes to travel to the far southwest corner. There are no restrictions on which streets our hypothetical traveler can take to reach the goal. At each intersection, the traveler can choose to go straight through, turn right, turn left, or reverse direc-

12. See ABBATE, *supra* note 6, at 127-30.

13. See *id.* at 26-27.

14. See *ACLU v. Reno*, 929 F. Supp. 824, 831-32 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844.

15. See *id.*

16. See *id.*

17. Another aspect of the system may not be so innovative, but is equally necessary. That is the ability of computers connected with the system to communicate, without regard to the make, model, or operating system of any particular computer. As different companies developed computers, their basic programming and operational aspects differed, so interaction between computers was limited or impossible. See ABBATE, *supra* note 6, at 48. Since the military and educational establishments used a wide variety of computers, a common "protocol" or language had to be developed to make the system operational. See *id.* at 49. The most well known version of that common language is known as "hypertext mark-up language," or "HTML." See MOSCHOVITIS ET AL., *supra* note 6, at 126-27. The existence of HTML, together with some visionary ideas about the system's potential, led to the "browser" programs that made the "World Wide Web" not only feasible, but popular. See *id.* As the Internet has become more widely used, newer and more sophisticated software has been, and will continue to be, developed. See *id.* at 165-67 (describing Java). The Internet's popularity and new programming is mutually reinforcing. See *generally id.* at ch. 8. As the Internet becomes easier to use, and thus more used, the incentive to provide more advanced programs is increased, which triggers even greater popularity.

tion (but must wait for the traffic signal). Our hypothetical traveler moves at near-light speed between intersections but must sometimes wait for subjective years at busy intersections. It should be rather obvious that the number of potential routes is effectively infinite. While it may often be desirable for the traveler to take the most direct route, assume that time and distance traveled are not significant factors.¹⁸ The hypothetical traveler could go back and forth between two intersections or around a single block as often and as long as desired, though that would not be very efficient.

The Internet system is similar to the hypothetical street grid. The differences are that the Internet system is not closed, there are hundreds of thousands of intersections, and a communication may have many more than four potential exit routes from any intersection. For all practical purposes, there is an infinite number of potential routes between any two Internet terminals.

A second defining characteristic of the Internet is that communications between any two computers with access is effectively instantaneous,¹⁹ and the near-light-speed travel makes distance an insignificant consideration.²⁰ The communication may be text-only (e-mail and usegroups), vocal (similar to standard telephone), or vocal and visual ("teleconferencing").²¹ In addition, it may be one-way, two-way, or multiple-way ("chat rooms").²² As transmission and computer capacities increase, it is probable that teleconferencing will soon emulate in-person, arms-length (no touch or smell yet) communication. All of these communications are mediated by computers—at least one at each end of the communication.²³ The direct transmissions are actually between computers.

In the Internet, and elsewhere, computers can and do exchange meaningful information without the participation of a human operator.²⁴ This point is important because a significant portion of Internet communications involve exchanges between a person at her or his computer and a distant computer that is not directly attended by a

18. At over 186,000 miles per second, light can travel around the globe more than seven times in a second. The difference in travel time between an electronic signal traveling 15,000 miles and one traveling 15 miles is probably not perceptible by unaided human senses.

19. See ABBATE, *supra* note 6, at 1.

20. This assumes that there are no delays in transmissions through the Internet. That assumption may not be realistic, due to the maximum possible speeds with which various components can handle messages and the ever-increasing number of users clogging switching points.

21. See *Reno v. ACLU*, 521 U.S. 844, 851 (1997).

22. See *id.*

23. There are router-computers at each of the switching and transmission points, but their function is normally directory, totally independent of the message's content and the parties' physical location, and completely transparent—the user(s) neither knows nor cares how many routers are involved or where they are.

24. See *Reno*, 521 U.S. at 852.

human.²⁵ The physical location to which communications are transmitted is functionally irrelevant and normally unrecorded.²⁶ The extent to which the distant computer “interacts” (sends information to, and accepts information from, the computer user) varies substantially. That variation has become significant for jurisdictional purposes.

As anyone familiar with commercial activities might surmise, the Internet’s potential for commercial activities was quickly recognized and exploited. Low-cost transmission of information is “natural” for the Internet, and “e-mail” remains one of the most used Internet functions. The development of Internet Web sites exponentially expanded the commercial potential of electronic communications. Using the Web, digital information (computer programs, digitalized text, graphics, audio, and video) can be marketed, sold, and delivered to multiple purchasers—regardless of date, time, or place—without employing any sales or delivery staff. The computer does it all, with appropriate programming of course. Instead of the traditional sales employees, a Web site owner employs computer-programming and maintenance personnel.

The commercial use of the Internet caused the Internet’s rapid growth.²⁷ It is likely that if its subject matter had been limited to research and intellectual pursuits, the Internet would still exist but the number of sites and users would be a small fraction of what it is today. Commercial use has also caused most of the Internet-related legal controversies.²⁸

Despite the Internet’s relatively recent advent, there has been significant discussion concerning it. Much of the discussion deals with a hypothetical realm frequently referred to as “Cyberspace.”²⁹

25. For example, a person doing legal research contacts a computer containing legal information, such as statutes or court decisions, “searches” that computer’s data for the desired information and retains a copy of selected information on his or her personal computer. There are, no doubt, persons controlling or attending the distant computer, but none of them participate in the legal researcher’s activities.

26. Some Internet-related transactions require that the information recipient identify his or her physical location. For example, the sale of a physical item requires that the seller obtain a physical address for the item’s delivery. However, that is not an inherent requirement of the communication itself but is necessary for other purposes. For the sale of digitalized information (such as a computer program), the physical location of the buyer is totally irrelevant; the digital information is transmitted directly to the computer and the buyer pays via a credit card whose issuer need not be, and probably is not, in the same political jurisdiction as the buyer. See, e.g., *E-Data Corp. v. Micropatent Corp.*, 989 F. Supp. 173, 177 (D. Conn. 1997).

27. See *ABBATE*, *supra* note 6, at 197-200.

28. See, e.g., *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (involving a claim of trademark infringement in the use of a domain name).

29. See, e.g., William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 *WAKE FOREST L. REV.* 197, 198 (1995); Howard B.

“Cyberspace” is a term coined and popular in science fiction.³⁰ It is an intangible, but perceptually real, “place” where electronic communications take place, one that has no physical existence, and therefore no physical boundaries. In popular thought, Cyberspace is perceptually separate from the physical reality in which human bodies exist and in which nations and states have physical (and jurisdictional) boundaries. Because of that conceptualization, there has been significant discussion on how, and indeed if, traditional physical-reality governments can control or influence Cyberspace-related events.³¹ In significant respects, this Article is a part of that discussion.

However, Cyberspace as envisioned and discussed does not exist on the Internet. In science fiction’s Cyberspace, a corporeal person has sensory inputs solely from Cyberspace, that is, he or she subjectively appears to enter a totally different reality (sometimes called “virtual reality”) where electronic data is perceived though all that person’s senses (sight, touch, taste, feel, sound, and so forth). Discussions, particularly political ones, based on this unrealized, subjective Cyberspace tend to lose touch with the actual physical reality that still exists, the one in which Internet users still physically exist and interact.³²

Regardless of how it may be perceived by a participant or imagined by a tax official, today (and for the foreseeable future) the Internet does not exist detached from mundane physical reality. Internet

Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 926 n.9 (1998).

30. See, e.g., WILLIAM GIBSON, *NEUROMANCER 5* (Ace ed. 1984) (“[The hero] . . . jacked into a custom cyberspace deck that projected his disembodied consciousness into the consensual hallucination that was the matrix.”). And in the same source “quoted” from a “kid’s show”:

“Cyberspace. A consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts . . . A graphic representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the non-space of the mind, clusters and constellations of data. Like city lights, receding”

Id. at 51. For a “more advanced” version, see ALEXANDER BESHER, *RIM* (Harper Paperbacks ed. 1996), in which the “virtual” world is intermingled with the “real” world and both become surreal. Cyberspace novels are so popular that they have become their own subgenre. See also *Cybermania*, University of Illinois English Dep’t, at <http://128.174.194.59/cybermania> (visited Mar. 27, 2000) (describing movies about Cyberspace and related concepts).

31. See, e.g., David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing that Cyberspace should have its own distinct law separate from “physical geographically-defined territories”).

32. Some science fiction novels are based on the proposition that a human personality (soul?) can be converted to digital information and exist totally independent of the human body, whether the physical body continues to exist or not. A variation, or companion, theme with similar results is the existence of a self-aware computer (“artificial intelligence” or “AI”) that exists solely in cyberspace. See, e.g., GREG EGAN, *DIASPORA* (1998). So far as the author is aware, no one has yet succeeded in transferring a human personality to digital format or in creating a self-aware computer.

transactions involve communication between two computers that physically exist at some identifiable, geographic locations. The persons directing the transmissions and owning the computers also physically exist at identifiable locations. The government where the computer and/or participants exist has the ability to enact and attempt enforcement of rules concerning those persons' actions. The real question is whether governments can reach through Cyberspace to regulate the actions of persons.

There is an additional way in which the Cyberspace construct is misleading, but it nevertheless seems to be a foundational premise of some court decisions.³³ In science-fiction Cyberspace, a "cyber-voyager" perpetually physically travels to cyber-locations and interacts with data, computers, and other cyber-voyagers.³⁴ Some commercial Web sites are referred to as "malls,"³⁵ invoking the image of a typical suburban mall where physical persons physically go to view, touch, and smell physical items and to interact with physical sales persons to purchase those items. In the image, sellers and purchasers engage in meaningful interaction, consciously and intentionally dealing with known persons. That analogy is based on the still science-fictional Cyberspace. Except perhaps in a very limited manner in chat rooms, the cyber-mall is not consistent with what really happens on the Internet.

A more accurate analogy would be a vending-machine site (or a public library's rack of mail-order catalogs). Return to the hypothetical driver in the hypothetical forty-street village. As he is driving, he observes a billboard advertising goods or services he might wish to purchase. The driver changes routes to arrive at the advertised location.³⁶ Arriving at the location, the driver observes hundreds or thousands of vending machines with pictures or descriptions of wares for sale. The driver-now-shopper moves around viewing the displays, comparing prices and descriptions (but not touching, tasting, or smelling), and he decides to purchase an item. He enters a credit card number into the vending machine's data-processing program and indicates the desired product. After confirming the validity of the entered data, the machine delivers the requested product either directly or starts the process through which a physical-reality product

33. See, e.g., *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996); discussion *infra* notes 203-229 and accompanying text. *But compare* *Cybersell, Inc. [Ariz.] v. Cybersell, Inc. [Fla.]*, 130 F.3d 414, 415 (9th Cir. 1997) (rejecting the notion that a corporation could be subject to personal jurisdiction because "cyberspace is without borders").

34. See, e.g., GIBSON, *supra* note 30, *passim*.

35. See, e.g., *skymall.com*, at <http://www.skymall.com/1-800-SKYMALL/WebObjects/Store> (visited May 15, 2001).

36. The driver may have started the trip with this destination in mind. That would not alter the usefulness of the analogy.

is delivered to a location chosen by the shopper. The shopper returns to being a driver and goes somewhere else.

Notice that in all of this, the driver-shopper was the only person "present." The only interaction was with automated machinery. The machine does not care nor need to know the true identity or location of the person pushing the buttons. The seller and its employees do exist, but they are all on the other side of the machines—wiring vending machines, changing descriptions and prices, and manipulating digital and physical products—not interacting directly with the shopper. The seller's purposeful acts are limited to opening the site, programming it to accept information (which may include product orders and how to collect payment for products sold), and arranging delivery in accordance with instructions given to the machine.

Some might object to this analogy as being too impersonal, that the seller really does have and need particular information about the buyer and her or his physical location. But those objections are easily met. Without mutual physical presence, the seller can never know who the physical purchaser really is and even in a physical shopping mall, the purchaser's identity is really irrelevant, so long as the seller has adequate assurance of payment before delivering the goods. A seller is also indifferent about the delivery of physical goods, so long as delivery costs are paid. The delivery location, which may be only a reshipment point (and the final destination somewhere else entirely), is totally immaterial to the seller.³⁷

It is true that information about Internet users is obtained (frequently without the user's knowledge or permission) and collated with information from other sources, enabling Internet sellers to identify the user and his or her physical location. But some Internet sellers do not collect customer information (and they should be praised).³⁸ In addition, users can provide misleading information, and programs exist that can totally frustrate efforts to track and identify Internet users.³⁹ For example, Internet users who purchase by credit card can be identified through the card number, but "e-cash" purchasers cannot.⁴⁰ With respect to the need for identity information,

37. The destination location is contractually insignificant as well. The standard legal rule is that title, risk of loss, etc., pass to the buyer when the seller delivers goods to the carrier, and thus, the sale is complete at the seller's location. See, e.g., *Butler v. Beer Across America*, 83 F. Supp. 2d 1261, 1264 n.6 (N.D. Ala. 2000) (discussing Internet mediated sale of beer to a minor).

38. See, e.g., *E-Data Corp. v. Micropatent Corp.*, 989 F. Supp. 173, 175 (D. Conn. 1997).

39. See, e.g., Mike Bunker, *Privacy Tools Usher in Era of Net Anonymity*, MSNBC, at <http://www.msnbc.com/news/347298.asp> (visited Dec 2, 1999) (describing the "Freedom" system developed by Zero-Knowledge Systems, which reportedly creates an impenetrable online anonymity for the Internet user).

40. "E-cash" is similar to the widespread long-distance telephone card that "stores" prepaid funds and deducts the cost of calls. There is no need to identify the user because

the Internet marketplace is more like a Central Asian cash bazaar than it is like a mid-American suburban mall.

But despite all that, Cyberspace is not an unusable concept. Geographic location is not relevant to Internet communications—even transmissions between physical computers located in the same political jurisdiction may be routed across political boundaries or circumvent them via satellite. The geographic location of other computers involved in an Internet-mediated transaction is not relevant to the persons involved.⁴¹ The technical “address” of any particular Internet-connected computer is frequently not known to, or of any concern to, an Internet user.⁴² Thus, to the extent that Internet-mediated transactions transcend traditional political and geographic boundaries, traditional legal concepts such as jurisdiction and venue may appear unfair or unreasonable, and may ultimately prove unworkable.

B. Taxes—Confiscation in Many Guises

The means governments have devised to obtain funds may seem infinite, but there are recognized categories of types of taxes. A full description of all types of taxes is beyond the scope of this Article.

payment is assured without that information. While the first ventures in e-cash may not have been great successes, more recent ventures may fare better. Mondex International Ltd. is a subsidiary of MasterCard International. It provides credit cards, debit cards, and e-cash cards that can be used on the Internet. See *Mondex on the Internet*, at <http://www.mondex.com/mondex> (last visited Feb. 16, 2000). The on-line advertising states: “On the Internet, no-one need know who you are when using Mondex. When goods and services are purchased using Mondex there is no record held of the transaction, allowing the user the privacy normally only afforded with physical cash.” *Id.* Tax officials are worried by e-cash because it provides no information useful in auditing taxpayers or tracing purchasers’ locations. See INLAND REVENUE, H.M. CUSTOMS & EXCISE, ELECTRONIC COMMERCE: THE UKS TAXATION AGENDA, CHALLENGES TO TAX COMPLIANCE 53 (Nov. 1999) (U.K.) [hereinafter UKS TAXATION AGENDA], <http://www.inlandrevenue.gov.uk/taxagenda/ecom.pdf> (visited Mar. 28, 2000).

41. Even if a person wishes to communicate with a particular person or company that is at a specific geographic location, that does not mean the computer which holds that person’s or company’s data (Web site program) is at the same geographic location. The server containing a San Diego, California, company’s Web site could be in Texas, Tijuana, or Transylvania—and the person accessing that Web site would neither know nor care.

42. Internet IP addresses, see Appendix A, are a series of numbers and periods without any obvious geographic reference. Those addresses are associated with “domain names,” which are “normal” words and periods. A person wishing to “visit” a particular computer via the World Wide Web enters a domain name, which is converted to an IP address. Domain names may give some indication of the nature of the organization that operates a particular Web site. Many domain names end in “.com” [commercial], “.gov” [government], “.org” [nongovernmental organization], or “.edu” [educational organization]. Many non-U.S. domain names now include a two-letter abbreviation of the domain’s physical (political) location, e.g., “.vz” [Venezuela], “.cn” [China], “.ru” [Russia], and “.kz” [Kazakhstan]. However, despite the potential for some identification of the site’s location or character, the Internet user is indifferent to that identification; the actual location of the Web site computer need not coincide with the domain name. See MOSCHOVITIS ET AL., *supra* note 6, at 189-90, 194-96.

However, a general description of tax types and their operation is a necessary foundation for the following discussions. For that purpose, a consistent terminology is helpful. All taxes can be basically described using four terms or concepts: (1) taxable event,⁴³ (2) measure,⁴⁴ (3) rate,⁴⁵ and (4) incidence.⁴⁶ One should keep in mind that all taxes, regardless of category or character, are involuntary transfers of wealth from the taxpayer to the government which cannot be enforced beyond the taxing authority's jurisdiction or in violation of its own laws.⁴⁷

The *taxable event* is the identified objective happening or condition that triggers a legal duty to pay taxes.⁴⁸ It may be a transfer of property (including money), the creation of a tangible item, or merely the existence of an item or condition at a specified time and place.⁴⁹ The *incidence* of the tax determines who is legally responsible to pay the tax amount to the government.⁵⁰ Note that the incidence of the tax is not necessarily on the person who bears the economic burden of the tax.⁵¹ Also, significantly for some taxes, the person who actually submits the taxes to the government may not be the one on whom the tax is incident.⁵² The *measure* of a tax is a number associ-

43. See, e.g., *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 190 (1995) (describing the taxable event of sales tax).

44. See, e.g., *id.* at 200 (describing measure of tax as "value of the service purchased").

45. See, e.g., *id.* at 178 (describing the rate).

46. See, e.g., *American Oil Co. v. Neill*, 380 U.S. 451, 455-57 (1965) (discussing the incidence of motor fuel tax).

47. See, e.g., *Miller Bros. v. Maryland*, 347 U.S. 340, 347 (1954).

48. See, e.g., *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 190 (1995) (describing the taxable event of sales tax as "compris[ing] agreement, payment, and delivery of some of the services in the taxing State").

49. See *id.*

50. See, e.g., *American Oil Co. v. Neill*, 380 U.S. 451, 455-57 (1965) (discussing the incidence of motor fuel tax).

51. See *id.* Frequently, it is difficult to determine who ultimately bears the economic burden of a particular tax. A corporate income tax is legally incident on the corporation earning income. See I.R.C. § 11 (1994). However, the paying corporation will take that tax into account when establishing a price for its products. If all the tax costs are passed on as part of the sales price, the economic burden is actually on the person buying things from the corporation. Of course, if the immediate buyer is not a consumer, that cost may be passed further along to the buyer's customers. However, if a corporation cannot increase its prices for competitive reasons, the economic burden of the tax may be passed on to the corporation's shareholders via a lower dividend. If the corporation does not have a net income, part of the economic burden may be effectively passed to the government imposing income taxes, via a "net operating loss" deduction. In that event, the ultimate economic burden is borne by taxpayers, who have to cover the shortfall. Tracing the economic burden can be much more complicated. Consider, for example, a situation in which the economic burden of a sales or VAT tax is imposed on building materials used in the construction of a commercial building.

52. In many situations, the person having the legal obligation to transmit tax funds to the government is not the person upon whom the tax is incident. A frequent example is the "withholding" of income tax payments from employees' pay. See I.R.C. § 3402 (1994). In the United States, sales taxes are imposed on the retail purchaser (customer), but the retail seller is required to collect the sales tax from the purchaser and remit the funds to the gov-

ated with the taxable event that is one component of the tax-amount calculation.⁵³ The number may be units of production, number of items, number of dollars (or other currency), or determined by any other means as a measure related to the taxable event.⁵⁴ The *rate* of a tax is the second component of the tax-amount calculation.⁵⁵

In the United States, the primary transaction or “consumption” tax, the “sales and use tax,” is treated separately from other transaction-measured excise taxes.⁵⁶ “Value added taxes” (“VAT”) are also generally treated as a distinct category.⁵⁷ However, sales, use, and VAT taxes should be considered a single category here because most of their respective attributes are similar if not identical.

Almost all U.S. states impose a retail sales tax.⁵⁸ Most frequently, the sales tax is imposed on all retail sales of tangible prop-

erty. See, e.g., *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 175 (1995). The obligation to submit exists even if the seller does not collect the funds from the purchaser-taxpayer. See *id.*

It is easy to see why a government might prefer that the person having the burden of submitting the tax funds not be the person on whom the tax is incident. For example, in the employer-employee situation, the employer is obligated to pay the employee a particular amount. The requirement that the employer pay a portion of that amount to the government does not increase the amount the employer pays out, so there is no particular reason for the employer to be reluctant to pay. The employer's net cost is the same either way. However, an employee who receives 100% of her earnings would presumably have a much greater resistance to paying some of those funds to the government. Another incentive toward “third-party” payment is the number of remitters with whom the government must deal. If consumers were required to pay sales taxes directly to the government, the government would have to deal with all consumers on an individual-transaction basis, which would be an accounting and enforcement nightmare. When the retail seller is required to remit the taxes, the number of responsible remitters is significantly reduced, and the amount to be paid can be calculated from the retailer's total sales, rather than by individual transactions.

53. See, e.g., *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (describing measure of tax as “value of the service purchased”).

54. See, e.g., *id.*

55. If the measure of the tax is not a currency amount, the rate is a currency amount. See, e.g., *National Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 360 (1869) (describing a tax on corporate shares with a rate of 50¢ per share). For example, if there is a tax based on the number of widgets produced per year, the tax rate would be a currency amount, perhaps \$0.005 per unit. The taxpayer (or government) would multiply the number of units produced (e.g., 1,000,000) by the tax rate to determine the amount of tax due (1,000,000 × \$0.005 = \$5,000). If the measure of the tax is a currency amount, the rate is normally a percentage. *Jefferson Lines*, 514 U.S. at 178 (describing sales tax measured by gross receipts and having rate of 4%).

56. See, e.g., II JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION*, at pt. V.

57. See, e.g., *id.* at ¶ 12.01.

58. See *id.*, *supra* note 56, at ¶ 12.01, tbls. 12.1-12.9 (3d ed. 1998). In many states, local governments or government agencies have the option of imposing an additional sales tax either for general revenue purposes, or to support particular government activities. See *id.* Sales tax rules and rates vary from state to state, and rates may vary substantially from location to location within a single state, causing problems for everyone, but especially for out-of-area sellers (discussed in Part IV, *infra*). The complexity of sales taxes is only partially revealed by the fact that it takes Hellerstein nine multi-page tables, each with tens of footnotes, to describe their characteristics.

erty.⁵⁹ It is common, however, for retail sales of food and medication to be exempt from the sales tax.⁶⁰ The measure of a transaction tax is the price paid and the rate is generally expressed as a percentage, for example, four percent of the price. One common characteristic of sales taxes that has created significant controversy with respect to Internet-mediated sales is the distinction between incidence and the responsibility to submit.

Typically, since the buyer has the legal obligation to pay a sales tax, it is "incident" on the buyer. However, for rather obvious administrative purposes, the seller is required to collect the sales tax (on the state's behalf) and pay the collected amount to tax authorities.⁶¹ Thus, actions to collect unpaid sales taxes are against the seller, not the responsible taxpayer.⁶² As discussed further below, this separation between responsible taxpayer and responsible tax remitter can create significant problems, particularly when the two parties are from (or in) different jurisdictions.

A typical VAT tax is like sales taxes, with one significant distinction. A VAT tax is generally imposed on all sales, not just retail sales to consumers. If Country *A* has a 5% VAT tax and Country *B* has a 5% sales tax, the total tax collected would be equal. However, Country *A*'s VAT tax would produce tax revenues at an earlier time.⁶³

59. See *id.* at ¶ 12.04[1].

60. See *id.* at ¶ 12.04[7]. The exemption of food and medicine sales is usually justified on a "tax equity" basis, that is, that persons with lower income spend a greater proportion of their incomes on "necessary" food and medicine, therefore exempting those sales shifts the tax burden more to persons who have the wherewithal to pay. Sales taxes in general are frequently criticized as being "regressive," meaning that persons with lower incomes spend a greater percentage of that income on sales taxes than those with higher incomes. See *id.* at ¶ 12.03. Exempting food and medicine reduces the "regressive" character of the tax. A similar argument has been made to justify the imposition of sales taxes on services, that is, that persons with higher incomes spend a greater proportion of their income for services, therefore taxing sales of services reduces the regressive nature of sales taxes and may even make them progressive. See *id.* (discussing the progressive/regressive nature of sales tax).

61. See *id.* at ¶ 12.01.

62. See, e.g., *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 175 (1995).

63. See, e.g., Law of the Republic of Kazakhstan, Concerning Taxes and Other Obligatory Payments to the Budget, Edict N 2235, arts. 53-73 (QSE trans. Aug. 1999) (as amended) (Kaz.). Suppose that the item ultimately sold to a retail purchaser is a \$200 leather jacket, produced in the jurisdiction where the final sale takes place. In Country *B*, the purchaser would pay \$10 in sales tax. The full amount would be received by the government after the retail sale. However, in Country *A*, there would typically be many VAT-taxable transfers before the retail sale. When the cow is sold, VAT tax is paid (on the part of the price attributable to its hide). When the meat-processing company sells the hide to the leather-making company, VAT tax is paid. When the leather is sold to the garment maker, VAT tax is paid. At each step between raw material production and final retail sale, VAT tax is paid and the government receives tax revenue. VAT taxes are usually prevented from becoming a tax on a tax on a tax by allowing a deduction for VAT taxes previously paid. Cumulatively, Country *A* receives VAT tax revenues equal to five percent of the jacket's retail sales price, but most of those revenues are received before the retail sale takes place. And, of course, the earlier tax revenues are received, the better the govern-

With respect to submission of VAT tax revenues, the obligation probably could, with equal administrative burden, be placed on either the purchaser or seller, except for the final retail sale. A VAT tax carries a higher administrative cost to taxpayers: The credit for prior VAT payments requires that all purchasers track the VAT-tax portion of each purchase price, allocate the VAT tax paid to the various components of items purchased,⁶⁴ and pass the information on to its customers.⁶⁵ In contrast, a sales tax only requires the final seller to determine the tax due, which is a single-step multiplication calculation.

“Use” taxes are companions for sales taxes. Use tax is due whenever a consumer possesses or uses an item in a taxing jurisdiction if (a) the item would have been subject to sales tax if sold in that jurisdiction, and (b) no such sales tax was paid.⁶⁶ A credit is given for sales tax paid to other jurisdictions to eliminate double taxation.⁶⁷ Use taxes are due from, and payable by, the in-jurisdiction user.⁶⁸ With respect to every significant factor, except taxable event, sales taxes and use taxes are identical. That includes use-tax rules that impose on the seller a collection and remission obligation. Those use-tax collection rules are at the center of the current controversy (and this discussion). Most sellers on whom these duties might be imposed do not operate or reside in the taxing jurisdiction. Thus arises the question of jurisdiction to impose or enforce those rules.

III. LIMITS ON STATE ACTION—ONLY THE PROPER PREY

A. *Fundamental Principles*

Internet-mediated activities emphatically present one very fundamental question: Over whom and what can a government legitimately exercise power? The Internet’s nature limits solving legal issues in a solely domestic context for at least two reasons. The first is technical. Closing or restricting a transmission route is automatically treated as an error and alternate, unrestricted routes are chosen. Even if all current transmission routes could be restricted, in the

ment likes it. VAT taxes are frequently much higher than retail sales taxes, but they can be completely hidden by not imposing VAT on retail sales to consumers, or requiring the retail seller to include the VAT in its sales price (that is, not separately stated).

64. What portion of a cow’s purchase price is allocable to its hide? What portion of 1000 pounds of refined copper is in an electric motor?

65. See generally James M. Bickley, *The Value-Added Tax: Concepts, Issues and Experience*, 47 TAX NOTES 447 (1990).

66. See, e.g., *Henneford v. Silas Mason*, 300 U.S. 577, 581-85 (1937).

67. See *id.*

68. See *id.*

near future satellite systems reaching every part of the globe will be operational.⁶⁹

The second reason is inherent in the Internet's functionality. All Internet sites are functionally equidistant from all other sites. Any attempt to regulate one site, or one category of sites, must apply to all sites or it will be of no effect.⁷⁰ Thus, an attempt to impose rules on Internet communications, or persons using the Internet, automatically involves persons and events wherever (geographically) the Internet can be accessed. Action by even the smallest local government can have world-wide repercussions.

Since the mid-1600s, European countries have accepted the principle that each country has objectively identifiable geographic boundaries and exercises sole sovereignty within those boundaries.⁷¹ During the twentieth century, that principle became a foundational rule of international relations.⁷² A corollary of that principle is that no country can legitimately "interfere" in the internal affairs of another country, that is, internal sovereignty necessarily limits a country's power outside its borders.⁷³

These principles would be easier to apply if no event or person ever crossed national boundaries. Unfortunately for easy realization of political theory, electronic communications can easily cross geographic boundaries, regardless of the wishes and regulations of geography-bound governments. One of the Internet's most fundamental and powerful features is its ability to transmit information almost instantaneously to any location in the world, totally disregarding political geography and ideology.

When these principles of international law were initially developed, high-speed communications meant fast horses and sailing ships. With a modicum of diligence, a government could detect any

69. Low orbit satellite (LOS) systems currently being developed will have that capability. No radically new technology is required. See *About Teledesic: Fast Facts*, at <http://www.teledesic.com/about/about.htm> (visited Mar. 28, 2001) (indicating that Internet-in-the-Sky network services are scheduled to begin in 2005).

70. Regulating an individual browser's actions automatically applies to all sites he or she can access. Any geographically limited regulation can be avoided by moving a Web site to a physical computer in another geographic area.

71. The 1648 Treaty of Westphalia ending the Thirty Years War is generally cited as the initial formal expression of the "new" regime of absolute internal state sovereignty within fixed geographic boundaries. See, e.g., THOMAS R. VAN DERVORT, *INTERNATIONAL LAW AND ORGANIZATION* 10-13 (1998).

72. See, e.g., *id.* at ch. 3.

73. See, e.g., DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES, G.A. Res. 2625, U.N. GAOR, 25th Sess., Annex, Supp. No. 28, at 121, U.N. Doc. A/8028 (1970). The U.N. Charter states: "[S]tates shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State." U.N. CHARTER art. 2, para. 4. That limitation also applies to states of the United States with respect to other states. See *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980).

meaningful penetration of national boundaries in either direction. Today, electronic communications cross political boundaries undetected, or can avoid them entirely via satellite. Obviously, technology did not leap from sail to satellites in one bound. As international communications and transportation technology advanced, many legal controversies were raised and resolved. Some of those resolutions are embodied in generally accepted rules for when a government can legitimately exercise its authority, even though that may have an impact (intended or unintended) beyond the country's geographic borders.⁷⁴

Some of those rules are set forth in agreements between countries concerning matters of mutual interest, such as taxation, exchange of ambassadors, extradition of criminals, and so on.⁷⁵ Other rules are solely "domestic" in a legal sense but are "international" in the sense that the domestic rules apply to transborder situations or events.⁷⁶ Many rules are based on enlightened self-interest. An example from the legal context: Assume a court of Country A has entered a judgment in favor of one of its nationals against a national of Country B, but there is no way to enforce the judgment in Country A. To obtain satisfaction, the judgment creditor must go to Country B. If Country B recognizes and enforces the Country A judgment, it will be much easier for the judgment creditor to obtain satisfaction.⁷⁷ It is more likely that Country B officials and courts will recognize the Country A judgment if Country A officials recognize Country B judgments, that is, there is reciprocity. Thus, it is in each country's self-interest for its domestic law to recognize other countries' official acts.⁷⁸

Another situation in which the domestic law may impact "international" situations is where some act or event, which takes place outside the country's boundaries has an impact within the country's

74. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) [hereinafter FOREIGN RELATIONS RESTATEMENT]. Section 404 identifies crimes such as piracy, slave trading, hijacking aircraft, genocide, and war crimes as being subject to "universal jurisdiction." *Id.*

75. See generally *id.* § 111.

76. The principle of "comity" is an example of how this type of rule operates. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) ("[Comity] is the recognition which one nation allows [to] another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.").

77. If there is no such recognition, the judgment creditor may be required to go through the entire legal process of Country B, with the possibility of losing and becoming a judgment debtor rather than a judgment creditor, not to mention the additional time, effort, and cost.

78. Of course, there are limits to this type of comity recognition. It is highly unlikely that a judgment based on testimony induced by overt physical torture would be enforced in a country where such means of obtaining testimony were considered inherently unreliable. In *Hilton*, the Court refused to enforce a French judgment under comity principles because the proven law of France was that U.S. judgments did not receive reciprocal treatment in French courts. See 159 U.S. at 228.

boundaries. A classic example: A person standing in Country X shoots an arrow that comes down in Country Y, striking Zerba, a local resident. Country Y clearly has geographic jurisdiction over the arrow-landing event and, in most cases, would claim jurisdiction over the person who loosed the arrow, even though that person was never in Country Y.⁷⁹

In addition to the geographic component, it is generally recognized that any country has jurisdiction over its nationals, wherever the national may be in the world.⁸⁰ That is the usual rationalization for the privilege of expatriates to pay tax in their "home" country on income earned in another country.⁸¹ Of course, that does not preclude the country where the national is physically present from also exercising jurisdiction.

B. Due Process Restraints on Government Action

These international law principles are inherent in the legal relationships between states within the United States.⁸² They are reinforced by constitutional obligations to satisfy due process requirements, not to unduly interfere with interstate commerce, to recognize other states' acts, and so forth. While thus acknowledging the relevance of fundamental international law principles, due to space con-

79. In most situations, a claim of jurisdiction would require that the archer have some intent to at least let loose the arrow in the direction of the international border under conditions where a reasonable person might foresee the arrow crossing the boundary. See FOREIGN RELATIONS RESTATEMENT, *supra* note 74, at § 402. Most U.S. states exercise long-arm jurisdiction over persons who commit a tort outside the state which has an impact within the state. See *id.* In the criminal law context, the U.S. Supreme Court has gone even further, allowing the exercise of jurisdiction over a nonresident alien for a crime committed in the defendant's home country, despite the fact that the defendant had been forcibly taken in his home country and unwillingly transported to the United States in violation of general international law principles. See *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992).

80. See, e.g., 28 U.S.C. § 1783 (1994); *Blackmer v. United States*, 284 U.S. 421 (1932); FED. R. CIV. P. 4(i).

81. See, e.g., FOREIGN RELATIONS RESTATEMENT, *supra* note 74, at § 412. That is, in turn, the reason for many treaties dealing with "double taxation" and for domestic rules that allow some adjustment for foreign taxes paid. See, e.g., 26 U.S.C. §§ 164, 901 (1999) (addressing deduction and credit, respectively).

82. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977). *Shaffer* reviewed the watershed decision of *Pennoyer v. Neff*, 95 U.S. 714 (1877), in relation to state court in rem jurisdiction and found that the strictly territorial aspects of *Pennoyer* were inconsistent with contemporary due process theory. While *Shaffer* held that *Pennoyer* had become outmoded with respect to state court personal jurisdiction, it did not even hint that the mutually exclusive sovereignty of states aspect of *Pennoyer* was changed. The state sovereignty principles there enunciated include: "The first of those principles was that 'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.' The second was 'that no State can exercise direct jurisdiction and authority over persons or property without its territory.'" *Shaffer*, 433 U.S. at 197 (quoting *Pennoyer*, 95 U.S. at 722). Those principles remain fundamental to the U.S. federal system. However, as will be discussed later, they are often applied in a Commerce Clause context rather than as due process principles.

siderations if nothing else, addressing international Internet-related issues must be deferred. This discussion will concentrate on domestic legal rules.

The U.S. Constitution prohibits federal and state governments from depriving any person of "life, liberty, or property" without due process of law.⁸³ One aspect of due process is the internal sovereignty principle and its corollary of external impotence. Entering a judgment against a person over whom the court has no jurisdiction does not fulfill the Constitution's due process requirement.⁸⁴ Consistent with international law traditions, the U.S. Supreme Court ruled very early that a court can render judgment against a person present within the territorial boundaries of that court.⁸⁵ The more difficult question, and the one relevant to this discussion, concerns persons who are not, and have never been, present within the acting government's territory.⁸⁶

As a preliminary matter, it must be noted that there are two types of jurisdiction over nonresidents: "specific" and "general." In brief, a state court exercises "specific" jurisdiction when the subject matter of the suit relates to ("arises out of") the nonresident defendant's contact with the forum state.⁸⁷ A state court must have "general" jurisdiction over a nonresident when the action does not relate to the nonresident defendant's contacts with the forum state.⁸⁸ The exercise of general jurisdiction requires "continuous and systematic general business contacts" between the nonresident and the forum state.⁸⁹ This distinction was alluded to in *International Shoe Co. v. Washington*,⁹⁰ but it was discussed in more detail in *Helicopteros Nacionales de Columbia, S.A. v. Hall*.⁹¹

1. Judicial General Jurisdiction

Helicopteros is normally considered the "landmark" case on judicial general jurisdiction. In that case, the defendant was a corpora-

83. U.S. CONST. amend. V, XIV (applicable to federal and state governments, respectively).

84. See *Shaffer*, 433 U.S. at 198-99; *Pennoyer*, 95 U.S. at 734-35.

85. See *Pennoyer*, 95 U.S. at 724.

86. These persons and entities are usually labeled "nonresidents," although this is somewhat misleading because jurisdiction over persons within the territory is not limited to those who reside there. See *id.*

87. The plaintiff's contact with the forum state is only incidentally related to the inquiry because by commencing the action, the plaintiff has consented to the court's jurisdiction. See, e.g., *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984).

88. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984).

89. *Id.* at 416.

90. 326 U.S. 310 (1945).

91. 466 U.S. at 414.

tion organized and having its principal office in Columbia.⁹² Its business was contract helicopter transportation in South America.⁹³ The cause of action arose from a helicopter crash in Peru in which U.S. citizens died.⁹⁴ The helicopter crashed during a flight under a contract with a Peruvian "consortium" that was the "alter ego" of a Houston, Texas, joint venture.⁹⁵ The plaintiffs, none being Texas residents, filed a wrongful death action in Texas, naming Helicopteros as a defendant.⁹⁶ The plaintiffs contended that Helicopteros had sufficient contacts with the state to allow Texas courts to exercise jurisdiction, which the Court understood as contending that "general" jurisdiction existed.⁹⁷

Helicopteros' acts in Texas consisted of negotiating (not signing) a general transportation contract related to the fatal flight, purchasing (over about seven years) a number of helicopters from a Texas manufacturer, and sending some employees to Texas for training or orientation.⁹⁸ Over the years, the Texas purchases exceeded \$4 million, and Helicopteros received from Texas banks payments of over \$5 million on the transportation contract.⁹⁹ The Court held that Helicopteros did not have sufficient contacts with Texas to support general jurisdiction.¹⁰⁰

To illustrate the type of situation in which general jurisdiction could be exercised, the Court turned to *Perkins v. Benguet Consolidated Mining Co.*¹⁰¹ In *Perkins*, the president and general manager of the defendant Philippine corporation effectively operated the corporation out of an office in Ohio during the Japanese occupation of the Philippine Islands.¹⁰² The corporation's records were kept in the Ohio office, directors' meetings were held there, general bank accounts were in Ohio, and salary and other payments were made from there.¹⁰³ It was rather obvious that the corporation conducted essentially all of its business (curtailed as it was by the war situation)

92. See *id.* at 409.

93. See *id.*

94. See *id.* at 410.

95. See *id.* at 409-10.

96. See *id.* at 412.

97. See *id.* at 415-16. The single-justice dissent in *Helicopteros* argues that the Court should have considered the possibility of exercising specific jurisdiction because the cause of action "[arose] out of" or "related to" Helicopteros' activities in Texas. *Id.* at 424-28 (Brennan, J., dissenting). The plaintiffs' allegations with respect to Helicopteros, however, seem to be limited to an allegation that its pilot was negligent, see *id.* at 426 (Brennan, J., dissenting), which could only have very tenuous and indirect connections with his employer's Texas contacts.

98. See *id.* at 410-11.

99. See *id.* at 411.

100. See *id.* at 418-19.

101. 342 U.S. 437 (1952).

102. See *id.* at 438-39.

103. See *id.* at 447-48.

from the Ohio office.¹⁰⁴ Under those circumstances, the Court found that the exercise of general jurisdiction did not violate due process principles.¹⁰⁵ To reach that conclusion, the Court found that the corporation had “continuous[ly] and systematic[ally]” carried on its general business activities in Ohio.¹⁰⁶ In contrast, the in-state activities in *Helicopteros* were all related to purchasing helicopters, which was part of its business operations only in the sense that it had to have helicopters to provide helicopter transportation.¹⁰⁷ The Court held that those were not the kind of systematic general business contacts that would satisfy due process requirements with respect to general jurisdiction.¹⁰⁸

If a clear distinction can be drawn between *Perkins* and *Helicopteros*, it is that in *Perkins*, the corporation’s in-state activities were as broad and continuous as they would have been if the corporation had been a legal resident of the state, that is, the forum-based activities related to the whole of the company’s commercial operations. But in *Helicopteros*, the corporation’s activities were limited to one contract negotiation and some equipment acquisitions; its general management and business operations were somewhere else.¹⁰⁹ The key to general jurisdiction is, therefore, “continuous and systematic” activities within the forum state that are not objectively different from the activities of a resident corporation.

2. Judicial Specific Jurisdiction

The requirements for exercising specific jurisdiction are less demanding, principally because there is a direct connection between the subject matter of the litigation and the forum state, that is, the act or its effect occurs within the forum’s geographic jurisdiction even if the defendant was not personally there. Whether due process requirements are satisfied is determined on a case-by-case basis.

The modern line of cases dealing with specific jurisdiction over nonresidents starts with the Supreme Court’s 1945 decision in *International Shoe*.¹¹⁰ That case involved the State of Washington’s attempt to collect its unemployment tax from International Shoe in state courts.¹¹¹ International Shoe contended that the Due Process Clause precluded Washington from exercising jurisdiction because

104. See *id.*

105. See *id.* at 438.

106. *Id.*

107. See *Helicopteros*, 466 U.S. at 416.

108. See *id.*

109. Since both corporations were alien corporations, it is unlikely that any distinction could be made if the defendant in a similar case were a U.S. corporation not resident in the forum state.

110. 326 U.S. 310 (1945).

111. See *id.* at 311.

the company was not legally “present” in Washington.¹¹² That contention first raised somewhat of a philosophical problem: since a corporation has no physical existence, how can it be said to be present anywhere? The Court answered in the only realistic manner, stating that a corporation’s presence (in its home state or elsewhere) could only be established through the activities carried on for it by corporeal persons acting on its behalf.¹¹³ In that context, what was International Shoe’s presence in Washington State? It had no offices in the state, no contracts were entered into in the state, no goods were legally delivered in the state, and no purchase contracts were legally created in the state. However, during the years in question, International Shoe had eleven to thirteen salesmen who operated solely within the state; who resided there; who solicited orders there; who rented motel, hotel, and display rooms there; and who were compensated by commission based on their in-state sales.¹¹⁴ The continuing and active presence of physical persons in Washington State working on International Shoe’s behalf was obvious, and the tax the State was attempting to collect was directly related to those persons’ presence and actions in the State. Specifically addressing the due process issue, the Court stated:

[Due process] demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An “estimate of the inconveniences” which would result to the corporation from a trial away from its “home” or principal place of business is relevant in this connection.

“Presence” in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued has been given. . . .

. . . .

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the

112. See *id.* at 315-16. International Shoe also contended that the tax was an unconstitutional burden on interstate commerce, but that contention was easily overcome due to federal legislation that expressly required employers to pay state unemployment taxes, even if they were engaged solely in interstate commerce. See *id.* at 315; see also I.R.C. § 3305(a) (1994).

113. See *International Shoe*, 326 U.S. at 316-17.

114. See *id.* at 313.

fair and orderly administration of the laws which it was the purpose of the due process clause to insure.¹¹⁵

The Court summarized its holding:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."¹¹⁶

Dissenting, Justice Black was of the opinion that International Shoe's contentions had so little merit that the appeal should be dismissed as unsubstantial.¹¹⁷ Black contended that the Due Process Clause was not intended to preclude a state from being able to tax and sue the persons or entities that deal with its citizens within its borders and that the Court should adopt that as a "workable standard."¹¹⁸ Black went on to state:

The Court has not . . . [adopted a workable standard], but instead has engaged in an unnecessary discussion in the course of which it has announced vague Constitutional criteria applied for the first time to the issue before us. It has thus introduced uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution.¹¹⁹

Based on subsequent cases, Justice Black's criticism about vagueness and uncertainty have proven true. However, his prediction that those problems would curtail state powers has not yet proven true.¹²⁰

Since 1945, there have been numerous court decisions discussing due process and judicial specific jurisdiction over nonresidents. A relatively small number are consistently cited in Internet-related cases and deserve brief mention here. One that requires only a mention is the Court's recognition that technological "progress" has increased the flow of commerce between states, increasing the call for broader jurisdiction over nonresidents while at the same time making defense of actions in foreign tribunals less burdensome.¹²¹

115. *Id.* at 316-19 (citations omitted).

116. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

117. *See id.* at 322 (Black, J., dissenting).

118. *Id.* at 323.

119. *Id.*

120. Justice Black's comments concerning the vagueness implicit in such terms as "fair play" and "contrary to natural justice" have significant merit. It is still possible that some future composition of the Court could result in very restricted interpretation of those terms. As everyone knows, what is "fair" is a matter of opinion depending more on who is asked than on any discernable objective reality.

121. *See Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *see also McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). Most court decisions expounding on that theme, particularly the "burden" part, seem to ignore the cost in time and effort involved in out-of-

In 1985, the Court made it clear that a nonresident could be subject to a state's jurisdiction even though the nonresident was never, personally or through agents, physically present in the forum state. In *Burger King Corp. v. Rudzewicz*¹²² the parties negotiated a contract for the franchise of a Burger King restaurant located in Michigan.¹²³ The defendants were Michigan residents.¹²⁴ The negotiations leading to the contract and the operation of the restaurant occurred over a two- to three-year period.¹²⁵ The significant in-person contacts took place in Michigan at Burger King's district office.¹²⁶ However, the principal Burger King agents involved were always at Burger King's international headquarters in Florida and, according to the company, these Florida-based agents made all of the significant decisions and contacts.¹²⁷ Burger King commenced a breach of contract action in Florida.¹²⁸

The defendants initiated contact with the knowledge that Burger King's principal offices were in Florida and that detailed control of the restaurant's operations would issue from Florida.¹²⁹ The Court emphasized that the defendants chose not to deal with a strictly local operation, instead, they "reach[ed] out beyond' Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization."¹³⁰ For a forum's court to exercise specific jurisdiction, "it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."¹³¹ And "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."¹³²

town litigation. Even though it is possible to travel almost anywhere in the world in a matter of hours, and communicate around the world in a matter of seconds, that does not mean transportation, lodging, and communications costs are zero. Those costs can be thousands of dollars, which may be minuscule for a multinational conglomerate, but extremely significant to a small business with a Web site.

122. 471 U.S. 462 (1985).

123. See *id.* at 466-67.

124. See *id.* at 466.

125. See *id.* at 466-67.

126. See *id.*

127. See *id.* at 464-67. One of the defendants attended a brief training course in Florida, but that was given little significance in the Court's decision. See *id.* at 479 & n.22.

128. See *id.* at 468.

129. See *id.*

130. *Id.* at 479-80 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)).

131. *Id.* at 474-75 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

132. *Id.* at 476 (citing *Calder v. Jones*, 465 U.S. 783, 788-90 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957)). In *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 306-08

Thus, the most important factor for judicial specific jurisdiction is that the nonresident's voluntary action was taken with the knowledge that it may have an impact on persons or events in a particular state. In that context, a 1958 statement by the Court is significant:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact [between the nonresident defendant] and the forum state]. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.¹³³

It is, therefore, not sufficient if the defendant's "contact" with the forum is the plaintiff's (or third party's) volitional act which relates to the defendant. The defendant must take some volitional act that could have some effect in the forum state. Merely making information available to a forum resident would not appear to satisfy this requirement,¹³⁴ but entering into a contract might.

One of the questions raised by this requirement (that is, that the in-state contacts be due to the defendant's acts, not acts of others) concerns acts by one person (the defendant) which might result in events or acts by others at some other location. In *World-Wide Volkswagen Corp. v. Woodson*,¹³⁵ Seaway Volkswagen, Inc., operated only in New York, where it sold a vehicle to the Robinsons, who resided in New York at the time.¹³⁶ The Robinsons left their New York home for a new home in Arizona and, on the way, were involved in an accident in Oklahoma.¹³⁷ A products liability action was filed in Oklahoma against everyone involved in the manufacture and sale of the vehicle, including the retailer (Seaway) and the regional distributor (World-Wide).¹³⁸ Seaway and World-Wide challenged the Oklahoma court's jurisdiction on due process grounds.¹³⁹ The plaintiffs contended, in essence, that jurisdiction was proper because, *inter alia*, by its nature the product involved (a motor vehicle) is inherently mobile and any vehicle-seller could foresee at the time of sale that

(1992), a decision very relevant to Internet-mediated commercial sales, the Court held that sending hundreds of catalogs and fliers to state residents, making millions of dollars worth of sales to those residents, and shipping the sold goods to that state was sufficient *for due process purposes* to allow the state's courts to exercise jurisdiction over the seller.

133. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citations omitted); *see also* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

134. This would be emphatically true if the defendant was not aware of the other party's geographic location at the time the information is provided.

135. 444 U.S. 286.

136. *Id.* at 288.

137. *See id.*

138. *See id.*

139. *See id.* at 288-89.

any particular vehicle could cause injury to persons in Oklahoma, regardless of where the original sale took place.¹⁴⁰ The Court made it quite clear that foreseeability alone is not sufficient to allow a state to exercise jurisdiction.¹⁴¹ But foreseeability is not totally irrelevant:

[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. The Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system *that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.*¹⁴²

Further:

Hence, if the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the *expectation* that they will be purchased by consumers in the forum State.¹⁴³

Due process requires that the defendant take some purposeful, forum-related action before jurisdiction can be exercised. If foreseeability of possible injury were the key criterion, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel."¹⁴⁴

140. See *id.* at 295.

141. See *id.* The Court elaborated:

If foreseeability were the [only] criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, see *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956); a Wisconsin seller of a defective automobile jack could be hauled before a distant court for damage caused in New Jersey, see *Reilly v. Phil Tolkani Pontiac, Inc.*, 372 F. Supp. 1205, 1207 (D.N.J. 1974); or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there, see *Uppgren v. Executive Aviation Services, Inc.*, 304 F. Supp. 165, 170-71 (D. Minn. 1969). Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.

Id. at 295-96.

142. *World-Wide Volkswagen*, 444 U.S. at 297 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)) (emphasis added) (footnote omitted).

143. *Id.* at 297-98 (citing, for comparison, *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961)) (emphasis added).

144. *Id.* at 296.

The dissents in *World-Wide Volkswagen* raise an issue that may be crucial with respect to Internet-mediated transactions. Justice Marshall's dissent emphasizes the fact that the defendants (an automobile wholesaler and an automobile dealer) were part of a nationwide distribution organization and derived substantial benefit from that membership, both in increased sales and in repair revenues.¹⁴⁵ With respect to the Court's statement that a person should be able to structure his activities to avoid particular jurisdictions, Justice Marshall's dissent states:

I sympathize with the majority's concern that the persons ought to be able to structure their conduct so as not to be subject to suit in distant forums. But that may not always be possible. Some activities by their very nature may foreclose the option of conducting them in such a way as to avoid subjecting oneself to jurisdiction in multiple forums.¹⁴⁶

Manifestly, the "quality and nature" of commercial activity is different, for purposes of the *International Shoe* test, from actions from which the defendant obtains no economic advantage: commercial activity is more likely to cause effects in a larger sphere, and the actor derives an economic benefit from the activity. That makes it fair to require him to answer for his conduct where its effects are felt. The profits may be used to pay the costs of suit and, knowing that the activity is likely to have effects in other states, the defendant can readily insure against the costs of those effects, thereby sparing himself much of the inconvenience of defending in a distant forum.¹⁴⁷

Based on Justice Marshall's reasoning, a person who is somehow commercially associated with a group that has other associates in other areas would be subject to jurisdiction wherever those other associates are. Becoming part of a global manufacturing and distribution network, according to this logic, would support jurisdiction wherever that network reached, that is, throughout the globe. That particular issue soon came to the forefront.

In *Asahi Metal Industry Co. v. Superior Court*,¹⁴⁸ Asahi Metal Industry Company, a Japanese corporation, manufactured valve assemblies in Japan that were used in motor vehicle tires.¹⁴⁹ It sold a very small portion of its production to Cheng Shin Rubber Industrial Company, a Taiwanese company which incorporated the assemblies into motorcycle tires.¹⁵⁰ Some of those motorcycle tires were sold in

145. See *id.* at 313-17 (Marshall, J., dissenting). Justice Blackmun joined Justice Marshall's dissent and wrote one of his own. See *id.* at 317-19.

146. *Id.* at 316.

147. See *id.* at 316-17.

148. 480 U.S. 102 (1987).

149. *Id.* at 106.

150. See *id.*

the United States (separately or as part of a new motorcycle).¹⁵¹ One of those tires allegedly failed, and the injured parties brought suit.¹⁵² Cheng Shin cross-claimed against Asahi, seeking indemnification.¹⁵³ There was no question that Asahi had not done business with any U.S.-based company (with respect to the particular accident or otherwise).¹⁵⁴ From the evidence, however, it was possible that Asahi could have foreseen that some of its product might eventually be present in the United States.¹⁵⁵ Cheng Shin's contention was that Asahi knowingly placed its product in "the stream of commerce"; therefore, Asahi was subject to suit wherever that stream may carry those products.¹⁵⁶

Asahi produced a complicated group of opinions. Eight Justices agreed with Part II-B of Justice O'Connor's opinion, which held that subjecting Asahi to this cross-claim in California would "offend traditional notions of fair play and substantial justice"¹⁵⁷ and, therefore, violate due process requirements.¹⁵⁸ Thus, regardless of any other conclusion, the California court's judgment against Asahi was reversed.¹⁵⁹

Part II-A of Justice O'Connor's plurality opinion dealt with the "stream of commerce" theory.¹⁶⁰ The point of contention was the statement in *World-Wide Volkswagen* that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."¹⁶¹ Justice O'Connor's opinion states that something more is required than placing an item in

151. *See id.* at 105-06.

152. *See id.*

153. *See id.* at 106. Since the primary action had been settled, the only remaining question was Asahi's liability to Cheng Shin, which may have influenced the Court's decision concerning the "fairness" of the litigation in California.

154. *See id.* at 108.

155. *See id.* at 107.

156. *See id.*

157. *Id.* at 113.

158. *See id.* at 113-16.

159. *See id.* at 116.

160. *See id.* at 108-13. Four Justices joined Part II-A (Rehnquist, O'Connor, Powell, and Scalia). *See id.* at 105. Four other Justices agreed that placing an item in the stream of commerce is sufficient for due process purposes as long as that person knows the item is marketed in the forum state. *See id.* at 116-21 (Brennan, J., concurring in part, concurring in judgment) (Blackmun, Marshall, and White, JJ., joining). The latter opinion argues that even if the O'Connor opinion correctly states the law, it misapplies the facts. *See id.* Justice Stevens wrote a separate opinion, also joined by Justices Blackman and White, taking the position that the "stream of commerce" discussion was unnecessary to the decision and that the O'Connor opinion misapplied the facts. *See id.* at 121-22 (Stevens, J., concurring in part, concurring in judgment).

161. *Id.* at 109 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (internal quotation marks omitted)).

the stream of commerce with the awareness that the stream may carry it to a forum state.¹⁶² The defendant must take some purposeful action directed at a particular forum state:

Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.¹⁶³

The substance of Justice O'Connor's "something more" is knowing action intending to derive benefit from the market in a particular area or state, something more geographically directed than merely selling something to a distributor who, in turn, sells the item to someone else, who then sells to someone else, and so on.

Justice Brennan's opinion argues that Justice O'Connor's opinion misconstrues *World-Wide Volkswagen*.¹⁶⁴ It contends that *World-Wide Volkswagen* only distinguishes between situations in which the preconsumer distribution system takes a product to a particular state and situations in which the postdistribution consumer takes that action.¹⁶⁵ Thus, according to Brennan's interpretation, if the defendant places an item into a commercial distribution system that distributes things in known locales, the defendant is amenable to suit in any forum that system reaches: the act of inserting an item into the stream is considered to be purposefully directed toward everywhere the stream (knowable to the actor) reaches.¹⁶⁶ This logic would appear to support jurisdiction even when the particular defending item could have only been brought into the forum State by a consumer, which is inconsistent with *World-Wide Volkswagen*.

Another incarnation of the action-directed-toward-the-forum rationale was originally applied in a contract setting,¹⁶⁷ but it has more

162. See *id.* at 112.

163. *Id.*

164. See *id.* at 116.

165. See *id.* at 118-20.

166. See *id.* This reading of *World-Wide Volkswagen* seems inconsistent with that decision, however, because the defendants in that case did participate in a stream of commerce that did include the forum state. The Brennan opinion is consistent with *World-Wide Volkswagen* only if the "stream of commerce" considered is that which exists downstream from the actor's location.

167. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221-22 (1957). That case involved an insurance contract that had been sold to a California resident and later assigned to an insurance company that had no other contact with California. See *id.* at 222. When the beneficiary filed suit in Texas to enforce a judgment previously obtained in California, the insurance company contended that the California court had not had jurisdiction to issue the judgment, because the company had not done business in California; the Texas court refused to enforce the judgment. See *id.* The Court on appeal held that the Due Process Clause did not preclude jurisdiction because, while the policyholder lived in California,

often been applied more often in intentional tort cases. For example, in *Keeton v. Hustler Magazine, Inc.*,¹⁶⁸ the action was commenced in New Hampshire by a New York resident.¹⁶⁹ The allegedly defamatory article was in a magazine that had a substantial distribution in New Hampshire, and the Court found that the plaintiff would suffer at least some of the resulting damages in that state.¹⁷⁰ The defendant had a monthly circulation of thousands of magazines over a number of years in New Hampshire.¹⁷¹ The Court held that by so distributing the offending publication in New Hampshire, the defendant had committed the tort in that state, which was, with respect to the alleged tort, sufficient purposeful contact with the state to allow its courts to exercise jurisdiction without violating due process principles.¹⁷²

*Calder v. Jones*¹⁷³ presented the obverse situation. Actress Shirley Jones commenced a defamation action in California against a reporter and the editor/owner of the *National Enquirer* based on an article in that publication.¹⁷⁴ The defendants contended that the California courts could not exercise jurisdiction over them because they had not acted in California and had not taken any relevant actions in that state.¹⁷⁵ The Court disagreed. A plaintiff's contacts with a forum may be "so manifold" that they might permit jurisdiction where it might not otherwise exist.¹⁷⁶ Specifically, the Court noted that the plaintiff was a resident of California, that her work and the industry in which she worked were centered in California, and that the alleged tort, if proven, would have its primary impact in California.¹⁷⁷ The defendant's alleged actions were "expressly aimed at California" where the plaintiff lived and worked, and when the defendants acted, they knew that any damages that might be caused would be suffered in California.¹⁷⁸ Since the publication had its largest circulation in California, the Court held that the defendants knowingly caused injury there and, therefore, could reasonably anticipate being haled into a California court.¹⁷⁹

the insurance company corresponded with the policyholder and collected premium payments from her. *See id.* at 221-23.

168. 465 U.S. 770 (1984).

169. *Id.* at 772.

170. *See id.* at 776.

171. *See id.* at 772.

172. *See id.* at 779.

173. 465 U.S. 783 (1984).

174. *See id.* at 784-85.

175. *See id.* at 789.

176. *Id.* at 788.

177. *See id.* at 788-89.

178. *Id.* at 789.

179. *See id.* at 790.

C. Due Process and Internet-Mediated Activities

1. Judicial Specific Jurisdiction and Internet Sites

There are a number of court decisions discussing personal jurisdiction, and thus due process requirements, in litigation involving Internet-mediated communications or transactions. Though these decisions are not tax cases, they are relevant because a tax-enforcement action is subject to the same due process rules concerning jurisdiction over the defendant. Most of the reported decisions are from trial courts, but a few appellate courts have issued opinions. With respect to persons who cannot be served in the forum state, trial court jurisdiction must be authorized by the state's long-arm statute. However, many, if not most, states' statutes authorize, either expressly or by court interpretation, for long-arm jurisdiction over nonresidents to the fullest extent possible under the Due Process Clause.¹⁸⁰ Thus, the Supreme Court decisions in the preceding section provide the benchmarks for the decisions in this section.

The fact-dependent nature of due process considerations and the wide variety of Internet sites make it difficult to establish clear categories of cases. To the extent that categories are beginning to appear, the distinctions are principally based on the level of Web site "interactivity." As discussed in Part II, a principal functional feature of the Web is that information can be obtained from, and transmitted to, a Web site.¹⁸¹ The Web site program regulates the degree to which a browser can submit information. If a browser can submit informa-

180. See, e.g., *Dainippon Screen Mfg. Co. v. CFMT, Inc.*, 142 F.3d 1266, 1270 (Fed. Cir. 1998) (California law); *Genetic Implant Sys., Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1458 (Fed. Cir. 1997) (Washington law); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996) (Ohio law); *Butler v. Beer Across America*, 83 F. Supp. 2d 1261, 1266 (N.D. Ala. 2000); *ESAB Group, Inc. v. Centricut, L.L.C.*, 34 F. Supp. 2d 323, 328 (D.S.C. 1999); *Millennium Enter., Inc. v. Millennium Music, L.P.*, 33 F. Supp. 2d 907, 909 (D. Or. 1999); *Superguide Corp. v. Kegan*, 987 F. Supp. 481, 486 (W.D.N.C. 1997); *SF Hotel Co., L.P. v. Energy Invest., Inc.*, 985 F. Supp. 1032, 1033 (D. Kan. 1997); *Telco Communs. Group, Inc. v. An Apple a Day, Inc.*, 977 F. Supp. 404, 405 (E.D. Va. 1997); *Weber v. Jolly Hotels*, 977 F. Supp. 327, 330 (D.N.J. 1997); *CD Solutions, Inc. v. Tooker*, 965 F. Supp. 17, 19-20 (N.D. Tex. 1997); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122 (E.D. Pa. 1997); *Transcraft Corp. v. Doonan Trailer Corp.*, 45 U.S.P.Q.2d (BNA) 1097, 1997 WL 733905, at *2 (N.D. Ill. 1997); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1330-31 (E.D. Mo. 1996); *EDIAS Soft. Int'l, L.L.C. v. BASIS Int'l, Ltd.*, 947 F. Supp. 413, 416 (D. Ariz. 1996); *Panavision Int'l, L.P. v. Toebben*, 938 F. Supp. 616, 620 (C.D. Cal. 1996); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996); *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351, 1352 (Fla. 3d DCA 1994); *State v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 718 (Minn. App. 1997), *aff'd by an evenly divided court*, 576 N.W.2d 747 (Minn. 1998) (addressing state complaint alleging deceptive trade practices, false advertising). *But see Hearst Corp. v. Goldberger*, No. 96 Civ. 3620 (PKL) (AJP), 1997 WL 97097, at *9 (S.D. N.Y. Feb. 26, 1997) (holding that the New York statute does not extend jurisdiction to the full extent of the Due Process Clause); *Cortlandt Racquet Club, Inc. v. O Saunatec, Ltd.*, 978 F. Supp. 520, 526 (S.D.N.Y. 1997) (same).

181. See discussion *supra* Part II.

tion, the Web site program may take some action based on what is submitted. A Web site that allows a two-way exchange of information is generally called "interactive."¹⁸²

With respect to state jurisdiction based on Internet-mediated activities, a growing number of court decisions¹⁸³ have used the analytical structure articulated in 1997 by the U.S. District Court for the Western District of Pennsylvania in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*¹⁸⁴ Zippo Manufacturing alleged that its trademark had been infringed by Zippo Dot Com by using "zippo" in its Internet domain names.¹⁸⁵ Zippo Dot Com challenged the court's personal jurisdiction, alleging that it had insufficient contacts with Pennsylvania to satisfy either Pennsylvania statutory requirements or the Due Process Clause.¹⁸⁶

Zippo Dot Com operated an Internet-based subscription news service; subscribing required payment by credit card, arranged either through the Internet or telephone.¹⁸⁷ Of Zippo Dot Com's 140,000 customers, approximately 3000 were Pennsylvania residents.¹⁸⁸ In addition, Zippo Dot Com had service contracts with seven ISPs that were physically in Pennsylvania.¹⁸⁹ Zippo Dot Com had no offices, employees, or agents in Pennsylvania at any time; however, its California-based Web site was accessible from Pennsylvania.¹⁹⁰

In its reference to Supreme Court decisions on the subject, the district court emphasized the point that the actions of the defendant to "reach out" to the forum state must be such as to make the defendant "reasonably expect to be haled into court there."¹⁹¹ The court said that its review of the then-few decisions on point indicated that the likelihood that personal jurisdiction can be exercised is "directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."¹⁹² The court then set out the three categories that later decisions have used:

182. See, e.g., *Techencyclopedia* (searchable dictionary), at <http://www.techweb.com/encyclopedia> (visited May 13, 2001).

183. See, e.g., *Mink v. AAAA Dev., LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997). See generally *Search Force, Inc. v. DataForce Int'l, Inc.*, 112 F. Supp. 2d 771, 776-78 (S.D. Ind. 2000).

184. 952 F. Supp. 1119 (W.D. Pa. 1997).

185. Zippo Dot Com had, through the normal Internet domain name registration process, exclusive rights to domain names "zippo.com," "zippo.net," and "zipponews.com". See *id.* at 1121 & n.3.

186. See *id.* at 1119.

187. See *id.* at 1121.

188. See *id.*

189. See *id.*

190. See *id.*

191. *Id.* at 1123 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980)).

192. *Id.* at 1124.

1. Entering into contracts with forum state residents that involve knowing and repeated Internet transmission of files to that state.
2. Passive websites that do no more than make information available.
3. Websites that are interactive, where the Internet user can exchange information with the website's host computer.¹⁹³

With respect to the first category, the court indicated that there was a clear basis for the exercise of jurisdiction.¹⁹⁴ With respect to the second category, the court said there was not sufficient grounds for the exercise of jurisdiction outside the Web site owner's state.¹⁹⁵ With respect to the third category, the court said the propriety of exercising jurisdiction "is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."¹⁹⁶

The court reviewed a number of cases with these categories in mind.¹⁹⁷ It concluded that Zippo Dot Com's relationship with Pennsylvania fell into the first category, that is, knowingly doing business with state residents via the Internet.¹⁹⁸ The court expressly rejected Zippo Dot Com's argument that its contacts with the state were "fortuitous" (because it did not actively solicit business in the state but, instead, Pennsylvania residents found its Web site and initiated contacts).¹⁹⁹ The court held that who initiated a particular contact was not important because Zippo Dot Com consciously chose to do business with state residents by processing the Pennsylvania residents' applications and assigning them passwords.²⁰⁰

The simplicity of the *Zippo* decision's three categories is appealing, its format familiar to lawyers and judges. Unfortunately, it really does not help very much. With respect to the first, there are obviously situations in which a person or company "does business" across state lines via communication media rather than personal presence. But the fact that one communication medium (for example, the Internet) is used rather than another (for example, the telephone, U.S. mail, or Airborne Express) is not particularly relevant. As for the second category, it is equally as obvious that there are Web sites

193. *Id.*

194. *See id.* (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996)).

195. *See id.* (citing *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996)).

196. *Id.* (citing *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996)).

197. *See id.* at 1124-25.

198. *See id.* at 1125-27.

199. *See id.* at 1126.

200. *See id.* at 1126. The court observed that if Zippo Dot Com had wanted not to be subject to Pennsylvania jurisdiction, all it had to do was not sell services to Pennsylvania residents. *See id.*

that are just "there." Those Web sites may contain information, but two-way communication (or communication directed to a particular person) does not exist. Those sites might be equated with a roadside billboard in the owner's state. The fact that some person from another state looks at a photograph of the billboard is not sufficient to support jurisdiction over the billboard owner in the photo-viewer's home state.

With those two rather obvious categories out of the way, the third category includes all Web sites which have some level of interactivity. *Zippo's* third category includes the vast majority of Web sites, probably approaching 100% of commercial Web sites. The variation among Web sites is great and the degrees of interactivity are so many that establishing a limited number of categories is risky; using only three, as *Zippo* does, seems to be an excessive oversimplification.

When trying to categorize the cases, there is one group that stands somewhat apart from all the others. These decisions expressly or implicitly conclude that a Web site: (a) is, per se, a powerful and continuing business solicitation, purposefully directed at every person with access to the Internet; and therefore, (b) is purposefully directed at each jurisdiction in which persons with Internet access reside.²⁰¹ Those conclusions are used to support a decision that the court has jurisdiction over the nonresident Web site owner.²⁰² While these decisions also find, or assume, that the Web site has resulted in some commercial contact with forum residents, the decisions state or imply that commercial contact is not critical.

The decision effectively leading the pack of cases extending jurisdiction to wherever the Internet reaches is *Inset Systems, Inc. v. Instruction Set, Inc.*²⁰³ Both corporations involved in the case were computer-related businesses.²⁰⁴ *Inset Systems, Inc.*, registered

201. See, e.g., *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738, 743 (W.D. Tex. 1998) (discussing a gambling Web site having actual interaction with a forum resident); *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 44 (D. Mass. 1997) (discussing how a company must take action to avoid Web site interaction with a specific jurisdiction if it is to avoid being subjected to the jurisdiction of the courts there); *IA, Inc. v. Thermacell Tech., Inc.*, 983 F. Supp. 697 (E.D. Mich. 1997); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) (using minimal interaction with forum residents to support a prior conclusion that jurisdiction was proper based solely on the existence of indiscriminately interactive Web site); *Inset Sys., Inc. v. Instruction Set, Inc.* 937 F. Supp. 161 (D. Conn. 1996). *But cf.* *Gary Scott Int'l, Inc. v. Baroudi*, 981 F. Supp. 714, 716-17 (D. Mass. 1997) (discussing additional evidence of some sales and intention to sell to forum businesses); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 5 (D.D.C. 1996) (declining to find jurisdiction solely based on Web site, but treating a general informational site as directed toward forum residents).

202. See cases cited *supra* note 201.

203. 937 F. Supp. 161 (D. Conn. 1996).

204. See *id.* at 162-63.

“INSET” under the Federal Trademark Act.²⁰⁵ Later, Instruction Set, Inc. (“ISI”) obtained “INSET.COM” as its Internet domain address.²⁰⁶ ISI also published its telephone number as “1-800-US-INSET.”²⁰⁷ Inset sued ISI alleging wrongful infringement of its trademark.²⁰⁸

The relevant portion of the Connecticut long-arm statute allows the exercise of jurisdiction over foreign corporations in actions arising from business solicited in that state “if the corporation had repeatedly so solicited business.”²⁰⁹ The *Inset Systems* Court found the statute’s requirements met Connecticut’s long-arm statute because the Internet, and thus ISI’s domain name and Web site, could be accessed from Connecticut:

[S]ince March, 1995, ISI has been continuously advertising over the Internet, which includes at least 10,000 access sites in Connecticut. Further, unlike hard-copy advertisements . . . which are often quickly disposed of and reach a limited number of potential consumers, Internet advertisements are in electronic printed form so that they can be accessed again and again by many more potential customers.²¹⁰

The district court relied on two of its prior decisions dealing with print advertisements placed in newspapers or other print publications known to be circulated in the state.²¹¹ The district court equated an Internet Web site with advertising in a publication having a known circulation. In effect, if not expressly, the court held that establishing an Internet Web site constitutes “purposefully availing” oneself of the privilege of doing business wherever there are others who can access the Internet.²¹² Despite the obvious possibilities, the district court did not rely on *Calder*.

205. See *id.* at 163.

206. See *id.*

207. See *id.*

208. See *id.* at 162.

209. *Id.* at 163 n.2 (quoting CONN. GEN. STAT. § 33-411(c)(2)).

210. *Id.* at 164.

211. See *id.* (citing *Whelen Eng’g Co. v. Tomar Elecs.*, 672 F. Supp. 659 (D. Conn. 1987); *McFaddin v. National Exec. Search, Inc.*, 354 F. Supp. 1166 (D. Conn. 1973)).

212. See *id.* at 165. The court stated:

In the present case, Instruction [ISI] has directed its advertising activities via the Internet and its [ISI’s] toll-free number toward not only the state of Connecticut, but to all states. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut.

Id. Sort of like the man who says he loves all of the women in the world and is thereby legally engaged to marry each of them!

A few subsequent cases have reached a similar result. In *Maritz, Inc. v. Cybergold, Inc.*,²¹³ the United States District Court for the Eastern District of Missouri concluded that jurisdiction was proper under the "commission of a tortious act" provision of the Missouri long-arm statute.²¹⁴ An additional factor in *Maritz* favored jurisdiction: the defendant's Web site was interactive and was programmed to automatically respond to all inquiries.²¹⁵ The district court equated the failure to restrict the Web site's response with a conscious decision to purposefully transact business in every jurisdiction reached by the Internet.²¹⁶

Likewise, in *Hasbro, Inc. v. Clue Computing, Inc.*,²¹⁷ the U.S. District Court for Massachusetts held it had that jurisdiction under the Massachusetts long-arm statute²¹⁸ in an action alleging trademark infringement.²¹⁹ Hasbro, owner of the registered trademark "Clue®," alleged that its rights were infringed by Clue Computing's use of the web address "clue.com," which Clue Computing had registered with appropriate authorities.²²⁰ To support its holding that jurisdiction was proper, the *Hasbro* Court relied on the Web site; eight telephone calls made over three years time from Clue Computing to Massachusetts telephone numbers; Clue Computing's purchase of software from a Massachusetts vendor (amount and cost unstated), and Clue Computing's provision of training services (not in Massachusetts) to employees of Digital Equipment (headquarters in Massachusetts) under a subcontract with another nonresident company, Professional Training Services.²²¹ The Web site advertised Clue Computing's services; listed the company's address, telephone number, and email address; and allowed a site visitor to "instantly" send e-mail by "clicking" a location on the web page.²²² The *Hasbro* Court emphasized advertising text on Clue Computing's Web site that described Clue Computing as a "virtual company" able to provide services "anywhere on the planet."²²³

213. 947 F. Supp. 1328 (E.D. Mo. 1996).

214. *See id.* at 1331 (citing MO. REV. STAT. § 506.500.1(3)).

215. *See id.* at 1333.

216. *See id.*; *see also* *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 3-5 (D.D.C. 1996) (discussing a company's Internet site plus advertisement in a local newspaper as activities designed to purposefully avail itself of the forum's privileges).

217. 994 F. Supp. 34 (D. Mass. 1997).

218. MASS. GEN. LAWS ANN. ch. 223A, § 3 (West 1997).

219. *See Hasbro*, 994 F. Supp. at 43-44.

220. *See id.* at 38.

221. *See id.* at 37.

222. *See id.* at 38.

223. *Id.* The advertising apparently listed Digital Equipment as one of Clue Computing's clients, *see id.* at 44, though that is somewhat inconsistent with the description of the indirect relationship between the two companies. *See also* *Gary Scott Int'l, Inc. v. Baroudi*, 981 F. Supp. 714, 716 (D. Mass. 1997) (basing jurisdiction on general Web site advertising,

The district court provides a long discussion of cases concerning Web sites, due process in general, and the Massachusetts long-arm statute.²²⁴ However, the basis for its conclusions can be stated rather simply: connecting a Web site to the Internet is “placing a product into the ‘stream of commerce.’”²²⁵ But the *Asahi* plurality opinion requires “something more” than that as a basis for jurisdiction; that “something more” can be advertising in the forum state, which “indicate[s] an intent or purpose to serve the market in the forum State.”²²⁶ The district court found that Clue Computing “purposefully directed” its advertising to Massachusetts because it directed its advertising at all states without expressly excluding Massachusetts.²²⁷ After expressing “concern” about cases holding that jurisdiction can be based on the mere existence of a Web site,²²⁸ it went on to hold jurisdiction proper because, supposedly, here there were additional facts: “soliciting business” in Massachusetts and “injury” in Massachusetts.²²⁹

The district court’s attempt to justify its conclusion is at best, weak. The *Hasbro* decision is, in effect, the same as the others: the existence of a Web site constitutes purposeful advertising in every jurisdiction from which it can be accessed, unless that jurisdiction is somehow purposefully excluded. How a Web site owner might purposefully exclude a jurisdiction, however, is unclear. Equally problematic is the court’s reliance on the location of the injury. Any plaintiff that can allege an injury would suffer that injury wherever the plaintiff was located.

A second theory used in cases finding Due Process satisfied with even minor forum-state contact is that the defendant was (or probably was) aware of the plaintiff’s location before the alleged intentional tort was committed.²³⁰ Some of these cases deal with trademark infringement, while others deal with defamation, but they all generally rely on Supreme Court defamation cases such as *Calder v. Jones*.²³¹

plus one sale to a forum resident and an expressed intent to sell to a client that did business in the forum state (and many other states)).

224. See *Hasbro*, 994 F. Supp. at 40-46.

225. *Id.* at 41 (citing *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996)).

226. *Id.* at 42 (quoting *Asahi Metals Indus. Co. v. Superior Ct.*, 480 U.S. 102, 112 (1987) (O’Connor, J., plurality opinion)).

227. *Id.* at 44.

228. *Id.* at 46 (citing *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1 (D.D.C. 1996); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996)).

229. *Id.*

230. See, e.g., *Telco Communs. v. An Apple a Day, Inc.*, 977 F. Supp. 404 (E.D. Va. 1997).

231. 465 U.S. 783 (1984).

In *Calder*, the Court noted that the defendant's connection with the forum state is the key consideration, but that, under some circumstances, the plaintiff's connections with the state are relevant.²³² In *Calder*, the plaintiff was the special, intended focus of the defendants' alleged tortious activities²³³ and the defendants were very aware of where the plaintiff resided.²³⁴ Nevertheless, the *Calder* Court still emphasized the defendant's conduct and the defendant's knowledge of the plaintiff's situation.²³⁵

In *Telco Communications v. An Apple a Day, Inc.*,²³⁶ the U.S. District Court for the Eastern District of Virginia relied on *Calder* to extend tort jurisdiction to persons who merely cause comments to be posted on Internet sites that may be accessible from the forum state. In *Telco*, the defendant posted press releases with Business Wire requesting distribution in three states, not including Virginia.²³⁷ Evidence indicated, however, that Business Wire advertisements (which the court apparently assumed the defendant had read) indicated that it was distributed to a wide audience, including Internet sites such as America Online (AOL), as well as other Virginia locations.²³⁸ The district court expressly agreed with the *Inset Systems* conclusion that posting an advertisement, even indirectly, on the Internet constitutes purposefully doing business wherever the Internet reaches.²³⁹

In *Bochan v. LaFontaine*,²⁴⁰ the same court held that posting allegedly defamatory comments on Internet newsgroup sites constituted the commission of a tort in Virginia because the acting person used AOL services and AOL is a Virginia-based company.²⁴¹ A second defendant, who did not have an AOL account but did have an Internet Web site (albeit unrelated to the alleged defamation), was held on the authority of *Telco* to be subject to jurisdiction with respect to the alleged defamation.²⁴² While the *Bochan* Court did mention *Calder*

232. See *id.* at 788.

233. See *id.* at 789.

234. See *id.*

235. See *id.* at 788.

236. 977 F. Supp. 404 (E.D. Va. 1997).

237. See *id.* at 407.

238. See *id.*

239. See *id.* at 406. Since the defendant posted two or three press releases, that satisfied the "regularly" soliciting business or "persistent course of conduct" requirements of the Virginia long-arm statute. *Id.* at 405-07 (quoting VA. CODE ANN § 8.01-328.1(A)(4)).

240. 68 F. Supp. 2d 692 (E.D. Va. 1999).

241. *Id.* at 699 (citing VA. CODE ANN § 8.01-328.1(A)(3)).

242. See *id.* at 700-02; see also *Telco Communs. v. An Apple a Day, Inc.*, 977 F. Supp. 404 (E.D. Va. 1997); *Cody v. Ward*, 954 F. Supp. 43, 45 (D. Conn. 1997) (discussing stock fraud via postings to Prodigy "discussion group," including personalized messages to plaintiff); *EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd.*, 947 F. Supp. 413, 418 (D. Ariz. 1996) (discussing how the defendant posted allegedly damaging statements on Internet sites, knowing that the plaintiff's forum-based business would be damaged); *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616, 621 (C.D. Cal. 1996) (explaining how "cybersitter" purposefully registered the plaintiff's name as domain name solely for the purpose of coercing

in a footnote, it did not expressly place much reliance on that case.²⁴³

The decisions finding due process satisfied by the mere existence of information available through the Internet and accessible from the forum state have been criticized as contrary to logic and inconsistent with well-established rules to the effect that national advertising is not sufficiently focused to support jurisdiction in any particular forum.²⁴⁴ In the Internet context, those decisions are particularly objectionable because their logical result would be that all established rules limiting personal jurisdiction would be instantly eliminated by connecting even the least interactive Web site with the Internet; all Web site owners would be subject to worldwide jurisdiction.

It should come as no surprise that other courts have reached a different conclusion. In *Hearst Corp. v. Goldberger*,²⁴⁵ the U.S. District Court for the Southern District of New York held that a Web site's existence was not sufficient to bring the out-of-state Web site owner within the scope of New York's "doing business" long-arm statute.²⁴⁶ While the Web site had been established to promote future business activities, no business had been conducted through the site by the time litigation had started.²⁴⁷ The parties did admit, though, that New York residents both could and had visited the site.²⁴⁸ The district court likened the Web site to an advertisement in a national publication not targeted at a particular state, which does not satisfy the statutory requirement for doing business in New York.²⁴⁹ In a

the plaintiff to buy him off). *But see* Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 728 (E.D. Pa. 1999) (determining that listserv and USENET postings are no different from passive Web site and do not support a conclusion that a plaintiff directed its efforts toward a forum).

243. See *Bochan*, 68 F. Supp. 2d at 698 n.16. In *Superguide Corp. v. Kegan*, 987 F. Supp. 481 (W.D.N.C. 1997), the court went even further, first assuming that significant numbers of forum residents had visited the defendant's Web site, then holding that the defendant purposefully directed his business activities toward the forum. See *id.* at 487.

244. See, e.g., *Cybersell, Inc. [Ariz.] v. Cybersell, Inc. [Fla.]*, 130 F.3d 414 (9th Cir. 1997); *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 540 n.3 (E.D. Pa. 1999) (characterizing *Inset Systems* as "ancient"); *ESAB Group, Inc. v. Centricut, L.L.C.*, 34 F. Supp. 2d 323 (D.S.C. 1999); *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104 (D. Conn. 1998); *Osteotech, Inc. v. Gensci Regeneration Sciences, Inc.*, 6 F. Supp. 2d 349 (D.N.J. 1998); *CFOs 2 Go, Inc. v. CFO 2 Go, Inc.*, No. C97-4676 SI, 1998 WL 320821 (N.D. Cal. June 5, 1998); *E-Data Corp. v. Micropatent Corp.*, 989 F. Supp. 173 (D. Conn. 1997); *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620 (PKL) (AJP.), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997); *Transcraft Corp. v. Doonan Trailer Corp.*, 45 U.S.P.Q.2d (BNA) 1097 (N.D. Ill. 1997); *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997).

245. No. 96 Civ. 3620 (PKL) (AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

246. *Id.* at *12 (citing N.Y. C.P.L.R. 302(a)(1)). The district court also held that the Web site, even if it infringed the plaintiff's trademark, constituted neither the commission of a tort in New York nor the commission of a tort outside New York by a person who regularly does business in New York. See *id.* at *13 (citing N.Y. C.P.L.R. 302(a)(2)-(3)).

247. See *id.* at *1.

248. See *id.*

249. See *id.* at *9*12.

footnote, the district court also noted that national advertisements had been found not to meet the minimum contacts requirements of the Due Process Clause.²⁵⁰

A significant majority of Internet-related decisions refer to, or are similar to, *Zippo* and use its three-category approach. *Zippo* category one, represented by *Bensusan Restaurant Corp. v. King*,²⁵¹ includes information-only sites not aimed at a large geographic area. The site information content is of interest only in a limited geographic area and there is little, if any, interactivity.²⁵² A number of cases relying on *Zippo* have held that the relevant Web site was passive, merely providing information, and insufficient to support jurisdiction.²⁵³

The second *Zippo* category, represented by *CompuServe, Inc. v. Patterson*,²⁵⁴ includes full-service Web sites that are highly interactive, are capable of completing all "normal" business transactions via

250. See *id.* at *11 n.13; see also *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356, 1364-65 (W.D. Ark. 1997) (agreeing that establishing a Web site does not support a conclusion that a Web site owner has placed its products in the stream of commerce sufficiently to justify jurisdiction in a forum, where there are no other contacts).

251. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997). A New York jazz club sued a Missouri jazz club alleging trademark infringement. See *id.* at 297. The latter's Web site was purely informational, with a calendar of events and an explanation of how to obtain tickets, which could not be done through the Web site. See *id.* The defendant night club's market was obviously local.

252. See *id.* Such sites are similar to an advertisement in a Midwest U.S. local shopping circular that was inadvertently left in an airplane seat pocket and later read by a bored Argentine passenger sitting in an airplane presently number 17 in line for takeoff from JFK International on its way to Helsinki.

253. See, e.g., *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 541 (E.D. Pa. 1999) (holding Web site was essentially passive, even though one could send e-mail and order advertising video through the site); *Patriot Sys., Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318, 1324 (D. Utah 1998) (concluding that since no details of Web site were given, it was "passive advertisement" merely providing information); *American Homecare Fed'n, Inc. v. Paragon Scientific Corp.*, 27 F. Supp. 2d 109, 114 (D. Conn. 1998) (holding Web site passive because it did not list any products for sale, nor did it provide any process for ordering products, downloading files, or visiting other sites); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 727 (E.D. Pa. 1999) (holding Web site was informational, contained no contracts to sell or solicitation, and was apparently not interactive). The *Barrett* case also held that posting messages to USENET discussion groups and listservers is insufficient to support jurisdiction in a particular state because such postings are merely available to anyone who wishes to read them and the person posting a message has no control over where it goes. See *Barrett*, 44 F. Supp. 2d at 728; cf. *Graphic Controls Corp. v. Utah Med. Prods., Inc.*, No. 96-CV-0459E(F), 1997 WL 276232, at *3 (W.D.N.Y. May 21, 1997), *aff'd on other grounds*, 149 F.3d 1382 (Fed. Cir. 1998) (holding that simply making information available nationwide via Internet does not demonstrate purposeful availment of any particular state's benefits; therefore, Internet site and toll-free telephone number were treated equally).

254. 89 F.3d 1257 (6th Cir. 1996). *CompuServe* involved a multi-year series of business dealings between a Texas resident (defendant) and an Ohio-based Internet service provider, which included a series of messages going both ways, files uploaded from Texas, and the defendant selling his software programs through the plaintiff's service. See *id.* at 1260-61. This was not a situation in which the plaintiff stumbled onto the defendant's Web site; rather, it was an on-going business relationship not significantly different than many non-Internet-mediated relationships. See *id.*

the Internet, and have in fact mediated a number of commercial contacts with residents of a forum state.²⁵⁵ One case using this analysis concluded that the defendant's Web site fell in the second category comprising highly interactive commercial sites.²⁵⁶ In *GTE New Media Services, Inc. v. Ameritech Corp.*,²⁵⁷ the U.S. District Court for the District of Columbia found that the relevant Web sites encouraged Internet users to submit data (that is, information requests) and responded by providing the information.²⁵⁸ The Web sites involved were Internet-based "Yellow Pages," which are essentially identical with the traditional paper "Yellow Pages."²⁵⁹ The court found that the sites were commercial in nature because the price the defendants could charge for advertising was directly related to the number of persons who used the sites.²⁶⁰ Despite the court's language, this decision should not be read as holding that the Web site alone was sufficient to justify exercising jurisdiction. What the court held was that the defendants made money from forum-based advertisers because the Web site was successful in attracting nonpaying users; therefore, the Web site's role was merely a factor in establishing contract prices.²⁶¹

Zippo's third and final category includes Web sites falling in between the other two categories, that is, having some interactive features but not constituting a full-service, on-line business location. It should be of little surprise that most cases fall into this third category, requiring further analysis. For example, in *ESAB Group, Inc. v. Centricut, L.L.C.*,²⁶² [ESAB Group II] the U.S. District Court for the District of South Carolina held there was not a sufficient basis for exercising jurisdiction over a nonresident defendant in a patent infringement case.²⁶³ In that case, the Web site was interactive to the point that it allowed customers to place orders, but only after the

255. Such sites might be compared with a software development company's combined development center and retail store. A customer can wander in, try out software, and purchase a copy, then go to the development center and submit his own software for evaluation, signing the related contracts and communicating with company experts.

256. See *GTE New Media Services, Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27 (D.D.C. 1998).

257. *Id.*

258. *Id.* at 38.

259. See *id.* at 32-33.

260. See *id.* at 39.

261. See *id.* at 38-39. The court said that the Web sites were "highly interactive" and had a significantly commercial quality and nature. See *id.* at 38. That may, on the surface, be correct. However, the interactivity is limited to allowing site visitors to choose the information they receive, just as a library patron might choose the hard-copy Yellow Pages for a particular city, consult its index, and then turn to a specific page. The interactivity did not involve any commercial-type transaction between the site visitor and the site owner and there was no need for the site to obtain or retain the site visitor's location.

262. 34 F. Supp. 2d 323 (D.S.C. 1999).

263. *Id.* at 334. In addition to having an interactive Web site, the defendant had actually sold a product directly to a forum resident. See *id.* at 329-30.

customer called a toll free number and established an account.²⁶⁴ Evidence indicated that this method was established specifically to avoid doing business in the forum state.²⁶⁵ The court, referring to *Zippo* and other cases, held that merely categorizing a Web site as interactive is not determinative; instead, the important issue is whether the commercial activity relates to the forum state, whether conducted via the Internet or otherwise.²⁶⁶

In *Millennium Enterprises, Inc. v. Millennium Music, L.P.*,²⁶⁷ the U.S. District Court for the District of Oregon considered whether the defendant's interactive Web site (plus one plaintiff-arranged sale to Oregon) was sufficient to support jurisdiction over the South Carolina defendant.²⁶⁸ The district court's opinion contains an exhaustive review of the Internet-related court decisions up to that time and reached the well-reasoned conclusion that jurisdiction could not be exercised in Oregon.²⁶⁹ In the process, the district court held that for due process purposes "doing business" in a jurisdiction requires knowing and repeated contacts over time, and that publishing an Internet Web site does not alone constitute knowing contact with any particular state.²⁷⁰ While establishing a Web site might make it foreseeable that persons in other jurisdictions might purchase products through the Web site, foreseeability alone does not confer jurisdiction.²⁷¹

Nor, the court held, does the fact that someone who accesses a Web site can purchase a compact disc render the Web site owner's actions "purposefully directed" at the forum from which access was made.²⁷² It is the conduct of the defendants, rather than the medium utilized by them, to which the parameters of specific jurisdiction apply.²⁷³ The district court's opinion is clearly consistent with the U.S. Supreme Court's due process decisions, particularly in respect to the

264. *See id.* at 327.

265. *See id.*

266. *Id.* at 330-31. The court noted that basing jurisdiction solely on the existence of a Web site would subject any Web site owner to worldwide jurisdiction and would "eviscerate" existing personal jurisdiction requirements. *See id.* at 331 n.4 (citing *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 115 (D. Conn. 1998)).

267. 33 F. Supp. 2d 907 (D. Or. 1999).

268. *Id.* at 913-14.

269. *See id.* at 923-24.

270. *See id.* at 920-21.

271. *See id.* at 921 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)).

272. *Id.* at 922.

273. *See id.* After reviewing the content of the Web site, the district court concluded that if the site targeted any particular area, it was the area around the defendants' retail outlets in South Carolina. *See id.*; *see also* *Scherr v. Abrahams*, No. 97C 5433, 1998 WL 299678, at *5 (N.D. Ill. May 29, 1998) (holding that the ability of Web site viewers to add their e-mail address to Web site's electronic mailing list, without action by Web site owner, is insufficient to support a conclusion that the owner targeted the viewer's state of residence).

observation that what is required is some conscious choice by the defendant to act within (or act in a way that may have an impact in) the forum jurisdiction.

There is apparently some comfort in "following" *Zippo's* lead and assuming it provides some structure. However, as noted above, the almost infinite variability of interactivity places all but the clearest cases in the third, middle category and *Zippo's* substance is reduced to a recognition that there are clear cases on either end of a broad spectrum with an erratic progression from one end to the other. Perhaps the most one can say about how the decisions sort out along the spectrum is that as a site's interactive capability increases, the possibility of a court's finding jurisdictional requirements satisfied also increases. However, there is a parallel and, perhaps, more important trend for the evidence of actual contacts by forum residents to increase as a Web site's interactivity increases. Thus, in cases where the court has found due process requirements satisfied, it is highly likely that evidence of successful commercial contacts with the forum's residents exists.²⁷⁴

Given the relatively low level of interaction required to satisfy judicial specific jurisdiction due process, one might wonder at the significant percentage of cases that result in a "no jurisdiction" conclusion. Upon some reflection, however, one should realize that Internet connections become an issue only when the evidence of "real world" contacts with the forum is weak or nonexistent. If there are numerous and obvious real world contacts, the issue of jurisdiction will probably not arise or, if it does, there is no need to resort to evidence of cyberspace contacts. As the real world evidence gets weaker, cyberspace contacts are presented to reinforce the weak spots. The desired end is proving that the defendant has had relevant, knowing contacts with the forum state. While that can be accomplished with evidence of communications only (clearly demonstrated by *Burger King*),²⁷⁵ it takes a significant level of communication to equal the weight of even a temporary physical presence.

With those qualifications in mind, some generalizations are possible. It is unlikely that a court will determine it can exercise personal

274. See, e.g., *Westcode, Inc. v. RBE Elec., Inc.*, No. CIV.A.99-3004, 2000 WL 124566 (E.D. Pa. Feb. 1, 2000); *Stomp, Inc. v. NeatO, L.L.C.*, 61 F. Supp. 2d 1074 (C.D. Cal. 1999); *Park Inns Int'l, Inc. v. Pacific Plaza Hotels, Inc.*, 5 F. Supp. 2d 762 (D. Ariz. 1998); *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494 (S.D.N.Y. 1997). But see *Millennium Enter., Inc.*, 33 F. Supp. 2d at 907 (finding that the defendant's interactive site allowed customer purchases but the only forum-connected sale was arranged by plaintiff's attorneys); *E-Data Corp. v. Micropatent Corp.*, 989 F. Supp. 173, 176-77 (D. Conn. 1997) (finding that the defendant's site was a full-service "store" selling licenses to use its photographs and that it did not need or record identifying information of customers; and finding, therefore, no evidence of forum-state contact).

275. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (rejecting notion that physical presence is necessary).

jurisdiction over a Web site owner if the Web site just provides information,²⁷⁶ even if that information includes a toll-free number to contact the site owner²⁷⁷ or the ability to contact the site owner via an e-mail link.²⁷⁸ If the subject Web site has low interactivity or there is little evidence of actual forum contacts, a significant factor appears to be how the “advertising” aspect of a Web site is viewed by the court. In *Inset Systems, Inc. v. Instruction Set, Inc.*,²⁷⁹ the court went to significant lengths to emphasize the power and persistence of web-based advertising, as compared to other types of national advertising (for example telephone “yellow pages,” television, radio, and newspapers, all which have limited availability), attempting to justify the conclusion that the Web site purposefully targeted each jurisdiction.²⁸⁰ On the other hand, most courts that have held they could not exercise jurisdiction equated Web site advertising with other types of nationwide advertising that has consistently been held not to “target” any particular jurisdiction.²⁸¹

276. See, e.g., *American Homecare Fed'n, Inc. v. Paragon Scientific Corp.*, 27 F. Supp. 2d 109 (D. Conn. 1998); *Patriot Sys., Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318 (D. Utah 1998); *No Mayo—San Francisco v. Memminger*, No. C98-1392 (DJH), 1998 WL 544974 (N.D. Cal. Aug. 20, 1998); *SF Hotel Co., v. Energy Inv., Inc.*, 985 F. Supp. 1032 (D. Kan. 1997); *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997); *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620 (PKL) (AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997). *But see*, e.g., *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 38 (D.D.C. 1998) (explaining that the site in question was “interactive” only in the sense that browsers could “search” for information from a relatively large database).

277. See, e.g., *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104 (D. Conn. 1998); *Graphic Controls Corp. v. Utah Med. Prods., Inc.*, No. 96-CV-0457E(F), 1997 WL 276232 (W.D.N.Y. May 27, 1997), *aff'd*, 149 F.3d 1382 (Fed. Cir. 1998). *But see*, e.g., *IA, Inc. v. Thermacell Techs., Inc.*, 983 F. Supp. 697 (E.D. Mich. 1997); *Gary Scott, Int'l, Inc. v. Baroudi*, 981 F. Supp. 714 (D. Mass. 1997).

278. See, e.g., *Mink v. AAAA Dev't, L.L.C.*, 190 F.3d 333 (5th Cir. 1999); *3D Systems, Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373 (Fed. Cir. 1998); *Cybersell, Inc. [Ariz.] v. Cybersell, Inc. [Fla.]*, 130 F.3d 414 (9th Cir. 1997); *Brown v. Geha-Werke GmbH*, 69 F. Supp. 2d 770 (D.S.C. 1999); *Osteotech, Inc. v. Gensci Regeneration Sciences, Inc.*, 6 F. Supp. 2d 349 (D.N.J. 1998). In *Butler v. Beer Across America*, 83 F. Supp. 2d 1261, 1268 (N.D. Ala. 2000), the district court concluded that even though the Web site allowed the purchase of products, there were insufficient forum contacts because the number of actual orders from forum residents were so minuscule.

279. 937 F. Supp. 161 (D. Conn. 1996).

280. *Id.* at 165; see also *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *State v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. App. 1997), *aff'd by an evenly divided court*, 576 N.W.2d 747 (Minn. 1998) (emphasizing the 24-hour, long-term availability of Web site advertising).

281. See, e.g., *ESAB Group, Inc. v. Centricut, L.L.C.*, 34 F. Supp. 2d 323 (D.S.C. 1999); *VP Intellectual Properties, L.L.C. v. Imtec Corp.*, 53 U.S.P.Q.2d (BNA) 1269 (D.N.J. 1999); *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104 (D. Conn. 1998); *Osteotech, Inc. v. Gensci Regeneration Sciences, Inc.*, 6 F. Supp. 2d 349 (D.N.J. 1998); *CFOs 2 Go, Inc. v. CFO 2 Go, Inc.*, No. C97-4676 SI, 1998 WL 320821 (N.D. Cal. June 5, 1998); *EData Corp. v. Micropatent Corp.*, 989 F. Supp. 173 (D. Conn. 1997); *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997); *Transcraft Corp. v. Doonan Trailer Corp.*, 45 U.S.P.Q.2d (BNA) (N.D. Ill. 1997); *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620 (PKL) (AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997). *But see* *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 45 (D. Mass. 1997) (holding that establishing a Web site injected the contested trademark “into the

If there is evidence of actual contact with forum residents, the possibility of a positive jurisdictional finding increases,²⁸² but if those contacts are sporadic or not economically significant a negative finding is still possible.²⁸³ In *Maritz*, for example, one of the cases where the court found jurisdiction existed, the court placed significant weight on the fact that the Web site computer was programmed to respond "indiscriminately" to browsers' requests.²⁸⁴

In situations of high interactivity, courts are more likely to find jurisdiction exists, both because evidence of actual forum contacts is more likely to exist and because the Web site is designed to transact business without regard to customer location. The importance of evidence of actual contacts was demonstrated in *E-Data Corp. v. Micropatent Corp.*²⁸⁵ In that case, the Web site was highly interactive; browsers could choose, order, pay for, and receive the company's principle product, digitalized photographs.²⁸⁶ However, the Web site did not require or retain customers' location; the only retained record was the charge-card transaction number.²⁸⁷ The court held that jurisdiction had not been established despite the site's interactivity level.²⁸⁸

Conversely, Web site limitations can reduce the potential for jurisdiction. *JB Oxford Holdings, Inc. v. Net Trade, Inc.*,²⁸⁹ a recent case decided by the U.S. District Court for the Southern District of

stream of commerce" and only slight additional forum contacts were sufficient to establish jurisdiction; some active measure must be taken to "avoid" forum state).

282. See, e.g., *Vitullo v. Velocity Powerboats, Inc.*, No. 97 C 8745, 1998 WL 246152 (N.D. Ill. Apr. 27, 1998); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997); *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34 (D. Mass. 1997); *Gary Scott Int'l, Inc. v. Baroudi*, 981 F. Supp. 714 (D. Mass. 1997); *Digital Equip. Corp. v. Alta Vista Tech., Inc.*, 960 F. Supp. 456 (D. Mass. 1997); *Maritz, Inc. v. Cybergold, Inc.* 947 F. Supp. 1328 (E.D. Mo. 1996). In *Superguide Corp. v. Kegan*, 987 F. Supp. 481 (W.D.N.C. 1997), the district court based its finding that jurisdiction existed on the assumptions that a significant number of forum residents had accessed the Web site and that they then interacted with it. See *id.* at 487 ("While the number of hits to defendant's website originating in North Carolina is not now before the court, a reasonable inference which arises is that such are numerous inasmuch as North Carolina is one of the populated states . . ."). If one makes an unfounded assumption that the court's assumptions are supportable, the court's decision is not unusual.

283. See, e.g., *Mink v. AAAA Dev., L.L.C.*, 190 F.3d 333 (5th Cir. 1999); *JB Oxford Holdings, Inc. v. Net Trade, Inc.*, 76 F. Supp. 2d 1363 (S.D. Fla. 1999); *CFOs 2 Go, Inc. v. CFO 2 Go, Inc.*, No. C97-4676 SI, 1998 WL 320821 (N.D. Cal. June 5, 1998); *Transcraft Corp. v. Doonan Trailer Corp.*, 45 U.S.P.Q.2d (BNA) 1097 (N.D. Ill. 1997); cf. *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351 (Fla. 3d DCA 1994) (holding regularly accessing Florida database does not support jurisdiction when enabling lease contract and all other contacts centered in New York and the location of the database computer was unimportant and may not have been known to the defendant).

284. See *Maritz, Inc. v. Cybergold, Inc.* 947 F. Supp. 1328, 1333 (E.D. Mo. 1996).

285. 989 F. Supp. 173 (D. Conn. 1997).

286. See *id.* at 174-75.

287. See *id.* at 175.

288. See *id.* at 177.

289. 76 F. Supp. 2d 1363 (S.D. Fla. 1999).

Florida is a good example. In that case the Web site expressly identified the states in which the site owner did business, and Florida was not included.²⁹⁰ The court held there was no jurisdiction.²⁹¹

It is difficult to draw an overall conclusion from these cases, but here is perhaps one. Plaintiffs must still prove that the defendant did something that could reasonably be expected to engender legal problems in the jurisdiction where the litigation was commenced. No case eliminates this fundamental requirement for judicial jurisdiction imposed by the Due Process Clause.

2. *Judicial General Jurisdiction and Internet Sites*

As discussed in Part III.B, there is a constitutionally significant distinction between judicial "general" jurisdiction and judicial "specific" jurisdiction. Due process requirements for the latter may be satisfied with a few acts directly connected with the subject matter of the action and the forum.²⁹² In contrast, judicial general jurisdiction must be based on evidence that shows a regular, significant, ongoing relationship with the forum, a relationship much the same as a resident's, such that it is reasonable for the forum to exercise jurisdiction with respect to any and all matters.²⁹³ Only a few decisions discuss general jurisdiction in an Internet context.

In cases where a Web site only provided information about the site owner and its products, the best-reasoned decisions have treated it as "mere" advertising which does not begin to meet the "continuous and systematic" type of forum activities necessary to establish general jurisdiction.²⁹⁴ The result has been the same when the Web site allows preparation and printout of an order form for mailing, fax, or direct e-mail.²⁹⁵ Even in cases involving highly interactive Web sites, the usual conclusion has been that general jurisdiction is not estab-

290. See *id.* at 1365, 1367.

291. See *id.* at 1368.

292. See discussion *supra* Part III.B.2.

293. See discussion *supra* Part III.B.1; see also, e.g., *Atlantech Distribution, Inc. v. Credit Gen. Ins. Co.*, 30 F. Supp. 2d 534, 536 (D. Md. 1998) (citing *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997)).

294. See, e.g., *Westcode, Inc. v. RBE Elec., Inc.*, No. CIV.A.99-3004, 2000 WL 124566 (E.D. Pa. Feb. 1, 2000); *Atlantech Distribution*, 30 F. Supp. 2d 534; *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997). In *Atlantech Distribution*, the court stated:

To subject [defendant] Colonial Mechanical to general personal jurisdiction based on its Internet presence would mean that it would presumably be subject to general personal jurisdiction in every jurisdiction in the country, thereby allowing a plaintiff to sue it for any matter anywhere in the nation. This the constitution does not permit.

Atlantech Distribution, 30 F. Supp. 2d at 537.

295. See, e.g., *Mink v. AAAA Dev., L.L.C.*, 190 F.3d 333 (5th Cir. 1999); *VP Intellectual Properties, L.L.C. v. Intech Corp.*, 53 U.S.P.Q.2d (BNA) 1269 (D.N.J. Dec. 9, 1999). Cf. *McDonough v. Fallon McElligott, Inc.*, 40 U.S.P.Q.2d (BNA) 1826, 1996 WL 753991 (S.D. Cal. Aug. 5, 1999).

lished. For example, in *Coastal Video Communications Corp. v. Staywell Corp.*²⁹⁶ the court characterized the Web site as the effective equivalent of having in-state salesmen or a physical store, but it still found general jurisdiction had not been proven because “there must be proof that the website is actually reaching a portion of the state’s population.”²⁹⁷

In *ESAB Group, Inc. v. Centricut, L.L.C.*,²⁹⁸ the Web site provided product and ordering information, and a customer could submit orders through the Web site if it had previously established an account by non-Internet contact.²⁹⁹ In addition, there was evidence of actual mail-order sales to forum residents, but those represented less than one-tenth of a percent of the defendant’s sales.³⁰⁰ The district court stated:

This court finds . . . that merely categorizing a web site as interactive or passive is not conclusive of the jurisdictional issue. General in personam jurisdiction must be based on more than a defendant’s mere presence on the Internet even if it is an “Interactive” presence.³⁰¹

Only one case has been found in which the court found general jurisdiction existed based, in part, on the defendant’s Web site. In *Mieczkowski v. Masco Corp.*,³⁰² the U.S. District Court for the East-

296. 59 F. Supp. 2d 562 (E.D. Va. 1999). In describing the Web site, the district court stated that the defendant:

[H]as established an on-line storefront that is readily accessible to every person in Virginia with a computer, a modem, and access to the World Wide Web. Thus, instead of using physical assets such as sample-bearing salesmen, or traditional business offices . . . [defendant] Krames is able to provide the same level of service via the Internet’s instant connections.

Id. at 569.

297. *Id.* at 571 (citing *Loumar v. Smith*, 698 F.2d 759, 763 (1983)). The court granted a motion to engage in discovery to learn if there had been actual contacts with forum residents. See *Coastal Video*, 59 F. Supp. 2d at 572; see also, e.g., *Origin Instruments Corp. v. Adaptive Computer Sys., Inc.*, No. CIV. A. 397 CV2595-L, 1999 WL 76794 (N.D. Tex. Feb. 3, 1999) (holding a Web site highly interactive because it provided the ability to purchase and download software). In *Westcode, Inc. v. RBE Electronics, Inc.*, No. CIV.A.99-3004, 2000 WL 124566 (E.D. Pa. Feb. 1, 2000), the court bluntly stated: “A corporation or individual is not subject to general jurisdiction in a foreign forum simply by virtue of an Internet presence.” *Id.* at *5 (dicta). Note that being “effectively equivalent to a physical store” for Due Process Clause purposes is not the same thing as establishing a nexus for Commerce Clause purposes.

298. 34 F. Supp. 2d 323 (D.S.C. 1999).

299. See *id.* at 327.

300. See *id.* at 326. In a previous decision involving the same parties, the U.S. Court of Appeals for the Fourth Circuit had held that no general jurisdiction had been established based on the defendant’s in-forum activities, but in that case the existence of the Web site had not been included in the evidence. See *ESAB Group, Inc. v. Centricut, L.L.C.*, 126 F. 3d 617 (4th Cir. 1997).

301. *ESAB Group*, 34 F. Supp. at 330 (citations omitted); see also *Origin Instruments*, 1999 WL 76794, at *2 (discussing highly interactive Web site that allowed purchase and download of software products).

302. 997 F. Supp. 782 (E.D. Tex. 1998).

ern District of Texas considered a product liability action very similar to *World-Wide Volkswagen*. A Virginia couple purchased a bunk bed from a Washington, D.C., retailer.³⁰³ The product had been manufactured by defendant Rose Furniture, a North Carolina company.³⁰⁴ Twelve years later, in North Carolina, the couple sold the bed to another North Carolina couple, who moved to Texas a year later.³⁰⁵ There, fourteen years after the bed was originally sold, the second couple's son died when he became entangled between the bed railings.³⁰⁶ The action against Rose Furniture (and others) alleged that the death was caused by defective product design.³⁰⁷ The North Carolina defendant contended that the Texas courts (and, therefore, the federal court sitting in diversity) did not have jurisdiction.³⁰⁸ The district court first discussed whether "specific jurisdiction" existed and concluded it did not because there was no evidence that it was foreseeable that this bed would be taken to Texas.³⁰⁹

The district court went on to consider whether there were sufficient contacts between the defendant and Texas to support general jurisdiction. The defendant had no offices, employees, agents, or property in Texas and was not licensed to do business there.³¹⁰ However, the defendant had had business dealings with Texas residents, including the following: (1) selling \$5.7 million worth of products over six years; (2) consummating over 250 transactions worth \$717,000 in 1997 (apparently the year of filing); (3) receiving 3.2% of its gross income from Texas sales over a four-year period; (4) mailings to previous Texas-resident customers twice a year; (5) purchasing 0.2% of its furniture from a Texas manufacturer during the preceding three years; and (6) maintaining a Web site accessible to approximately 2.2 million Texas residents.³¹¹

With regard to the Web site, the court found that it was much more than a "traditional" advertisement.³¹² At the Web site, persons could browse through the furniture selections, obtain information about specific items (construction, materials, price), print out (but not electronically submit) an order form, check prior orders' status,

303. *See id.* at 783.

304. *See id.*

305. *See id.*

306. *See id.*

307. *See id.*

308. *See id.*

309. *Id.* at 785. The similarity between this case and *World-Wide Volkswagen* was too obvious to allow a different conclusion concerning special jurisdiction.

310. *See id.*

311. *See id.*

312. *See id.* at 787.

and communicate with sales representatives by e-mail.³¹³ In addition, the defendant responded to all inquiries through the Web site.³¹⁴

In considering its conclusion, the district court reviewed a number of prior decisions dealing with Web sites and jurisdiction. It found Rose Furniture's Web site akin to the one involved in *Maritz*, in that both sites were interactive, soliciting business generally (without discrimination based on location), and promoting the owners' business.³¹⁵ In its conclusion, the district court stated:

The Court need not decide today whether standing alone the Web site maintained by the defendant is sufficient to satisfy a finding of general jurisdiction. Nor must it look only to the traditional business contacts that the defendant has with the State of Texas. Rather, it is the combination of the two that leads the Court to the conclusion that the defendant maintains substantial, continuous and systematic contacts with Texas sufficient to subject it to [general] personal jurisdiction.³¹⁶

The court's reasoning would have been more convincing if there had been evidence of Internet-mediated sales to Texas residents, or even that a number of Texas residents had actually communicated via the Web site.³¹⁷

It is not obvious that the defendant's non-Internet contacts with Texas would satisfy the general jurisdiction requirements discussed in *Helicopteros*.³¹⁸ Rose Furniture did have continuing "traditional" contacts with Texas over a period of time and those were part of its regular business activity, selling furniture.³¹⁹ It is also true that the defendant's forum contacts in *Helicopteros* were less regular and were auxiliary to its regular business of flying helicopters in South America.³²⁰ On the other hand, Rose Furniture did not have any offices or other physical presence in the forum state, which contrasts with the defendant in *Perkins*,³²¹ where the defendant had its principal officer, office, and management operations in the forum state.³²²

313. See *id.*

314. See *id.*

315. See *id.* at 788 (discussing *Inset Sys. Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996)).

316. *Mieczkowski*, 997 F. Supp. at 788.

317. See *Coastal Video Communs., Corp. v. Staywell Corp.*, 59 F. Supp. 2d 562 (E.D. Va. 1999). In *Coastal*, a customer could complete a purchase transaction; thus, the court said the site was the effective equivalent of a "brick and mortar" store in the forum. See *id.* at 569. However, there was no evidence concerning the extent of the defendant's actual contacts with forum residents, through the Web site or otherwise, and the court held that it did not have sufficient information to rule on the issue of general jurisdiction. *Id.* at 572.

318. See *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408 (1984).

319. See *Mieczkowski*, 997 F. Supp. at 787.

320. See *Helicopteros*, 466 U.S. at 410-11.

321. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

322. See *id.* at 447-48.

If the allegedly defective product had been sold in Texas (either via the Web site or the "traditional" distribution process), there is no question that Rose Furniture's actions would support specific jurisdiction. But there is little to suggest that combining two routes to specific jurisdiction can create a sufficient basis for general jurisdiction.

Mieczkowski illustrates one problem with finding a Web site's existence as a sufficient basis for specific jurisdiction; this same problem was discussed by the U.S. District Court for Oregon in *Millennium Enterprises, Inc. v. Millennium Music, L.P.*³²³ The Web site in *Millennium* was slightly more interactive than the one in *Mieczkowski* because a browser could complete a purchase through the Web site.³²⁴ The district court held that it did not have general jurisdiction over the defendant, which was clearly supported by the fact that there had been only one sale to a forum resident, and that was "arranged" by the plaintiff.³²⁵ The court concluded that a Web site, per se, was insufficient to support judicial specific jurisdiction; because is no deliberate action by the Web site owner within the forum.³²⁶ In the process the district court astutely observed:

[A] Web site is not automatically projected to a user's computer without invitation as are advertisements in a newspaper or on the television and radio. Rather, the user must take affirmative action to access either a passive or interactive Web Site. . . . Thus, contrary to the scenario described in *Inset*, information published on Web sites is not thrust upon users indiscriminately.

. . . .

Absent actual exchanges or transactions with residents of the forum or evidence that local residents were [purposefully] targeted, the distinctions between specific and general jurisdiction become blurred. . . . Web sites are accessible day and night to all who possess the necessary technological know-how and equipment. Thus, *if an interactive Web site can constitute "purposeful availment" of a forum [for specific jurisdiction purposes] simply by being continuously accessible to residents of that forum, surely that contact can be considered as "continuous and systematic" for purposes of general jurisdiction.* Taking this reasoning to its logical conclusion, a plaintiff could sue a foreign defendant in any forum and claim jurisdiction based on the defendant's interactive Web site, even if the cause of action is unrelated to the Web site. Such results hardly conform with notions of "fair play and substantial justice." The

323. 33 F. Supp. 2d 907 (D. Or. 1999).

324. *Id.* at 908-09. During the period from March through September, 1998, 0.01% of the defendant's sales were through the Web site. *See id.*

325. *See id.* at 909-10; *see also* *Hanson v. Denckla*, 357 U.S. 235 (1958).

326. *See Millennium*, 33 F. Supp. 2d at 922.

grasp of personal jurisdiction was never intended to reach so far and so wide.³²⁷

The district court clearly identified the most significant objection to determining that the existence of a Web site, by itself, is a sufficient basis for permitting general jurisdiction in a particular forum: there is no rational way to limit the logic to one forum. Any logic supporting the conclusion would apply equally to any forum from which the Internet can be accessed, that is, the entire world. Such a conclusion is contrary to the theories that underlie both due process requirements and generally accepted international law principles.

D. Commerce Clause Limitations

Justice Frankfurter penned some lines that need to be kept firmly in mind when reviewing court decisions concerning constitutional issues in general, and Commerce Clause-related state tax issues in particular:

Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result. . . .

. . . Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when state taxes come before it. . . . We must be on guard against . . . [relying on] formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.³²⁸

As can be seen in the following discussion, what started (and remains) a jurisdictional (due process) issue has "imperceptibly" con-

327. *Id.* at 922-23 (citation omitted) (emphasis added). To the same effect regarding "global" jurisdiction, see *Cybersell, Inc. [Ariz.] v. Cybersell, Inc. [Fla.]*, 130 F.3d 414 (9th Cir. 1997); *Atlantech Distrib. Inc. v. Credit Gen. Ins. Co.*, 30 F. Supp. 2d 534, 537 (D. Md. 1998); *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D.N.Y. 1997); *Playboy Enter., Inc. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996). See also *McDonough v. Fallon McElligott, Inc.*, 40 U.S.P.Q.2d (BNA) 1826, 1996 WL 753991 (S.D. Cal. Aug. 5, 1996) (general jurisdiction based only on Web site would "eviscerate" personal jurisdiction requirements).

328. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-45 (1940).

verted to a Commerce Clause issue by reference to formulae and “magic words.”

1. *In General*

As noted earlier, resolving due process issues does not exhaust the constitutional limitations on taxing Internet-mediated activities. Article I, section 8, of the United States Constitution grants to Congress the power to regulate interstate and foreign commerce.³²⁹ As long ago as 1824, Supreme Court opinions noted the “negative” or “dormant” aspects of the Commerce Clause, that is, the fact that this delegation of power to Congress precludes states from enforcing rules that interfere with interstate commerce.³³⁰ The limitations apply to all types of state rules, including tax rules.³³¹

Legal theory concerning how to determine if a state act is invalid due to Commerce Clause limitations has undergone somewhat erratic changes, similar to theories relating to other aspects of the relationship between state and federal regulation of commercial activities.³³² The narrow definition of “interstate commerce” that prevailed before the 1930s fixed a definite line between intrastate and interstate activities and rather inflexible rules concerning state taxation. In 1888, the Supreme Court held that “no State has the right to lay a tax on interstate commerce in any form.”³³³ The sea-change reinterpretation of “interstate commerce” in the 1930s required a reevaluation of the relationship between state regulation and interstate commerce.³³⁴ As will be seen, however, the changes have not resulted in a revision of all pre-1930s rules.

Current Commerce Clause theory allows state regulation of persons and things involved in interstate commerce so long as the regulation does not discriminate against or “unduly burden” interstate

329. U.S. CONST. art. I, § 8, cl. 3.

330. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231-32, 239 (1824) (Johnson, J., concurring).

331. See, e.g., *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 180 (1995).

332. See generally I JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* ch. 4 (3d ed. 1998) (offering a detailed discussion of historical and modern application of the Commerce Clause to state tax issues) [hereinafter *STATE TAXATION*].

333. *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888). A few years later that statement was somewhat modified to preclude only direct burdens on interstate commerce. See *Sanford v. Poe*, 165 U.S. 194 (1897).

334. If there had been no revision of the rules concerning state regulation, the adoption of the “affectation” doctrine concerning federal jurisdiction with respect to interstate commerce would have virtually eliminated state regulation of any commerce-related activity. A seminal statement of that reevaluation in the state tax arena is Justice Rutledge’s opinion concurring in part and dissenting in part in three companion cases: *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944); *General Trading Co. v. State Tax Comm’n*, 322 U.S. 335 (1944); and *International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944). That opinion is published following the *International Harvester* decision at 322 U.S. at 349.

commerce.³³⁵ The watershed case for current state taxation theory is the Supreme Court's 1977 decision in *Complete Auto Transit, Inc. v. Brady*.³³⁶ In that case, the Court articulated a four-part test to determine if a state tax runs afoul of the Commerce Clause. Under that test, a state tax is not invalid "when [1] the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State."³³⁷ The application of this test has not been easy or straightforward.

The fourth factor is rarely a problem because there is no requirement of economic parity between taxes paid and services provided,³³⁸ and the existence of general government functions (police, courts, roads, and so on) has been found adequate justification for almost any level of taxation.³³⁹ With respect to the third factor (discrimination) the pre- and post-*Complete Auto* cases have been fairly consistent. State taxation unconstitutionally discriminates when it imposes greater burdens on interstate activities than it does on in-state activities.³⁴⁰ Thus a tax on the value of corporate shares that imposes a significantly higher tax with respect to foreign corporations is invalid.³⁴¹ It is possible to impose one tax on domestic taxpayers and a different tax on out-of-state taxpayers, but the state must show economic equivalence, which has proven very difficult in practice.³⁴² The combination of sales and use taxes has survived scrutiny even though use taxes, taken alone, would clearly discriminate against interstate commerce.³⁴³ Use taxes are imposed on goods used in a taxing jurisdiction if the state's sales taxes were not paid when those goods were purchased.³⁴⁴ The most frequent reason for not paying local sales taxes is purchase outside the jurisdiction. Use taxes are saved from invalidation by allowing a credit for sales taxes paid to other jurisdictions.³⁴⁵

A tax that does not discriminate may still place an undue burden on interstate commerce, principally through multiple taxation. The

335. See generally *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Mobil Oil Corp. v. Comm'n of Taxes*, 445 U.S. 425 (1980); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

336. 430 U.S. 274 (1977).

337. *Id.* at 279.

338. See, e.g., *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 199 (1995).

339. See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626, 629 (1981).

340. See, e.g., *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 341 (1992).

341. See *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996).

342. See, e.g., *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999); *Oregon Waste Sys. v. Department of Env'tl. Quality*, 511 U.S. 93 (1994).

343. See *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

344. See, e.g., *id.* at 580-81.

345. See *id.* at 583-84; see also *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 199 (1995).

multiple-taxation issue is directly addressed under the second *Complete Auto* factor (“fairly apportioned”), by determining if the tax is “internally consistent” and, if so, whether it is “externally consistent.”³⁴⁶ (One must take these two terms as “words of art” and not seek a close definitional relationship between the terms and the inquiries they label.) For the “internal consistency” test, one assumes that every state adopts an identically worded tax.³⁴⁷ The tax is acceptable if no double taxation would result.³⁴⁸ For example, in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*,³⁴⁹ the state imposed a sales tax on bus transportation tickets sold in the state for transportation originating in the state.³⁵⁰ This passes the internal consistency test because those combined events can only happen in one state.³⁵¹

The “external consistency” test is not so straightforward. Its expressed purpose is to transcend formal names and designations to determine if the value being taxed, or part of it, might also be taxed in another state.³⁵² If potential double taxation exists, the tax is invalid. Failing the external consistency test can be avoided by apportionment, credits, or some other method.³⁵³ However, problems arise when formalities and labels are completely cast aside for economic effects.

In *Jefferson Lines*, the tax was imposed on the buyer, measured by the ticket’s gross price.³⁵⁴ Labels aside, the passenger’s transportation expense is the transportation company’s gross income, an equivalence too obvious to ignore. Before *Jefferson Lines*, the Court had considered a New York gross income tax, as applied to bus transportation companies, in *Central Greyhound Lines, Inc. v. Mealey*.³⁵⁵ The Court invalidated the tax in *Central Greyhound* because it was not apportioned; the transportation company’s gross income was earned as its buses traveled through various states.³⁵⁶ The place where the income was received (ticket purchased) was not where the income was earned (moving passengers).³⁵⁷ States other than New York could justifiably tax gross income earned in that

346. *Jefferson Lines*, 514 U.S. at 199; see also *Goldberg v. Sweet*, 488 U.S. 252 (1989); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

347. See *Jefferson Lines*, 514 U.S. at 185.

348. See *id.*

349. *Id.*

350. *Id.* at 177-78.

351. See *id.* at 185.

352. See *id.*

353. See *id.*; see also, e.g., *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (formula allocation of worldwide income); *Container Corp. of America*, 463 U.S. 159 (same); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) (facially discriminatory use tax saved by credit for out-of-state sales tax paid).

354. See *Jefferson Lines*, 514 U.S. at 177-78.

355. 334 U.S. 653 (1948).

356. See *id.* at 663.

357. See *id.* at 660-61.

state, thereby duplicating the New York tax.³⁵⁸ While the “external consistency” test had not then been articulated, the Court invalidated the tax on Commerce Clause grounds due to the potential for multiple taxation.³⁵⁹ The Court noted that apportioning the gross income based on passenger miles within the state could avoid the problem.³⁶⁰

The dissent in *Jefferson Lines*, logically, points out that the Oklahoma tax and the New York tax were both on the gross ticket price.³⁶¹ The dissent states: “[A]s a practical matter, in respect to both taxes, the State will calculate the tax bill by multiplying the rate times gross receipts from sales; the bus company will pay the tax bill; and, the company will pass the tax along to the customer.”³⁶² In other words, under the external consistency test, as articulated in theory, the tax in *Jefferson Lines* is not distinguishable from the tax in *Central Greyhound*. One difference the dissent did not note was that in one (*Jefferson Lines*—sales tax) the tax is separately stated in the customer’s bill, while in the other (*Central Greyhound*—gross receipts) the tax is hidden in the ticket price.

The *Jefferson Lines* majority distinguished the two taxes on formalities, the taxable event (purchasing a ticket versus providing services) and the taxpayer (ticket purchaser versus service provider).³⁶³ The majority supported that distinction and stated:

[O]ur cases are implicit with the understanding that the Commerce Clause does not forbid the actual assessment of a succession of taxes by different States on distinct events as the same tangible object flows along. . . . In light of this settled treatment of taxes on sales of goods and other successive taxes related through the stream of commerce, it is fair to say that because the taxable event of the consummated sale of goods has been found to be properly treated as unique, and internally consistent, conventional sales tax has long been held to be externally consistent as well.³⁶⁴

The Court went on to justify similar treatment for sales taxes on services, even when some portion of those services may be performed outside the taxing state.³⁶⁵ Perhaps the key point in the majority’s distinction of *Central Greyhound* is that in *Central Greyhound* the Court understood the New York gross receipts tax to be “simply a variety of tax on income, which was required to be apportioned to reflect the location of the various interstate activities by which it [is]

358. See *id.* at 662.

359. See *id.* at 661-63.

360. See *id.* at 663.

361. *Jefferson Lines*, 514 U.S. at 203-04 (Breyer, J., dissenting).

362. *Id.* at 204.

363. See *id.* at 186-87.

364. *Id.* at 187-88 (citations omitted).

365. See *id.* at 192.

earned.”³⁶⁶ In other words, an “income tax” is distinct from a “sales tax” for Commerce Clause external consistency purposes, even if the two are economically equivalent.³⁶⁷

This extended discussion of *Jefferson Lines* is not intended as criticism. Rather, it demonstrates that despite the theory of the Commerce Clause “external consistency” test, traditional distinctions between various types of taxes (income, property, excise, sales, and so forth) will not be ignored. Reading between the lines of the majority’s opinion in *Jefferson Lines* reveals why that is so. If all labels are ignored, there could be only one tax along the stream of commerce from the raw materials producer to the final consumer. That, obviously, would invalidate entire tax structures through which state and federal governments obtain operating funds.

2. Commerce Clause and Consumption Taxes

The most controversial aspect of taxing Internet-mediated activities relates to consumption taxes. In the United States, that currently means sales and use taxes. It appears that use taxes will provide the battleground and baseline for Internet-related tax controversies, and perhaps for jurisdictional issues in general. Solutions reached with respect to consumption taxes fixing where Internet-mediated transactions and activities occur can be applied to other taxes and regulations.³⁶⁸ Perhaps unfortunately, sales and use tax problems are not being approached with an open mind. Instead, state and local tax authorities view them as merely another round in their decades-long struggle to impose collection and payment obligations on mail-order sellers.³⁶⁹ The fact that the states have generally lost the battles in that arena may account for the strident, emotional character of their positions concerning Internet-based sales.³⁷⁰ And it was in a 1992 mail-order use tax case, *Quill Corp. v. North Dakota ex rel. Heitkamp*,³⁷¹ that the Supreme Court re-

366. *Id.* at 190. The majority gives traditional labels and treatment precedence over functional economic equivalence.

367. Perhaps one could infer, in theory, that the external consistency test can be failed only by two or more taxes formally imposed on a single taxpayer. While that may seem a rather long leap in logic, there is little else to distinguish *Jefferson Lines* from *Central Greyhound*.

368. Unfortunately, *Jefferson Lines* might be used to rationalize employing inconsistent rules for different taxes.

369. See, e.g., Jeri Clausung, *Foes of Internet Tax Ban Vow to Fight On*, N.Y. TIMES ON THE WEB, Apr. 4, 2000, at <http://www.nytimes.com/library/tech/00/04/capital/04capital.html> (last visited Apr. 6, 2000). The article quotes Shawn Bullard, Associate Legislative Director, National Association of Counties: “This was only one of many battles that we’ve fought, and we are getting ready to fight again.” *Id.*; see also Appendix B.

370. See Appendix B.

371. 504 U.S. 298 (1992).

minded³⁷² states and taxpayers of the distinction between Due Process and Commerce Clause limitations on state taxation.³⁷³

For reasons not altogether obvious, sales and use taxes have been treated as inherently distinct from other taxes.³⁷⁴ Perhaps that is only because they are consumption taxes imposed on the consumer.³⁷⁵ As demonstrated in *Jefferson Lines*, the sales-and-use-tax combination rather easily satisfies the discrimination and “multiple burden” tests. However, they have generated a series of cases concerning not upon whom the tax can be imposed, but concerning who can be required to collect and remit taxes imposed on someone else. As will be seen, this distinction has not been consistently recognized; the retail seller/tax collector is often treated, if not referred to, as the taxpayer.

a. *The Jurisprudence.*—One surveying the current political and legal discussions might conclude that the issues are new, and that the only significant consideration is the technological changes over the past thirty or so years. Actually, there is very little about the controversy that is new or has not been discussed many years ago. About the only new thing is the amount of state revenue silicon-seers say is involved. Starting further back, closer to beginnings, allows a more objective consideration and reveals some explanations of otherwise perplexing questions.

The current debate swirls around state officials’ contention that they have, or should have, the right to compel all sellers to collect state consumption taxes from purchasers and to remit the tax amount (collected or not) to the purchasers’ state of residence.³⁷⁶ If forced to more precisely define the issue, state tax officials admit that

372. The term “reminded” is used purposefully. See Justice Rutledge’s opinion concerning the three companion cases, *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944); *General Trading Co. v. State Tax Comm’n*, 322 U.S. 335 (1944); and *International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944), stating:

[T]hough overlapping, the two conceptions [Due process and dormant Commerce Clause] are not identical. There may be more than sufficient factual connections . . . between the transaction and the taxing state to sustain [a] tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached . . . at least tentatively as if they were separate and distinct, not intermingled ones.

General Trading, 322 U.S. at 353.

373. See discussion *supra* note 372.

374. See, e.g., *Oklahoma Tax Comm’n v. Jefferson Lines*, 514 U.S. 175 (1995).

375. Other excise taxes with a similar economic effect are imposed on a taxable event earlier in the distribution chain and are not separately stated on the consumer’s sales invoice. See *infra* text accompanying notes 381-386. If sales taxes were imposed on the seller and not separately charged to the buyer, the Court would have had a more difficult problem in *Jefferson Lines*.

376. See generally *infra* Part III.B.2.b.

the question is whether a state has the power to compel out-of-state sellers to collect use taxes from that state's residents.³⁷⁷

The practice of having tax revenues collected and submitted by someone other than the taxpayer is not new or limited to sales and use taxes. The advantages are obvious: (1) the person with the duty to remit is more likely to pay, since the funds paid are not the remitter's (it is always easier to spend other persons' money); (2) the number of persons with whom the tax authorities must deal is greatly reduced; and (3) there may be administrative problems collecting from the taxpayer which are avoided when dealing with a third party. It seems this final reason was among the earliest recognized. As early as 1869, the Court noted that it was "common" in New England states to require corporations to pay the tax levied on the shareholders and that, with respect to nonresident shareholders, "it is the only mode in which the State can reach their shares for taxation."³⁷⁸ The Court found no constitutional impediment to a state requiring the officers of a national bank to withhold and pay state property taxes assessed against shareholders measured by their shareholdings.³⁷⁹ That method of collecting tax with respect to corporations has persisted for at least a century.³⁸⁰

With the proliferation of automobiles and the resulting need for road maintenance funds, states sought any viable means of collecting funds and distributing the cost; road users were many and varied; determining actual usage could be complicated and subject to manipulation. A rather elegant structure was created. The typical motor fuel (or "gasoline") tax was imposed on the persons who used it for motor vehicle transportation, with the tax fixed at a specified price per gallon.³⁸¹ To cut collection costs, states imposed the duty to pay taxes as far back the distribution chain as possible (refiner, importer, distributor, retail dealer, in that order of preference), with the requirement or permission to pass the tax down to the ultimate consumer.³⁸² Since the tax was for road maintenance, the common gaso-

377. Of course if states have that power, they can enforce sanctions against sellers who do not comply. Those sanctions are, invariably, that the seller pay the amount it "should" have collected, plus penalties, interest, etc. See, e.g., *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 341, 344 (1954).

378. *National Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 361 (1869).

379. See *id.*; see also *Citizens Nat'l Bank v. Kentucky*, 217 U.S. 443 (1910) (bank acts as agent for shareholders); *First Nat'l Bank v. County of Chehalis*, 166 U.S. 440 (1897).

380. See, e.g., *International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435 (1944); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940).

381. The various states' gasoline taxes had (and have) minor differences, but the general scheme and manner of tax collection were essentially identical. Some of the cases that support the text description are the following: *Pierce Oil Corp. v. Hopkins*, 264 U.S. 137 (1924); *Standard Oil Co. v. Kurtz*, 330 F.2d 178 (8th Cir. 1964); *Anastasio v. Gulf Oil Corp.*, 42 A.2d 149 (Conn. 1945); *Standard Oil Co. v. Jones*, 205 N.W. 72 (S.D. 1925); and *Standard Oil Co. v. Brodie*, 239 S.W. 753 (Ark. 1922).

382. See, e.g., *Kurtz*, 330 F.2d at 181-82 (describing tax on dealer).

line tax allowed exemptions for farmers, stationary engine use, and the like.³⁸³ Because the tax was initially paid on all gasoline, exempt users were required to individually apply for refunds from the state (administrative convenience for the exempt consumer was apparently not a high-level consideration).³⁸⁴ When it was contended that a state's gasoline tax infringed on interstate commerce, the short answer was that the tax was on the privilege of using state highways, which only happened after the gasoline had completed its interstate journey.³⁸⁵ Similar schemes are used to collect other excise taxes.³⁸⁶

When the persons required to collect the gas tax complained that they were actually paying taxes imposed on other persons, the response was that the involuntary tax collectors were not being taxed but merely being regulated.³⁸⁷ The Supreme Court expressly noted: "[A] State which has, under its constitution, power to regulate the business of selling gasoline . . . is not prevented by the [U.S. Constitution's] due process clause from imposing the incidental burden."³⁸⁸ By 1934, the Supreme Court could blithely say that the collection method was "a common and entirely lawful arrangement."³⁸⁹ However, when a state tried to impose the tax collection and payment obligation with respect to a sale that took place entirely outside the state and was unconnected with the state, the Court held that tax did not meet due process requirements.³⁹⁰

The only located decision that specifically mentions accounting duties with respect to interstate commerce is *Bowman v. Continental Oil Co.*,³⁹¹ decided in 1921. Continental imported gasoline into the state and sold some in the same containers in which it was imported (5.5% of sales) and the remainder from "broken" containers.³⁹² Since 1921 was before greater flexibility of definition was introduced, the Court held that sales in the original containers were "in interstate commerce" at the time of the sales and thus not subject to the state's gasoline excise tax.³⁹³ After reviewing the New Mexico statute, the Court found that the statute itself was not separable (interstate ver-

383. See, e.g., *Jones*, 205 N.W. at 73-74.

384. See, e.g., *id.*

385. See *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 93 (1934).

386. See, e.g., *Heyman v. Mahin*, 275 N.E.2d 421 (Ill. 1971) (cigarette tax).

387. See, e.g., *Pierce Oil Corp. v. Hopkins*, 264 U.S. 137 (1924); *Standard Oil Co. v. Brodie*, 239 S.W. 753 (Ark. 1922).

388. *Pierce Oil Corp.*, 264 U.S. at 139. The Arkansas Supreme Court made an identical, express ruling in *Brodie*, 239 S.W. at 756.

389. *Monamotor Oil Co.*, 292 U.S. at 93 (citing *Citizens Nat'l Bank v. Kentucky*, 217 U.S. 443, 454 (1910), and *Jones*, 205 N.W. 72); see also *Pierce Oil Corp.*, 264 U.S. 137; *Brodie*, 239 U.S. 753.

390. See *American Oil Co. v. Neill*, 380 U.S. 451 (1965).

391. 256 U.S. 642 (1921).

392. See *id.* at 643-44.

393. See *id.* That holding was principally based on a previous holding of the Court in the same case. See *Askren v. Continental Oil Co.*, 252 U.S. 444 (1920).

sus post-interstate), but that enforcement could be separated, thus saving the statute, by enjoining enforcement with respect to sales in unbroken containers (that is, those made while the goods were still in “interstate commerce”).³⁹⁴ Thus, the Court instructed the lower court to issue a decree requiring Continental Oil “to render detailed statements of all gasoline received, sold, or used by it, whether in interstate commerce or not, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated.”³⁹⁵ There is nothing in the opinion that indicates any state-required reporting or “accounting” had been an issue. So far as can be ascertained from the opinion, the reporting requirement was based on the Court’s power to establish an enforceable decree, not on a conclusion that the state had the power to require such an accounting.

Thus, when sales taxes were being enacted, states had a readily available example of a comparable tax (comparable in being of small amount, with innumerable taxpayers), which had a tried and proven collection scheme that could be easily adapted to the retail sale of goods. The primary difference was that the sales tax was measured by the retail sales price, so the collection duties had to be imposed on the retailer where that price was first determined.

Similarly, the gasoline tax precedent was helpful to the Court when the constitutionality of use taxes came before it. In *Henneford v. Silas Mason Co.*,³⁹⁶ the Court cited, inter alia, a gas tax case for the proposition that “[a] tax upon the privilege of use or storage when the chattel [is] used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate.”³⁹⁷ The Court offered considerable discussion on the equality and fairness of the sales-and-use-tax combination and expressly distinguished between the use tax (on property that has become part of the mass in the state) and an indirect tax on a foreign sale: “But the fact that the legislature has chosen to lay a tax upon the use of chattels that have been bought does not make the tax upon the use a tax upon the sale.”³⁹⁸

394. See 256 U.S. at 646. The theory of “interstate commerce” at that time relied on drawing a bright line where particular items began and ended their interstate journey. See *id.* at 647. States could regulate items (or with respect to items) before or after—but not during—their interstate journey. See *id.* Thus the significance of sale from “broken” or “unbroken” containers.

395. *Bowman*, 256 U.S. at 650.

396. 300 U.S. 577 (1937).

397. *Id.* at 583 (citing *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934)).

398. *Id.* at 587. *Silas Mason* emphasizes the precise incidence of sales and use taxes. See 300 U.S. at 582; see also *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 49 (1940).

That distinction has been consistently followed.³⁹⁹ Imposing a tax on a sale in another state is beyond the state's power and would violate the Commerce Clause.⁴⁰⁰ If imposing a tax on a transaction that occurs in another state is beyond a state's power, it is very difficult to see how imposing any other obligation on that transaction is not subject to the same infirmity.

Two years after *Silas Mason* the Court relied even more heavily on gasoline tax cases. In *Felt & Tarrant Manufacturing Co. v. Gallagher*,⁴⁰¹ an Illinois corporation contended that it could not be required to act as California's use-tax collection agent.⁴⁰² The bulk of the brief opinion details the nature of Felt & Tarrant's operations in California, that is, two exclusive general agents authorized to solicit sales, employ subagents, rent property in the company's name, and other similar activities.⁴⁰³ In addition to shipping ordered goods directly to purchasers, the company (to save shipping costs) made bulk shipments to the agents, who then made the deliveries.⁴⁰⁴ The Court disposed of the company's arguments by referencing and quoting *Silas Mason* (discussed immediately above) and two gasoline tax cases, *Monamotor Oil* and *Continental Oil*.⁴⁰⁵ Specifically, in its reliance on the gasoline tax cases, the Court quoted *Monamotor's* conclusion that a state could require a person to perform administrative tasks in support of the state's collection of a lawfully imposed tax and that requiring the distributor to act as the state's collection agent was a "common and entirely lawful arrangement."⁴⁰⁶ In addition, the Court stated: "*Bowman v. Continental Oil Company* recognized the right of the state to require a distributor 'to render detailed statements . . .'"⁴⁰⁷ The Court's reading of the *Continental Oil* opinion is not consistent with the opinion taken as a whole. It is, at best, taken out of context.⁴⁰⁸ Nevertheless, that statement in *Monamotor* has been subsequently (and apparently without further investigation)

399. See, e.g., *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335 (1944); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939).

400. See *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944); see also *Oklahoma Tax Comm'n v. Jefferson*, 514 U.S. 199 (1995) (holding that a retail sale of goods or services can only be taxed in the state where the sale occurs).

401. 306 U.S. 62 (1939).

402. *Id.* at 64.

403. See *id.*

404. See *id.*

405. See *id.* at 66-68 (citing *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934); *Bowman v. Continental Oil Co.*, 256 U.S. 642 (1921)).

406. *Id.* at 68 (quoting *Monamotor Oil*, 292 U.S. at 93).

407. *Id.* at 67 (quoting *Continental Oil*, 256 U.S. at 650).

408. See *supra* text accompanying notes 391-395.

cited in support of a conclusion that collection obligations can be imposed on out-of-state sellers.⁴⁰⁹

When the first significant mail-order cases came before the Court in 1941, the Court had considerable recent experience with gasoline taxes for reference. In companion cases by Iowa against the mail-order pioneers (and giants) Sears, Roebuck & Co.⁴¹⁰ and Montgomery Ward & Co.,⁴¹¹ the Court expressed concern for the “practical operation” rather than the “precise form of descriptive words” that might be applied.⁴¹² With that in mind, the Court noted that use taxes were a constitutionally permissible means of preventing residents from evading sales taxes,⁴¹³ and imposing a reporting burden on interstate businesses was also permissible.⁴¹⁴ Both Sears and Montgomery Ward sold goods to Iowa residents from in-state retail stores and via catalog.⁴¹⁵ Sears’ approximately \$10.1 million annual sales to Iowa residents were almost evenly divided between in-store sales and mail-order sales.⁴¹⁶ The Court emphasized the fact that the companies had registered as foreign corporations doing business in the state and had substantial local presence: Sears had twelve retail stores,⁴¹⁷ Montgomery Ward had twenty-nine plus several “order offices.”⁴¹⁸ As unitary, in-state business operations, the Court held “departmentalization” did not immunize the companies from state regulation:⁴¹⁹ “these [mail]-orders are still a part of respondent’s Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the “impotence of state power.”⁴²⁰ The Court’s holding that both companies were required to collect, report, and remit use taxes on mail-order sales to Iowa residents was clearly premised on the fact that the companies were qualified to do business in that state and had very substantial local business operations.

409. See, e.g., *Heyman v. Mahin*, 275 N.E.2d 421, 424 (Ill. 1971) (quoting *Monamotor Oil*).

410. See *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941).

411. See *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941).

412. *Sears, Roebuck*, 312 U.S. at 363 (quoting *Lawrence v. State Tax Comm’n*, 286 U.S. 276, 280 (1931)).

413. See *id.* (citing *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937)).

414. See *id.* at 363–64 (citing *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 68 (1939); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 95 (1934)).

415. See *Montgomery Ward*, 312 U.S. at 374; *Sears, Roebuck*, 312 U.S. at 362.

416. See *Sears, Roebuck*, 312 U.S. at 362 n.3 (noting that Iowa sales in 1936 were \$5080 from stores and \$5,900,000 from mail order, and in 1937 were \$5,600,000 from stores and \$5,400,000 from mail order).

417. See *id.*

418. *Montgomery Ward*, 312 U.S. at 374.

419. *Sears, Roebuck*, 312 U.S. at 364–65 (portraying one of the many instances in which the Court appears to be treating the collection agent as the taxpayer).

420. *Id.* at 364 (citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940)).

Justice Roberts' two-justice dissent emphasizes the functional separation of the companies' mail-order business and the "interstate commerce" nature of mail-order sales.⁴²¹ Based on a then-old-style formal distinction between interstate and intrastate business activities, the dissent argued that forcing the companies to comply with use-tax collection rules was a direct burden on interstate commerce and therefore unconstitutional.⁴²² "Iowa may not abuse its conceded power to tax or regulate the respondent's activities within the State by attempting to compel compliance by the respondent with unconstitutional efforts to tax or burden its interstate commerce."⁴²³ The dissent was not impressed by Iowa's argument that it should be able to impose the use-tax collection rules against the companies because the state "[could not] effectively reach its own citizens in order to enforce the use tax on them. This cannot, however, justify the state's attempt to save itself trouble by placing an unconstitutional burden upon interstate commerce conducted by a citizen of another state."⁴²⁴

Thus, a notable difference between the majority and dissent is that the majority viewed the companies' operations as unitary and the dissent thought the two aspects of the business operations should be considered separately. When treated as a unitary operation, it was clear that the companies did business within the state and were subject to the state's general regulatory jurisdiction. The fact that those regulations included obligations relating to one part of its Iowa business operations rather than another was considered constitutionally insignificant by the majority.⁴²⁵ The opinions did agree, however, that if the companies had limited their activities to mail-order sales, they would not be subject to the state's use-tax collection duties.⁴²⁶

One interesting fact is that the state court had considered the applicability of use-tax collection duties to sales made to Iowa residents by retail stores in adjacent states.⁴²⁷ The Iowa Supreme Court had held that Montgomery Ward was not required to undertake the "almost impossible task" of collecting use tax on those sales because there was "no feasible way of knowing or ascertaining where the customer lives or where he is going to make use of the merchandise purchased."⁴²⁸ That issue was not raised by the petition for certiorari and was therefore not considered by the Supreme Court.⁴²⁹

421. See 312 U.S. at 366-72 (Roberts, J., dissenting).

422. See *id.*

423. *Id.* at 369.

424. *Id.* at 371.

425. See *id.* at 364.

426. See *id.* at 362-63.

427. See *Montgomery Ward*, 312 U.S. at 374 n.3.

428. *Id.* (quoting *Montgomery Ward & Co. v. Roddewig*, 292 N.W. 142, 142-43 (Iowa 1940) (Hamilton, C.J., concurring)).

429. See *Sears, Roebuck*, 312 U.S. at 366 (Roberts, J., dissenting).

There does not appear to have ever been a thoughtful examination of the imposition of use-tax collection duties on out-of-state sellers, probably as a result of “sales-and-use-tax” being lumped together as a conceptual unit. In 1944, the Supreme Court heard a set of three “sales-and-use-tax” cases, *McLeod v. J.E. Dilworth Co.*,⁴³⁰ *General Trading Co. v. State Tax Commissioner*,⁴³¹ and *International Harvester Co. v. Department of Treasury*.⁴³² Each case involved a tax that the state wished to impose on a retail sale transaction involving the interstate movement of goods. *Dilworth* involved Arkansas’ sales tax and sales by Tennessee businesses to Arkansas purchasers, with the goods delivered to the purchasers in Arkansas.⁴³³ *General Trading* involved Iowa’s use tax on sales by a Minnesota seller to Iowa purchasers, sent from Minnesota directly to the Iowa purchasers.⁴³⁴ *International Harvester* involved Indiana’s “gross income” tax on sales by local or out-of-state dealers where the out-of-state purchaser took physical delivery in Indiana.⁴³⁵ In each case, the relevant state statute required the seller to remit the tax to the taxing state.⁴³⁶ These cases established the tradition of treating sales and use taxes based on their precise combination of taxable event and incidence, without much concern for economic impact, which was continued fifty years later in *Jefferson Lines*.⁴³⁷

Dilworth held the Arkansas sales tax on Tennessee sales invalid as an attempt “to project its powers beyond its boundaries and to tax an interstate transaction.”⁴³⁸ *General Trading*, however, held the Iowa use tax valid, even though the transactions were essentially identical to the *Dilworth* transactions, because the Iowa tax was incident on an in-state use, not an out-of-state sale.⁴³⁹ In its conclusion, the Court said, seemingly an afterthought: “To make the distributor the tax collector for the State is a familiar and sanctioned device.”⁴⁴⁰

430. 322 U.S. 327 (1944).

431. 322 U.S. 335 (1944).

432. 322 U.S. 340 (1944). Justice Rutledge filed a single opinion in the three cases, dissenting to *Dilworth* and *International Harvester* but concurring in *General Trading*. See 322 U.S. at 349 (Rutledge, J., concurring and dissenting). The principles enunciated in Justice Rutledge’s opinion have since become central in cases involving state taxation of interstate business. See, e.g., *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 306 (1992) (“[h]eeding Justice Rutledge’s counsel”).

433. See *Dilworth*, 322 U.S. at 328.

434. See *General Trading*, 322 U.S. at 336.

435. See *International Harvester*, 322 U.S. at 341-42.

436. The Indiana gross income tax appears to have been just that, a tax on all gross income of state residents and nonresidents engaged in business in the state. See *id.* at 344 n.4. The Court did not make any distinction between this tax and the sales and use taxes in the companion cases.

437. See *Oklahoma Tax Comm’n v. Jefferson Lines*, 514 U.S. 175, 187 (1995).

438. *Dilworth*, 322 U.S. at 330.

439. See *General Trading*, 322 U.S. at 338.

440. *Id.* at 338-39 (citing *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 93-94 (1939)).

Other than that statement, there is nothing in the opinion to suggest that the taxpayer had argued that it could not be forced to collect the tax. One might infer that the quoted sentence was added in response to Justice Jackson's dissent. That dissent was based on reasoning that is as accurate and pertinent to today's Internet-mediated sales as it was in 1944:

The transaction of sale is not taxed [by Iowa's use tax] and, being clearly interstate commerce, is not taxable. So we are holding that a state has power to make a tax collector of one whom it has no power to tax. Certainly no state has a constitutional warrant for making a tax collector of one as the price of the privilege of doing interstate commerce. He does not get the right from the state, and the state cannot qualify it. I can imagine no principle of states' rights or state comity which can justify what is done here. Nor does the practice seem conducive to good order in the federal system. The power of Iowa to enforce collection in other states is certainly very limited and the effort to do so on any wide scale is unlikely either to be systematically pursued or successfully executed.⁴⁴¹

But this decision, by which one may not ship goods from anywhere in the United States to a purchaser in Iowa without becoming a non-resident tax collector, exceeds everything so far done by this Court. In my opinion the statute is an effort to exert extraterritorial control beyond which a state could exert if there were no Constitution at all. I can think of nothing in or out of the Constitution that warrants this effort to reach beyond the state's own border to make out-of-state merchants tax collectors because they engage in interstate commerce with the State's citizens.⁴⁴² As the dissent points out, the cases cited by the majority do not involve out-of-state sellers, but instead defendants who were clearly doing business in, and making deliveries in, the taxing state.⁴⁴³ While the extent to which a state might impose regulations that burden interstate commerce may have expanded since 1944 (or are subject to different logic), the fundamental basis of state power has not changed.

If one examines the cases cited by the *General Trading* majority in support of its off-handed holding, no case involving out-of-state taxpayer/collectors is found.⁴⁴⁴ Subsequent cases citing *Monamotor*

441. 332 U.S. at 339-40 (Jackson, J., dissenting) (citation omitted).

442. See *id.* at 339. Justice Roberts joined in the dissent. Justice Rutledge's opinion challenging the rationale applied in the three companion cases does not address the question raised by Justice Jackson.

443. See *id.*

444. See *Monamotor Oil*, 292 U.S. 86 (Iowa motor fuel tax, Iowa distributors); *Pierce Oil Corp. v. Hopkins*, 264 U.S. 137 (1924) (Arkansas gasoline tax, Arkansas dealer); *Citizens Nat'l Bank v. Kentucky*, 217 U.S. 443 (1910) (Kentucky bank shares tax, Kentucky bank); *Standard Oil Co. v. Brodie*, 239 S.W. 753 (Ark. 1922) (Arkansas gasoline tax, Ar-

Oil show a similar pattern.⁴⁴⁵ The end result is that there does not appear to have ever been a serious examination of the issue. Instead, requiring any seller to collect sales and use taxes was just a common and entirely lawful arrangement, which must *a fortiori* be legal. What the gasoline and sales and use tax cases do show, at least through 1944, is that no collection duties were imposed on sellers that did not have substantial, continuous, and systematic in-state business activities.⁴⁴⁶

Ten years after *General Trading* (in 1954) the Court, in *Miller Bros. v. Maryland*,⁴⁴⁷ did recognize that the retail seller was not the taxpayer. Maryland residents visited Miller Brothers' Delaware retail store and purchased furniture. The store did not make telephone or mail-order sales. Some of the purchases were delivered to the buyer's home by common carrier and some by the seller's own trucks. Maryland contended that it could require Miller Brothers to remit use taxes on all sales to Maryland residents.⁴⁴⁸ The Supreme Court disagreed. *Miller Bros.* noted two factors that are still true, but frequently ignored in contemporary rhetoric: (1) the collection of use taxes on inhabitants is an expensive administrative problem that states can avoid by shifting the burden to out-of-state sellers; and (2) the practical effect of transferring the collection burden to the seller is that the out-of-state seller pays the sales tax on a sale that does not occur within (is not taxable by) the taxing jurisdiction.⁴⁴⁹ Even though the Court noted that use tax questions were generally discussed as Commerce Clause questions,⁴⁵⁰ its decision was based on due process considerations.⁴⁵¹ The facts showed that Miller Brothers was not "doing business" in Maryland.⁴⁵² Maryland residents had to personally visit Miller Brothers' Delaware store to make purchases.⁴⁵³ The use tax Maryland was attempting to collect from Miller Brothers ("Miller Bros.") was not due (because the taxable event did

kansas dealer); *Standard Oil Co. v. Jones*, 205 N.W. 72 (S.D. 1925) (South Dakota motor fuel tax, South Dakota dealer).

445. See, e.g., *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977); *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954).

446. *General Trading* is not an exception to that statement because in that case the Court accepted the Iowa court's factual conclusion that the company was an in-state retailer "maintaining a place of business in" Iowa. *General Trading*, 322 U.S. at 337.

447. 347 U.S. 340 (1954). The majority opinion in *Miller Bros.*, which held that the state could not force the out-of-state seller to collect use taxes, see *id.* at 347, was written by Justice Jackson, see *id.* at 341, but it did not specifically rely on Justice Jackson's dissent in *General Trading*, see *id.* at 346.

448. See *id.* at 341.

449. See *id.* at 343-44.

450. See *id.* at 345 n.14.

451. See *id.* at 344-45.

452. See *id.* at 347.

453. See *id.* at 341.

not happen) until after the transaction was complete.⁴⁵⁴ As the Court stated, “[That the Maryland] inhabitants incurred a liability for the use tax when they used, stored or consumed the goods in Maryland, no one doubts. But the burden of collecting or paying their tax cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here.”⁴⁵⁵

The four-Justice dissent⁴⁵⁶ directly disagreed with the majority’s conclusion that Miller Bros. had not “injected” itself into the Maryland market by advertising and deliveries⁴⁵⁷ and contended that the increased burden of collecting Maryland’s tax would, in these particular facts, be “a minimal burden.”⁴⁵⁸ The principal distinction between the majority’s and dissent’s position is that the dissent treated the problem as one of specific jurisdiction, while the majority continued the what was then long-standing practice by questioning whether the company was engaged in commercial activities in the taxing state.⁴⁵⁹

Six years after *Miller Bros.*, the Court again addressed a state’s imposition of tax-collection duties on a nonresident seller. In *Scripto, Inc. v. Carson*,⁴⁶⁰ Florida demanded that Scripto’s specialty trading division remit Florida use tax on sales of promotional pens to Florida businesses.⁴⁶¹ Scripto had no offices or other physical facilities in Florida, but it received all orders in, and shipped its products from, its Atlanta, Georgia, offices.⁴⁶² Scripto contended that there was not sufficient nexus to allow Florida to enforce that demand.⁴⁶³ The Florida statute defined “dealer” for sales and use tax purposes to include all sellers who solicited sales (through representatives, catalogs, or other advertising) within the state, regardless of where the seller was located.⁴⁶⁴ Scripto did not have any employees or exclusive agents in Florida, but it did have contracts with ten “advertising specialty brokers” who had worked continuously in Florida as independent contractors for a number of years.⁴⁶⁵ These persons received catalogs and other materials from Scripto, solicited sales in Florida (sign-

454. See *id.* at 344.

455. *Id.* at 347.

456. Justices Black, Clark, and Warren joined an opinion authored by Douglas. 347 U.S. at 357 (Douglas, J., dissenting).

457. See *id.* at 358.

458. *Id.* at 357.

459. The dissent’s use of inapposite theory has flavored subsequent decisions which, in turn, gives what slight support there is for some of the more extreme positions currently being taken by state tax officials.

460. 362 U.S. 207 (1960).

461. *Id.* at 207-08.

462. See *id.*

463. See *id.* at 208.

464. See *id.* at 208 n.1 (quoting FLA. STAT. § 212.06(2)(g)).

465. See *id.* at 209.

ing contracts as “salesman”), and were paid commissions on sales.⁴⁶⁶ Apparently these persons did not work exclusively for Scripto.⁴⁶⁷ The Court held that the distinction between “employee” and “independent contractor” was not constitutionally significant with respect to Scripto’s activities.⁴⁶⁸ Recognizing that *Miller Bros.* required “some definite link” between the state and the transaction it seeks to tax, the Court stated:

We believe that such a nexus is present here. First, the tax is a nondiscriminatory exaction levied for the use and enjoyment of property which has been purchased by Florida residents and which has actually entered into and become a part of the mass of property in that State. [The old “bright line” theory of “interstate commerce.”] The burden of the tax is placed on the ultimate purchaser in Florida and it is he who enjoys the use of the property, regardless of its source. We note that the appellant [Scripto] is charged with no tax—save when, as here, he fails or refuses to collect it from the Florida customer.⁴⁶⁹

In context, it is apparent that the Court was considering the connection between the Florida tax and the Florida taxpayer; there was sufficient nexus with respect to the tax itself. The Court’s discussion of the extent of Scripto’s activities within Florida was principally in that context, that is, was there any economically significant distinction between Scripto’s Florida activities and a resident retail seller’s in-state activities? The difference between the taxable events that trigger sales tax (retail transaction) and use tax (possession of property) was not discussed.

With respect to imposing collection duties on Scripto, the Court stated: “As was pointed out in *General Trading Co.*, this [requiring the seller to collect taxes] is ‘a familiar and sanctioned device.’ Moreover, we note that Florida reimburses appellant for its service in this regard.”⁴⁷⁰ The Court distinguished *Miller Bros.* on the basis that *Miller Bros.* could not know which cash purchasers in its Delaware store were Maryland residents and that it made only “occasional” deliveries to Maryland: “Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales.”⁴⁷¹ The Court con-

466. *See id.*

467. *See id.* at 209-10.

468. *See id.* at 211 (“The formal shift in the contractual tagging of the salesman as ‘independent’ neither results in changing his local function or solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida.”).

469. *Id.* at 210-11.

470. *Id.* at 212 (quoting *General Trading Co. v. State Tax Comm’n*, 322 U.S. 335, 338 (1944)).

471. *Id.* The implications of that statement seem slightly inconsistent with the *Miller Bros.* facts. The stipulated facts in that case make it appear that the store delivered all or most of the sold merchandise to the customer’s home, which required that store employees

cluded that the minimum connections not present in *Miller Bros.* were present with respect to *Scripto*.⁴⁷² The *Scripto* opinion is not particularly convincing.

The primary difference noted by the Court between *Miller Bros.*' operations and *Scripto*'s was that *Scripto* made a specific effort to exploit the Florida market and, during the entire period in question, *Scripto* had a group of representatives continuously active in the state and generating significant revenues.⁴⁷³ It is relatively clear that the *Scripto* analysis was phrased in terms of judicial specific jurisdiction, as required for due process.⁴⁷⁴ *Scripto* was later characterized in *Quill*⁴⁷⁵ as being the furthest extension of the Commerce Clause nexus to out-of-state sellers.⁴⁷⁶

Perhaps the more interesting part of *Scripto* is the Court's conclusion that *General Trading Co.* controls the decision.⁴⁷⁷ As discussed earlier, *General Trading* was based on the factual conclusion that the company was doing business in the taxing state.⁴⁷⁸ Therefore, even though much of the decision's language can be read as applying judicial specific jurisdiction rules, the decision is based on the more exacting requirement that the company be engaged in significant, ongoing commercial activities in the state.⁴⁷⁹

In 1967 (thirteen years after *Scripto*), the Court decided *National Bellas Hess, Inc. v. Department of Revenue*.⁴⁸⁰ *National Bellas Hess, Inc.* (NBH, Inc.) was a national mail-order retailer, incorporated in Delaware and headquartered in Missouri.⁴⁸¹ It had no physical prop-

learn the buyer's residence address at the time of sale. See *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 341 n.2, 357 (1954) (Douglas, J., dissenting).

472. See *Scripto*, 362 U.S. at 213.

473. See *id.* at 212.

474. The Court mentioned Commerce Clause issues with respect to Florida's exaction of sales/use taxes on the products *Scripto* shipped into Florida. See *id.* at 210-211. It is clear that the Court was applying the "old" rules about when goods in transit in interstate commerce "come to rest" in a state sufficiently to allow state taxation of those goods, viz. the Court stated: "[T]he mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share." *Id.* at 212 (citing *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 338 (1944)). In that context, there was no need for the Court to consider the Commerce Clause "nexus" requirements developed in later cases. Of course, the "nexus" between the taxpayer-user and the state is not the real issue.

475. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992).

476. See *id.* at 306 (noting that the tax had been upheld even though all of the sales activity had been conducted by independent contractors).

477. See *Scripto*, 362 U.S. at 212.

478. See *supra* text accompanying note 439.

479. *Scripto*'s language (not its holding) continued the slide started in *Miller Bros.* toward using specific jurisdiction language when discussing a prescriptive jurisdiction problem.

480. 386 U.S. 753 (1967), overruled in part by *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992).

481. See *id.* at 754-55.

erty or agents in Illinois.⁴⁸² Its contact with Illinois was through catalogs and “flyers” mailed to Illinois consumers.⁴⁸³ Illinois residents mailed their orders to Missouri, and the ordered goods were sent from there to the customer by mail or common carrier.⁴⁸⁴ The Illinois use-tax statute imposed tax collection duties on any “[r]etailer maintaining a place of business [within] [Illinois],” which phrase was defined to include retailers who solicited sales solely by catalogues or other advertising, regardless of where the orders were accepted.⁴⁸⁵ Based on this definition, Illinois contended that NBH, Inc., was required to collect use taxes from its Illinois customers, turn over the proceeds to Illinois, keep records, give receipts, and the like, or be subject to civil and criminal penalties.⁴⁸⁶ One civil penalty was to “submit” customers’ use-tax obligations, even though the customers had not paid the tax to NBH, Inc., a customary result for sales and use taxes.⁴⁸⁷ NBH, Inc., contended that Illinois’ attempt to impose these obligations violated due process and constituted an unreasonable burden on interstate commerce.⁴⁸⁸ The burden was clearly not trivial.⁴⁸⁹

The Court started by stating that the two constitutional limitations were closely related. For Commerce Clause purposes, the Court said, the test was whether the tax was designed to make interstate commerce bear a “fair share of the cost of the local government whose protection it [interstate commerce] enjoys.”⁴⁹⁰ For the Due Process Clause, the Court said, the “simple but controlling question is whether the state has given anything for which it can ask return.”⁴⁹¹ With specific reference to the burden of collecting use taxes, the

482. See *id.* at 754.

483. See *id.*

484. See *id.* at 754-55.

485. *Id.* at 755 (quoting the statute).

486. See *id.* at 755-56 (citing various statutes).

487. See *id.* at 757 n.9.

488. See *id.* at 756.

489. The Court described many requirements imposed by the statute beyond collecting the tax:

National [NBH, Inc.] must give the Illinois purchaser ‘a receipt therefore in the manner and form prescribed by the [Department of Revenue],’ if one is demanded. It must also ‘keep such records, receipts, invoices and other pertinent books, documents, memoranda and papers as the [Department of Revenue] shall require, in such form as the [Department of Revenue] shall require,’ and must submit to such investigations, hearings, and examinations as are needed by the appellee to administer and enforce the use tax law.

Id. at 755 (footnotes omitted).

490. *Id.* at 756 (quoting *Freeman v. Hewitt*, 329 U.S. 249, 253 (1946), and citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 462 (1959); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948)).

491. *Id.* (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940), and citing *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952); *Ott v. Mississippi Val. Barge Line Co.*, 336 U.S. 169, 174 (1949)).

Court stated that due process requires some “definite link, some minimum connection” between the state and the person it seeks to encumber.⁴⁹² The Court noted that in decisions preceding *Bellas Hess*, it had held that a state could impose the duty to collect use taxes on out-of-state sellers when the out-of-state seller maintained in-state retail stores,⁴⁹³ when the sales were arranged by local in-state agents,⁴⁹⁴ and when the out-of-state seller had independent-contractor salesmen engaged in continuous solicitation in the taxing state.⁴⁹⁵ The Court expressly declined to “obliterate” the line it had previously drawn between sellers who had an in-state operation and those who only communicated with the state through mail or common carrier.⁴⁹⁶ The Court summarized its reasons why the use-tax collection burden was unconstitutional in this setting primarily in Commerce Clause terms:

[I]t is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National [NBH, Inc.] were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [NBH, Inc.’s] interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose “a fair share of the cost of the local government.”⁴⁹⁷

Those considerations are the same ones Justice Jackson raised in his dissent in *General Trading*, decided over twenty years earlier.⁴⁹⁸ The difference in result can be explained principally by the fact that the Court in *Bellas Hess* did not accept, as fact, that NBH, Inc., was “doing business” in the state. If the long-distance interaction between NBH, Inc., and Illinois residents had been sufficient to support Illinois’ position, it would have supported a similar conclusion concerning every other taxing jurisdiction where NBH, Inc., had customers.

492. *Id.* (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954), and citing *Scripto, Inc. v. Carson*, 362 U.S. 207, 210-11 (1960); *American Oil Co. v. Neill*, 380 U.S. 451, 458 (1965)).

493. *See Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941).

494. *See General Trading Co. v. State Tax Comm’n*, 322 U.S. 335 (1944); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939).

495. *See Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

496. *See National Bellas Hess, Inc.*, 386 U.S. at 758.

497. *Id.* at 759 (footnotes omitted).

498. *See General Trading Co.*, 322 U.S. at 339 (Jackson, J., dissenting).

The practical burden that would thereby have been imposed on NBH, Inc., (whose out-of-state shipments went across the nation) would have been orders of magnitude greater than the practical burden imposed on General Trading (whose out-of-state shipments went to one adjacent state). From this comparison, one might infer that decisions concerning burdens on interstate commerce are to be judged more on the particular litigant's relative financial strength than on legal criteria.

After another ten years passed, the Court again addressed the problem of imposing use-tax collection duties on an out-of-state seller in *National Geographic Society v. California Board of Equalization*.⁴⁹⁹ In *National Geographic*, the state's target was the National Geographic Society (the Society), which made mail-order sales of maps, atlases, and other materials to California residents from its offices in Washington, D.C., and Maryland.⁵⁰⁰ California contended that the Society's two in-state offices were sufficient to allow imposition of California use-tax collection duties on the mail-order sales.⁵⁰¹ The Society disagreed, pointing out that the offices had no connection with the mail-order sales, but only sold advertising in the Society's magazine.⁵⁰² The Society's advertising sales offices had been operating in the state for nearly twenty years before the case was heard by the Supreme Court, during which time the staff had doubled (to eight persons total) and advertising sales had aggregated about \$1 million annually.⁵⁰³ The Court held that the lack of a functional connection between the in-state offices and the mail-order sales was not relevant, affirming the judgment of the California Supreme Court that the imposition of collection duties was constitutional.⁵⁰⁴ Significantly, however, the Court expressly rejected the California Supreme Court's holding that when an out-of-state seller conducts a substantial mail-order business with a state's residents, the "slightest presence" of that seller in that state, independent of the interstate mail-order business, was sufficient nexus to allow imposition of use-tax collection duties.⁵⁰⁵

In reaching its decision in *National Geographic*, the Court placed on one side a group of cases which had held a sufficient nexus existed

499. 430 U.S. 551 (1977).

500. *See id.* at 552.

501. *See id.* at 554.

502. *See id.* at 560. For a short period, the California offices did make some sales of similar materials and collected California sales tax with respect to those sales. However, both the California Supreme Court and the U.S. Supreme Court found it unnecessary to consider those activities in reaching a decision with respect to the mail-order sales. *See id.* at 554 n.3.

503. *See id.* at 554 n.2.

504. *See id.* at 560.

505. *Id.* at 555-56.

for imposing apportioned gross receipts taxes⁵⁰⁶ or use-tax collection duties,⁵⁰⁷ when the target company had continuing, income-producing activities in the state. On the other side the Court placed *Miller Bros.* and *Bellas Hess*, in which the Court had held there was no basis for imposing use-tax collection duties. With respect to the gross receipts tax cases, the Court emphasized that it had approved the tax when it was clear that the value taxed was related to the in-state activities; that is, it was appropriately apportioned.⁵⁰⁸ It then stated that a state has an even stronger claim when it is “only” imposing the administrative duty of collecting taxes imposed on other persons because there is no possibility of double taxation (specifically referring to sales and use taxes).⁵⁰⁹ With respect to the prior use-tax collection cases (both those which had approved, and those which had disapproved, imposing the duty), the Court emphasized the state services enjoyed by the company, as a whole, as a justification for imposing the tax-collection duties.⁵¹⁰ It expressly rejected the theory that those prior cases had been based on whether there was a functional connection between the seller’s in-state activities (which “benefited” from state services) and the activities generating the sales on which use taxes were to be collected.⁵¹¹ The Court equated the state’s services to National Geographic’s in-state sales offices with the services provided by the state to the retail outlets of Sears, Roebuck and Montgomery Ward; the fact that the Sears and Ward’s retail outlets had functionally participated in the respective mail-order businesses’ operations was held insignificant.⁵¹²

National Geographic was considered essentially simultaneously with *Complete Auto Transit, Inc. v. Brady*.⁵¹³ As mentioned at the opening of this section, *Complete Auto* articulated a four-part test for determining if a state’s tax *unduly burdens interstate commerce*. Given their propinquity, if the Court understood *National Geographic* as a Commerce Clause case, one would expect an application of the *Complete Auto* formula; however, one would be disap-

506. See *id.* at 556-58 (citing *Standard Pressed Steel Co. v. Washington Rev. Dep’t*, 419 U.S. 560 (1975); *General Trading Co. v. Tax Comm’n*, 322 U.S. 335 (1944); *Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62 (1939)).

507. See *id.* at 555-57 (citing *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Nelson v. Montgomery Ward*, 312 U.S. 373 (1941); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941)).

508. See *id.* at 557-58.

509. See *id.* at 558. There was no mention of the fact that such an administrative burden had been considered very substantial, and legally significant, in *Bellas Hess*.

510. See *id.* at 558-62.

511. See *id.* at 560-61.

512. See *id.*

513. 430 U.S. 274 (1977). *National Geographic* was argued one month after *Complete Auto* and the *National Geographic* decision was handed down one month after *Complete Auto*’s. This suggests that when *National Geographic* was argued, the *Complete Auto* opinion was being written.

pointed. Instead, the Court relies on the decisions discussed above that focus on whether the company is actively involved in in-state business, such as *Continental Oil*, *Felt & Tarrant*, *General Trading*, *Monamotor Oil*, *Sears, Roebuck*, and *Miller Bros.*, strongly suggesting a due process analysis.⁵¹⁴

Again unfortunately, though the Court was looking at whether the Society was “doing business” in California, it used words and phrases familiar to judicial specific jurisdiction cases. In its rather confusing analysis, the Court did refer to both *Complete Auto*⁵¹⁵ and *Bellas Hess*⁵¹⁶ but did not discuss the relationship, if any, between the two.⁵¹⁷ Trying to determine where, how, or if the Court used the *Complete Auto* analysis in *National Geographic* is futile, because the Court did not actually treat it as a tax case.

With this history, in 1991, the North Dakota Supreme Court considered *State ex rel. Heitkamp v. Quill Corp.*,⁵¹⁸ a case almost identical to *Bellas Hess*. Because the intervening twenty years had produced significant legal and technological changes, the North Dakota court held that it was no longer appropriate to follow *Bellas Hess*.⁵¹⁹

514. The Court cited *Complete Auto* twice: the majority cited it once as an example of a properly apportioned tax; Justice Blackmun’s concurrence in the result, once as an example of inconsistency in the Court’s tax rulings. See *National Geographic*, 430 U.S. at 559, 563 (Blackmun, J., concurring in the result).

515. See *id.* at 558. The citation to *Complete Auto* was only that, a bare citation supporting the statement that “fairly apportioned” taxes had been sustained when they were fairly related to state services to the out-of-state taxpayer. See *id.* The concurrence cited *Complete Auto* as proof that the Court’s tax cases were “not fully consistent.” *Id.* at 563 (Blackmun, J., concurring in the result).

516. See *id.* at 559.

517. Ironically, in *Quill Corp. v. North Dakota ex rel. Heitkamp*, the Court used *National Geographic*’s reference to *Bellas Hess* to support its argument that *Complete Auto* had not weakened *Bellas Hess*. 504 U.S. 298, 311–12 (1992).

518. 470 N.W.2d 203 (N.D. 1991), *rev’d*, 504 U.S. 298 (1992).

519. See *id.* at 213. In its opinion, the North Dakota mentioned the growth of the mail-order business from a “relatively inconsequential market niche” to a retail “Goliath” with \$183.3 billion in 1989 sales. *Id.* at 208, 209. It also relied on the advances in computer technology to conclude that compliance with the multitude of regulations imposed less of a burden than in the early 1960s. See *id.* at 215.

It is interesting to note that the North Dakota Supreme Court did not mention either the relative size of the mail order market (compared to the entire retail market which also increased during that period) or the increase in the number of both sales-taxing jurisdictions and tax rates that occurred during the same period. That is consistent with state tax authorities’ tactics in the current debates, where they assert that very large dollar volumes of sales are going untaxed, creating an impression that an extremely significant portion of retail sales are not taxed. When placed in the context of total retail sales, and retail sales tax revenues, however, it is fairly obvious that even the exaggerated untaxed sales and alleged tax “losses” are not all that significant. See ROBERT J. CLINE AND THOMAS S. NEUBIG, ERNST & YOUNG LLP, THE SKY IS NOT FALLING: WHY STATE AND LOCAL REVENUES WERE NOT SIGNIFICANTLY IMPACTED BY THE INTERNET IN 1998, at ii (1999) [hereinafter THE SKY IS NOT FALLING], [http://www.ey.com/global/vault.nsf/US/Sky_is_not_falling/\\$file/Sky.pdf](http://www.ey.com/global/vault.nsf/US/Sky_is_not_falling/$file/Sky.pdf) (visited Mar. 31, 2001). The Ernst & Young study estimated sales tax “losses” at \$170 million, less than one tenth of one percent of total sales and use tax revenues, and this in a year that produced a \$36 billion surplus in state budgets. See *id.* If state budget figures are

The North Dakota use-tax definition of “retailer” included all persons who engaged in “regular or systematic solicitation of a consumer market” in the state.⁵²⁰ Related regulations defined “regular or systematic” as three or more advertisements within a twelve-month period.⁵²¹ North Dakota filed an action in state court to compel Quill to pay use taxes, plus penalties and interest, on all sales after July 1, 1987.⁵²²

Quill sells office equipment and supplies through catalogs, fliers, advertisements, and telephone calls.⁵²³ While it has physical facilities in only three states, it makes sales throughout the United States.⁵²⁴ It is a “typical,” but comparatively large, retail mail-order seller.⁵²⁵ The Supreme Court noted that Quill’s annual national sales (for an unidentified year) were over \$200 million, with “almost” \$1 million in sales to about 3000 North Dakota customers.⁵²⁶ Though Quill was stated to be the sixth largest “vendor of office supplies” in the state, it had no physical facilities or agents in North Dakota, and it delivered all of the merchandise via U.S. mail or common carrier from out-of-state locations.⁵²⁷ Naturally, Quill took the position that North Dakota had no power to compel it to collect or pay use taxes.⁵²⁸

Obviously, *Quill* is factually indistinguishable from *Bellas Hess*. The North Dakota Supreme Court acknowledged the similarity, but decided that *Bellas Hess* was no longer good law.⁵²⁹ That conclusion was based on the interim evolution in both due process theory and business methods and technology.⁵³⁰ With respect to due process, the North Dakota court noted the changes in theory discussed earlier.⁵³¹ The post-*Bellas Hess* cases approve judicial specific jurisdiction over persons whose activities are directed toward the state, even if that person is never physically present in the state.⁵³² Thus, the Court concluded, North Dakota courts could exercise jurisdiction over Quill,

rounded to tenths of billions (e.g., \$17.2 billion), which is not uncommon, it is unlikely that any state’s budget figures would be changed if all use taxes were actually collected.

520. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 302-03 (1992) (quoting N.D. CENT. CODE § 57-40.2-01(6) (Supp. 1991)).

521. *Id.* at 303 (citing N.D. ADMIN. CODE § 81-04.1-01-03.1 (1988)).

522. *See id.* at 303.

523. *See id.* at 302.

524. *See id.*

525. *See id.*

526. *Id.* at 302.

527. *Id.* Quill did retain title to some software a few North Dakota customers used to make orders, but that was so de minimis no one considered it a real basis for jurisdiction. *See id.* at 315 n.8.

528. *See id.* at 303.

529. *See State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 213 (N.D. 1991), *rev’d*, 504 U.S. 298 (1992).

530. *See id.*

531. *See supra* Part III.B.

532. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

at least with respect to goods sold to North Dakota customers. Therefore, the Due Process Clause also did not protect Quill from use-tax collection duties.⁵³³ The U.S. Supreme Court agreed, noting that Quill had “purposefully directed” its commercial activities at North Dakota residents sufficiently to satisfy due process requirements.⁵³⁴

Relevant to the Commerce Clause issue, which it did not clearly separate from due process, the North Dakota court described two types of changes to support its decision to disregard *Bellas Hess*. The first change was the line of cases after *Bellas Hess* that rejected a formalistic approach to state taxation of interstate commerce in favor of a more flexible approach based on the practical effect of the tax, that is, *Complete Auto* and its progeny. The North Dakota court stated that since *Bellas Hess* was based on a formalistic “physical presence” test, it had been discredited by subsequent decisions.⁵³⁵ Further, the court noted, the state of North Dakota provided services and benefits that allowed Quill to sell its goods in the state, including but not limited to disposal of “24 tons” of catalogs and flyers, thereby justifying the imposition of the tax-collection obligations.⁵³⁶

The second change noted by the North Dakota court related to the burden imposed on interstate commerce by use-tax collection duties. *Bellas Hess* relied in part on the number and diversity of sales taxes in the United States and the consequent compliance burden on mail-order businesses.⁵³⁷ The North Dakota court noted that the mail-order business, at least as a whole, had become big business, implying that it had resources not available twenty-five years earlier.⁵³⁸ It also noted advances in computer technology, which went from effectively nonexistent in the 1960s to pervasive in the 1990s. According to the court, these two factors combined to substantially lessen the

533. *Quill*, 504 U.S. at 308.

534. *See id.* at 306-08. Neither court addressed the distinction between “special” and “general” judicial jurisdiction. Both referred to judicial specific jurisdiction cases.

535. *State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 214 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992).

536. *Id.* at 218-19. Here, like the Supreme Court in *National Geographic*, the North Dakota court failed to note that under *Complete Auto*, the necessary relationship is between the taxes paid to, and the services rendered to the taxpayer by, the state. There is no obvious connection between the services provided by the state and a requirement that the theoretical recipient of the services in turn perform services for the state. One might be excused for thinking that the alleged state services were provided to the use-tax payers (state residents), with the quid pro quo being the taxes collected rather than the collection services.

537. *See National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), *overruled in part by Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992).

538. *See id.* at 208-09. Perhaps it was hoping that the current Supreme Court would vote with the *Bellas Hess* dissent, which made the same argument as the North Dakota court, but over 20 years earlier. Instead, the *Bellas Hess* dissent undermines the North Dakota court’s “changed circumstances” argument. *See National Bellas Hess*, 386 U.S. at 765 (Fortas, J., dissenting) (accusing majority of “vastly underestim[ing] the skill of contemporary man and his machines”).

burden of complying with multiple sales tax regimes.⁵³⁹ While the Supreme Court indirectly acknowledged these environmental changes, it disagreed with the North Dakota court's conclusion.⁵⁴⁰

Thus, when *Quill* came to the Supreme Court, the Court had to address *Bellas Hess* and the evolution of Due Process and Commerce Clause doctrine in the intervening years. The Supreme Court's first step was to revitalize the separation of Due Process and Commerce Clause issues.⁵⁴¹ The two clauses, it said, were analytically distinct: While a lack of due process, the Court said, necessitates a conclusion that the tax is an undue burden, even if there is sufficient contact for due process purposes, the tax may still impose an undue burden for Commerce Clause purposes.⁵⁴² Therefore, the Court said, the two issues should be analyzed separately.

The Court acknowledged that there had been an evolution in the application of the Commerce Clause to taxation after *Bellas Hess*.⁵⁴³ In particular, the Court noted that *Complete Auto* had established a more flexible, four-part test to determine if a tax is an undue burden on interstate commerce.⁵⁴⁴ But the Court said *Bellas Hess*, and therefore *Quill*, concerned only the first of those four factors, that is, whether the tax is applied to an activity with a substantial nexus with the taxing state.⁵⁴⁵ The Court stated that the North Dakota court had treated the "minimum contacts" requirement of due process theory (judicial specific jurisdiction) as equivalent to the "substantial nexus" requirement of Commerce Clause theory⁵⁴⁶ (which, one might have said before *Quill*, was not a surprising thing for the North Dakota court to do). Due process concerns relate to the connection between the state and the person over which it wishes to exercise jurisdiction, emphasizing "notice" and "fair warning" are key fac-

539. See *id.* at 215. The North Dakota court did not cite any authority for the proposition that what constitutes an unconstitutional burden when imposed on a poor man may be constitutionally imposed on a rich man.

540. See *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 316 (1992).

541. See *id.* at 305-06.

542. See *id.* (quoting *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part, dissenting in part)). This clear reference to Justice Rutledge's opinion is significant because, as discussed below, it was his dissents that first enunciated the theoretical basis for the more flexible approach to taxation of interstate activities.

543. See *id.* at 309-10.

544. See *id.* at 311.

545. See *id.*

546. See *id.* The Court dismissed the North Dakota court's conclusion that *Bellas Hess* was outmoded by referring to post-*Complete Auto* cases that relied on *Bellas Hess*, specifically: *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) (a decision particularly significant for taxing Internet-related activities); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980); and *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 559 (1977).

tors.⁵⁴⁷ In contrast, the Court stated, Commerce Clause nexus requirements “are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy.”⁵⁴⁸

The Court noted that none of the cases relied on by the North Dakota court involved persons with no physical presence in the state.⁵⁴⁹ Further, the Court stated that while more recent theory favors a flexible, case-by-case approach, it does not categorically reject a “bright-line” rule under appropriate circumstances.⁵⁵⁰ Instead of being “a trap for the unwary,” the Court characterized the *Bellas Hess* rule as furthering the ends of the Commerce Clause by delineating a “discrete realm” of interstate commerce that is free from use taxation.⁵⁵¹ The Court admitted that if *Bellas Hess* had not existed, it might have reached a different decision, justifying the continued validity of *Bellas Hess* more on *stare decisis* than Commerce Clause theory.⁵⁵² The bright-line test, the Court said, created a clear, firmly established boundary in an area of the law it characterized as a “quagmire” with much room for controversy, confusion, and litigation.⁵⁵³ In addition, consistent with the theory underlying *stare decisis*,⁵⁵⁴ the Court noted that for twenty-five years there had been substantial reliance on the settled rule and that the dramatic growth of the mail-order business may have been due in part to the existence of that rule.⁵⁵⁵ Finally, the Court noted that clearly dividing due

547. See *Quill*, 504 U.S. at 312.

548. *Id.* Despite the Court’s statement, however, it could be argued that *Complete Auto*’s factors two and three directly address those structural concerns, and therefore, addressing them in the nexus (factor one) context is redundant.

549. See *id.* at 314.

550. See *id.*

551. *Id.* at 314-15. The quoted phrase should be taken in context, that is, state imposition of use-tax collection duties on out-of-state mail-order retailers.

552. *Id.* at 317-18.

553. See *id.* at 315. That statement could be a harbinger of other bright-line rules and a swing back toward the “formalistic” approach to state taxation of interstate commerce. At the least, it could be used to justify bright-line rules concerning Internet-mediated activities, with respect to which there are so many impenetrable swamps of legal theory and political rhetoric that they will be finally overcome only by rising above the swamp or draining it.

554. Three Justices who joined in part of the majority opinion specifically addressed *stare decisis*. They asserted that the inquiry into the reasons underlying *Bellas Hess* was unnecessary. See *id.* at 319-21 (Scalia, J., concurring in part, concurring in the judgment). Justices Kennedy and Thomas joined Justice Scalia. See *id.* These three believed that the Court should have merely reversed the North Dakota Supreme Court with a bare citation to *Bellas Hess*. Justice White’s solo dissent challenged the majority opinion almost across the board, specifically challenging the separation of Due Process and Commerce Clause nexus requirements, the validity of the majority’s position that interim decisions had continued *Bellas Hess*’s vitality, and the strength of the *stare decisis* argument. See *id.* at 322-34 (White, J., concurring in part, dissenting in part).

555. See *id.* at 316. Later, the Court states, “[T]he *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizeable industry.” *Id.* at 317. That essentially turns the North Dakota court’s position on its head; the expansion

process issues and Commerce Clause issues makes it clear that Congress can adopt appropriate rules using its Commerce Clause power without running afoul of the Constitution's due process limitations.⁵⁵⁶

Quill establishes a protective harbor for a limited category of out-of-state sellers (those "whose only connection with customers in the [taxing] state is by common carrier or the United States mail"),⁵⁵⁷ but it does not precisely address related problems. As the Court noted, *Quill* did have title to some computer programs (and disks?) physically present in North Dakota.⁵⁵⁸ However, that was insufficient to create a "substantial nexus" because the Court had earlier (in *National Geographic*) expressly rejected a "slight presence" as sufficient for Commerce Clause purposes.⁵⁵⁹ Thus, the distinction between "slight presence" and "substantial nexus" remained unanswered. Only mail-order sellers with no in-state physical presence are within the safe harbor; all others are apparently subject to some undefined "more flexible" analysis under which a "substantial nexus" is enough, but something more than the "slightest presence" is required.

Quill completed the slide toward applying judicial specific jurisdiction terms to regulatory issues. Perhaps more significantly, it did not rely on, or even mention, the line of tax collection-duty cases discussed earlier and relied on in *Bellas Hess*. Of equal significance is that the Court throughout its opinion referred to *Quill* as the taxpayer. To say that *Quill* increased the depth and width of the state-tax quagmire is a gross understatement.

Two related issues have been addressed following *Quill*: (1) what relationship between in-state persons and the out-of-state seller is sufficient to attribute an in-state presence to the seller (2) what takes in-state activities or things beyond "slightest presence" into "substantial nexus" territory. The cases in which these issues have been addressed reveal the depth of state tax officials' desire to squeeze *Quill* into a safe harbor for nothing larger than a one-person inflatable raft.

There are two areas in which the relationship to in-state persons have been addressed. The first concerns related corporations. In *SFA Folio Collections, Inc. v. Tracy*,⁵⁶⁰ the Ohio Supreme Court held that

of the mail-order business becomes a justification for continuing the *Bellas Hess* rule, rather than an argument for abandoning it.

556. See *id.* at 318-19. Since *Quill*, Congress has taken up the Internet taxation issues with an eye toward creating a national solution. See *infra* discussion Part V. That effort should have been made less tentative by *Quill*, but due process questions remain relevant.

557. *Id.* at 315 n.8 (quoting *Bellas Hess*).

558. See *id.* at 315 n.8.

559. See *id.*

560. 652 N.E.2d 693 (Ohio 1995). *SFA Folio* is almost identical to *Bloomingtondale's by Mail, Ltd. v. Pennsylvania Dep't of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989), which found that the presence of a sister corporation did not establish nexus with an out-of-state mail order seller, despite their coordinated marketing themes.

an in-state retailer's presence did not establish Commerce Clause nexus over its sister corporation, a mail-order-selling corporation with no in-state property or agents.⁵⁶¹ The Ohio Tax Commissioner argued that SFA Folio and Saks-Ohio were parts of a unitary retail merchandising operation and that, therefore, SFA Folio was required to collect use tax on mail-order sales to Ohio residents.⁵⁶² There was apparently some evidence that Saks-Ohio stores, as a matter of independent policy, accepted "returns" of SFA Folio merchandise and distributed about 200 SFA catalogs per issue.⁵⁶³ The Ohio court held that SFA Folio and Saks-Ohio were separate legal entities under Ohio corporation law and could not be treated otherwise for its tax laws.⁵⁶⁴ The court noted that Saks-Ohio's return policy and its catalog distribution might have created sufficient nexus for due process concerns, but they were insufficient to satisfy Commerce Clause substantial nexus requirements.⁵⁶⁵

A second relationship area addressed since *Quill* relates to contacts between the out-of-state seller and less-than-professional state residents. A group of school "book club" cases (some of which predate *Quill*) involves two companies, Scholastic Book Clubs, Inc., and Troll Book Clubs, Inc.⁵⁶⁶ The companies' operations are essentially identical. Packets containing book descriptions and order forms are sent to elementary school teachers.⁵⁶⁷ The teachers may, or may not, make that information available to their students.⁵⁶⁸ The students purchase books and give their payments to the teacher.⁵⁶⁹ The teacher sends a consolidated order to the "book club" with payment.⁵⁷⁰ The

561. See *SFA Folio*, 652 N.E.2d at 697.

562. See *id.* at 695-96.

563. See *id.* at 697.

564. See *id.* at 696-97.

565. See *id.* at 697. The court expressly rejected a "unitary business" argument to establish Commerce Clause nexus. See *id.* at 698. That theory, the court said, was a due process theory applied to a taxpayer with a proven in-state nexus to determine what portion of that taxpayer's total income was taxable in the state. See *id.* (citing *Allied-Signal Inc. v. Director of Taxation*, 504 U.S. 768, 778 (1992)). The *SFA Folio* situation is clearly distinguishable from *Reader's Digest Ass'n v. Mahin*, 255 N.E.2d 458 (Ill. 1970), upholding the imposition of a use-tax collection burden on a parent company where the in-state employees of a subsidiary solicited orders, on a contract basis, for the parent company's products. See *id.* at 459.

566. *Pledger v. Troll Book Clubs, Inc.*, 871 S.W.2d 389 (Ark. 1994) (post-*Quill*); *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 255 Cal. Rptr. 77 (Ct. App. 1989) (pre-*Quill*); *Appeal of Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996) (post-*Quill*); *Scholastic Book Clubs, Inc. v. Department of Treasury*, 567 N.W.2d 692 (Mich. Ct. App. 1997) (post-*Quill*). The description of facts in the text is accurate for both Troll Books and Scholastic Books and is distilled from all four of the cited cases.

567. See *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 255 Cal. Rptr. at 78.

568. See *id.* at 78-80 (indicating that the response rate to Scholastic's mailings was 14.6%, which may be better than the average mail-order catalog but does seem to indicate that the teachers were not under any compulsion to obtain orders from their students).

569. See *id.* at 78.

570. See *id.*

“book club” fills the orders by sending the books to the teacher, who distributes them to the students.⁵⁷¹ Teachers who submit orders receive “bonuses” that allow them to purchase books, or other items, which they can use however they choose.⁵⁷² The cases arose in states where the selling company had no in-state physical presence (property, employees, or professional agents) and all contacts with the state were through mail or common carrier. Perhaps it is not surprising that the results were mixed—two courts held that sufficient nexus existed to impose use-tax collection duties, and two courts held that no such nexus existed.

In *Scholastic Book Clubs, Inc. v. State Board of Equalization*⁵⁷³ (decided before *Quill*), the California Court of Appeal held that the company was required to collect and pay use taxes on books sold to California residents.⁵⁷⁴ The primary issue, the court felt, was whether the teachers were the company’s agents.⁵⁷⁵ Based on the facts, the court found that the teachers were the company’s agents, but it is not clear if that conclusion is based on a pre-sale implied contract or post-sale ratification.⁵⁷⁶ The court then analogized the situation to the facts in *Scripto* and held that the teachers were not legally distinguishable from the professional salespersons in *Scripto*.⁵⁷⁷ The court did not separately analyze the Due Process and Commerce Clause nexus issues. The decision appears to consider only due process issues.

In the second case, *Pledger v. Troll Book Clubs, Inc.*⁵⁷⁸ (decided after *Quill*), the Arkansas Supreme Court also concentrated on the agency question.⁵⁷⁹ The court noted that an agency relationship necessarily includes some degree of control by the principal.⁵⁸⁰ The fact that over eighty percent of the teachers receiving the company’s mailings did nothing, the court said, proved that no agency relationship existed.⁵⁸¹ The Arkansas court distinguished the prior California decision on two grounds: the California case was decided before *Quill* and thus did not consider the physical presence aspect dispositive, and Arkansas law did not allow “the relationship of agency to be im-

571. See *id.* at 79.

572. See *id.*

573. *Id.*

574. *Id.* at 81.

575. See *id.*

576. The court said that once the teachers started to act, they were acting under the company’s authority and that an agency relationship can be implied based on conduct and circumstances, as well as by ratification. See *id.* at 79-81.

577. See *id.* at 81.

578. 871 S.W.2d 389 (Ark. 1994).

579. *Id.* at 392.

580. See *id.*

581. See *id.*

plied retroactively by ratification.”⁵⁸² Because the teachers were not the seller’s agents, the Arkansas court held that *Quill* required a holding that use-tax collection duties could not be imposed on the out-of-state seller.⁵⁸³

Subsequently, the Kansas Supreme Court held the teachers were the company’s agents,⁵⁸⁴ and the Michigan Court of Appeals held that they were not.⁵⁸⁵ In all the cases, only the Michigan court expressly and directly addressed *Quill*’s Commerce Clause nexus requirements. The Michigan court held that the teachers were not the company’s agents, and that *Quill*’s actual-in-state-presence requirement was not satisfied.⁵⁸⁶ It did not hold that if the teachers were agents, the company would be required to collect and remit use taxes.

The Pennsylvania Commonwealth Court examined another common sales technique involving nonprofessionals in *House of Lloyd v. Pennsylvania*.⁵⁸⁷ The out-of-state company established a marketing “hierarchy of district managers, supervisors, demonstrators, and hostesses.”⁵⁸⁸ Except for the hostesses, who sponsored small “parties” in their homes, the persons signed contracts with House of Lloyd and receive sample kits that contained products, apparently with a value between \$150 and \$300.⁵⁸⁹ House of Lloyd contended it was not required to pay use taxes on the sample kits and various “prizes” and “gifts.” House of Lloyd was apparently successful in its recruiting program, because the court noted that it had over 50,000 persons “dedicated to promoting and selling [its] products, to recruiting and training salespeople, and to securing a substantial flow of goods into the Commonwealth.”⁵⁹⁰

582. *Id.*

583. *See id.*

584. The Kansas court initially indicated that it was “easy” under Kansas law to imply agency, then went on to prove that. The court concluded that “[b]y Scholastic’s accepting orders and payments and shipping merchandise to teachers for distribution to the student purchasers, the Kansas teachers are the implied agents of Scholastic.” Appeal of Scholastic Book Clubs, Inc., 920 P.2d 947, 956 (Kan. 1996).

585. The Michigan court said the teachers were more like parents who ordered books for their children from a mail-order catalog, and no one would contend the parents were the mail-order seller’s agents. *See* Scholastic Book Clubs, Inc. v. Department of Treasury, 567 N.W.2d 692, 696 (Mich. Ct. App. 1997).

586. *See id.* at 695-96. A directive from Michigan’s Treasury Department, Use Tax Nexus Standards, Mich. Rev. Admin. Bull. 1999-1 (Mich. Dep’t of Treas., May 12, 1999), Westlaw, MI TAX RAB 1999-1, discussed *infra* at Part III.D.2.b., could easily be read as inconsistent with this decision. Under the directive, almost anyone who does anything in the state that benefits an out-of-state seller creates a “sufficient” Commerce Clause nexus. *See id.* (“Jurisdictional Standard” discussion in part entitled “Law and Analysis”).

587. 694 A.2d 375 (Pa. Commw. Ct. 1997).

588. *Id.* at 376.

589. *See id.*

590. *Id.* at 376-77; *see also* John Swenson Granite, Inc. v. State Tax Assessor, 685 A.2d 425, 429 (Me. 1996) (holding *Quill*’s Commerce Clause nexus requirements were satisfied when a company, in four and one-half years, sold \$4 million in products from New Hampshire into Maine, carried 89% of the deliveries in its own trucks, and kept its vice-president

This case reveals a marketing strategy that clearly lies outside the *Quill* safe harbor, even if it includes no in-state offices or physical facilities. The number of in-state persons who promoted House of Lloyd's products places its marketing scheme in an entirely different universe than mail-order and school-book-club marketing.⁵⁹¹ The "home party" marketing scheme purposefully establishes a long term, continuous, in-state team of marketers. Mail-order sellers only send out catalogs (or now, create Internet Web sites). It should also be noted that *House of Lloyd* did not concern collection of use taxes owed by Lloyd's customers.⁵⁹² The use-tax obligation was triggered by Lloyd's use (through its in-state agents) of personal property in the state for promotional purposes; property to which Lloyd retained title and control.⁵⁹³ The taxable event occurred while Lloyd owned and used the property, and therefore, Lloyd was the taxpayer, not merely an involuntary tax collector.⁵⁹⁴

The issue of what direct action takes an out-of-state seller into "substantial nexus" territory has also been addressed, but perhaps less rationally. In *Orvis Co. v. Tax Appeals Tribunal of New York*,⁵⁹⁵ the New York Court of Appeals held that *Quill* does not require the physical presence to be substantial, but only that it be "more than a 'slightest presence.'"⁵⁹⁶ The New York court examined the physical activities of two companies within New York.⁵⁹⁷ It concluded that those activities were more than a minimum and therefore the state could properly impose the burden of collecting state sales taxes.⁵⁹⁸

With respect to one taxpayer, Orvis Company, Inc., the New York court inferred that there may have been an average of four visits per year to "as many as 19 wholesale customers."⁵⁹⁹ Thus:

and a Maine-resident employee present in the state promoting new and repeat business). *But see* Laptops Etc. Corp. v. District of Columbia (*In re* Laptops Etc. Corp.), 164 B.R. 506 (Bankr. Md. 1993) (noting that a substantial portion of sales from a Virginia retail store were made to Washington, D.C., residents, but the minimal personal presence of employees in Washington, D.C., for business purposes was insufficient to establish a sufficient Commerce Clause nexus).

591. *Cf.* Sharp v. House of Lloyd, Inc., 815 S.W.2d 245 (Tex. 1991) (same corporation found to be "doing business" in Texas for corporate franchise tax purposes, on similar facts).

592. *See* *House of Lloyd*, 694 A.2d at 377-78.

593. *See id.*

594. *See id.*

595. 654 N.E.2d 954 (N.Y. 1995).

596. *Id.* at 961.

597. *See id.*

598. *See id.*

599. *Id.* at 962. In reaching that conclusion, the court approved the Tax Tribunal's, and the administrative law judge's, decision to disregard testimonial affidavits (allowed by the tribunal's rules) in favor of broad inferences from a letter from Orvis' treasurer. That letter was in response to a preliminary inquiry by an informal New York sales tax auditor and was treated as an "admission against interest." The court, after acknowledging that the Tribunal's rules expressly allowed submission of affidavits in lieu of live testimony, com-

[T]he foregoing evidence supported a reasonable inference by the Tax Appeals Tribunal that Orvis' substantial wholesale business in this State was generally accomplished by means of its sales personnel's direct solicitation of retailers through visits to their stores in New York, subject only to approval of all orders in Vermont.⁶⁰⁰

To reach its decision, the New York court cumulated all of the assumed activities of the wholesale division during the three-year audit period and concluded that those cumulated activities provided sufficient nexus to require the operationally distinct mail-order division to collect use taxes *from the beginning of the audit period*.⁶⁰¹ The court stated, "This sales activity in New York *would presumptively suffice* as a nexus to impose a use-tax collection responsibility."⁶⁰²

The other taxpayer in the *Orvis* case, Vermont Information Processing, Inc. (VIP), sold computer software and hardware to New York beverage distributors.⁶⁰³ The products were delivered to New York by common carrier or mail. However, over the three-year audit period, VIP employees went to New York on forty-one occasions to deal with "the more intractable problems" with its products.⁶⁰⁴ Here, too, the court stated, as a factual matter, that it could be "reasonably infer[red]" that VIP's sale contracts obligated VIP to make charge-free visits to customers within sixty days of a sale.⁶⁰⁵ The court found that the employees' in-state presence "enhanced sales and significantly contributed to VIP's ability to establish and maintain a market . . . in New York."⁶⁰⁶ Again, the court held the taxpayer responsible for New York use-tax collection from the beginning of the audit period.⁶⁰⁷

mented, "The fact is, on the crucial issue in this litigation, Orvis declined to expose its witnesses to cross-examination by producing them at the hearing" *Id.* at 961. Thus, rather than 12 visits in three years, as indicated by the evidence, the court based its conclusion on an inference that there may have been an average of four visits per year to "as many as 19 wholesale customers." *Id.* at 962.

Orvis' affidavits indicated that its wholesale sales persons visited New York customers for the purpose of discussing shipping problems and to check displays. Even the letter on which the Tax Tribunal relied indicated that the persons making the in-state visits had no authority to take orders. *See id.* at 961.

600. *Id.* at 961. It is interesting to note that, just prior to the quoted statement, the court mentioned that the state auditor had found wholesale sales to "from 9 to 16" New York customers, but concluded (based on the "incredible" affidavits) that the sales persons had visited up to 19 customers. *Id.* Perhaps there was a misprint in the opinion. While one might expect such obvious antitaxpayer bias from a Tax Tribunal hearing officer, it is not the type of objective analysis one would expect from the highest court of a state.

601. *See id.*

602. *Id.* (emphasis added).

603. *See id.* at 955.

604. *Id.* at 962. VIP did not advertise in New York or do any direct mail solicitation. *See id.* at 966 (Bellacosa, J., dissenting).

605. *Id.* at 962.

606. *Id.*

607. *See id.*

The New York court's legal analysis is on a level with its factual legerdemain. The decision spends a number of pages reviewing the "evolution" of U.S. Supreme Court "doctrine" concerning state taxation of interstate commerce.⁶⁰⁸ In support of its conclusion that after *Bellas Hess* it is easy ("not unduly exacting") to find the required physical presence, the court relied on two cases, *Standard Pressed Steel Co. v. Washington*⁶⁰⁹ and *Goldberg v. Sweet*.⁶¹⁰ The court found solace in *Standard Pressed Steel* because, in that case, the taxpayer's in-state presence consisted of one engineer who worked out of his home and consulted with the taxpayer's single in-state customer.⁶¹¹ What the court did not note was that dealing with the customer, Boeing Aircraft Co., was a full-time job performed wholly within the state over a number of years and that the business and occupation tax involved was only on the in-state sales directly related to the engineer's services.⁶¹² The New York court also failed to mention that a group of company engineers visited Boeing for about three days every six weeks.

The court's reference to *Goldberg* is even more curious. That case involved Illinois' excise tax on interstate telephone calls.⁶¹³ The New York court characterized the decision as basing its findings of a sufficient nexus on the fact that the tax was on calls terminating or originating in Illinois and billed to an Illinois address.⁶¹⁴ Immediately after that conclusion, the New York court correctly noted that neither the parties nor the U.S. Supreme Court questioned Illinois' nexus to tax.⁶¹⁵ The intended implication was that such a small thread (one end of a telephone call and a billing address) provided nexus. Such a reading of *Goldberg* is unwarranted. Neither the parties nor the courts questioned nexus between the state and taxpayers in that case because it was beyond question.⁶¹⁶ A cursory examination of *Goldberg*

608. See *id.* at 955-60.

609. 419 U.S. 560 (1975).

610. 488 U.S. 252 (1989).

611. See *Orvis Co.*, 654 N.E.2d at 957.

612. See *Standard Pressed Steel*, 419 U.S. at 561-62.

613. See *Goldberg*, 488 U.S. at 254.

614. See *Orvis Co.*, 654 N.E.2d at 957. The page cited by the New York court discusses apportionment, not nexus. See *Goldberg*, 488 U.S. at 263.

615. See *Orvis Co.*, 654 N.E.2d at 957; cf. *Goldberg*, 488 U.S. at 260.

616. The tax in *Goldberg* was only imposed on telephone calls that originated or ended in the state and were billed to in-state addresses. *Goldberg*, 488 U.S. at 262. The nexus between the event and the tax is obvious, the same that exists when sales tax is imposed on an in-state sale. The plaintiffs in *Goldberg* brought a class-action suit on behalf of all Illinois persons who paid telephone bills. See *id.* at 257. The defendants, aside from the Director of Illinois's Department of Revenue, were all telephone companies (like GTE) on whom the collection obligation was imposed and who contracted with those bill-payers for long distance services. See *id.* The relevant nexus was not a mere telephone call and billing address, it was the provision of long distance telephone services to thousands of state residents. Undoubtedly those service providers also had offices and employees within the

shows that the only question was whether the tax was properly apportioned; to the extent that the relied-on portion of *Goldberg* mentioned nexus, the discussion was speculation about whether *other* states might have nexus to impose a similar tax.⁶¹⁷

While the New York court did include abbreviated descriptions of prior U.S. Supreme Court sales and use tax cases,⁶¹⁸ it consistently stressed the number of taxpayer agents that had contact within the taxing state, not the quality or nature of the in-state business activities carried on by those agents.⁶¹⁹ By reducing the apparent requirements to a minimum-numbers game,⁶²⁰ the New York court was able to say that the numbers justified imposition of use-tax collection duties under its assumed facts concerning *Orvis* and *VIP*.

Ultimately, the New York court treats *Quill* as establishing a positive bright-line test, that is, that any taxpayer who has more in-state physical contact than *Quill*, regardless how fleeting, automatically satisfies Commerce Clause nexus requirements.⁶²¹ The court concluded that “contemporary Commerce Clause analysis” does not require that the vendor’s in-state physical presence be substantial. “Rather, it must be demonstrably more than a ‘slightest presence.’”⁶²² To make that determination, the court relied on numbers, not substance, which is not approved by *Quill* or any other Supreme Court decision. Saying that the New York court “missed the boat” in *Orvis* would be inaccurate—“missed the harbor” would be more precise.

One important issue that the court did not discuss in *Orvis* is *when* nexus was established. Whether there was sufficient nexus at the beginning of the audit period was never addressed. Since the duty to collect cannot arise until nexus exists, the court failed to address a crucial question. Instead, it imposed the duty from the beginning of the audit period, apparently assuming that the taxpayers had carried on similar in-state activities for some unstated time before the audit period. When the nexus is based on an accumulation of temporary visits, there must be some consideration of how many and what type of visits are sufficient; otherwise there is no real accumulation and one temporary visit is sufficient (which is clearly not supported by any Supreme Court decision). Without evidence concerning

state, but that is not mentioned in the decision because nexus was not even a potential issue. *See id.* at 257, 260.

617. *See id.* at 261-63.

618. *See Orvis Co.*, 654 N.E.2d at 960.

619. *See id.*

620. *See id.*

621. *See id.* at 960-61. The court asserted that treating *Quill* otherwise (i.e., as only creating a safe harbor for mail-order sellers, which is what *Quill* actually does) would totally undermine the Supreme Court’s primary justification for its holding. *See id.*

622. *Id.* at 960-61.

pre-audit-period activities (none were mentioned), a more clear example of an *ex post facto* duty would be difficult to find.

Decisions like *Orvis* put out-of-state vendors in a very precarious position. If out-of-state vendors do not, from the very beginning, collect use tax from all purchasers, there may come a time when a court renders a judgment requiring payment of the taxes they “should have” collected, plus penalties and interest. Out of self-preservation, vendors may start collecting taxes even if it is obvious that no Commerce Clause nexus exists. One supposes state tax collectors would applaud the result, that is, the collection and remission of use taxes by persons who could not constitutionally be required to do so, the ends justifying the means. Some state tax collectors have not been content with sitting back and waiting for court decisions to frighten vendors into volunteering collection services. Businesses that take state tax administrators’ pronouncements seriously will be forced to collect sales tax or use tax on all sales.

b. State Tax Regulators.—Perhaps due to prior losses,⁶²³ a Michigan Department of Treasury directive reduces minimum Commerce Clause nexus to the point of nonexistence. Revenue Administrative Bulletin 1999-1⁶²⁴ (“RAB 1999-1”) asserts that if one person indirectly associated with an out-of-state seller is in the state for any part of one day, sufficient nexus exists for imposing use-tax collection duties on that seller for the next year.⁶²⁵ For “administrative convenience,” the Department declared that it would only engage in enforcement efforts if someone were in the state on two or more days during any twelve-month period.⁶²⁶ RAB 1999-1 states that there is sufficient Commerce Clause nexus for Michigan to impose use-tax collection obligations on a seller whenever the seller has an employee or any other type of associate “regularly and systematically present in

623. See *Magnetek Controls, Inc. v. Michigan*, 562 N.W.2d 219 (Mich. Ct. App. 1997). In *Magnetek*, the Michigan Department of Treasury argued that regular trips to other states by marketing personnel, plus having independent contractor representatives in those states, was not sufficient to allow those states to impose taxes, thus the taxpayer owed more to Michigan. See *id.* at 221. The court relied heavily on *Orvis* to rule against the Department. See *id.* at 223-24 (citing *Orvis Co.*, 654 N.E.2d at 954). Perhaps that loss prompted an internal review at the Department. See *id.* at 223. On the other hand, perhaps the Department merely takes inconsistent positions, one for use taxes and the opposite for “single business tax” solely due to the revenue effect. See *id.* at 223-24; see also *Gear Research v. Michigan Dep’t of Treasury*, Nos. 227850, 239890, 1997 WL 672609 (Mich. Tax Tribunal July 15, 1997) (arguing that *Quill* requires some continuous physical presence (office, factory, store, etc.) before recognizing jurisdiction to tax).

624. Use Tax Nexus Standards, Mich. Rev. Admin. Bull. 1999-1 (Mich. Dep’t of Treas., May 12, 1999), Westlaw, MI TAX RAB 1999-1.

625. See *id.* (“Jurisdictional Standard” discussion in part entitled “Law and Analysis”).

626. *Id.* Sellers should be wary, however, because the RAB’s preamble states that it can be modified at any time. See *id.* Conclusion II of the RAB states that the directive (and any amendments, no doubt) will be applied retroactively to “all open years and for cases still open and on direct review.” *Id.*

Michigan conducting activities to establish or maintain the market for the out-of-state seller.”⁶²⁷ To that point, the position is not particularly remarkable. The language following that general statement, however, totally eviscerates the “regularly and systematically” language and stretches “establish or maintain” far beyond common understanding.⁶²⁸ The directive includes in the list of acts that “establish or maintain the market” anything that might result in direct or indirect contact with actual or potential customers. The list includes everything from soliciting sales to conducting training for potential customers, to dealing with deadbeat customers.⁶²⁹

The Multistate Tax Commission (MTC)⁶³⁰ created a “Public Participation Working Group” to draft guidelines on the constitutional nexus necessary for imposing use-tax collection burdens.⁶³¹ The result, which appears to be complete deadlock, might have been used to predict the climate in Congress’ Advisory Commission on Electronic Commerce.⁶³² In January 1998, the MTC released a draft set of “guidelines” (MTC State Draft) written by the state tax administra-

627. *Id.* (paragraph I(6) of “Conclusions”). It might reasonably be inferred that the “market” being established or maintained is in Michigan, though that is not required by the language used.

628. *See id.*

629. *See id.* (paragraph I(6)(a) of “Conclusions”). The relevant portion states:

- (a) Activities that establish or maintain the market for the out-of-state seller include, *but are not limited to*, the following:
- (1) Soliciting sales;
 - (2) Making repairs or providing maintenance or service to property sold or to be sold;
 - (3) Collecting current or delinquent accounts, through assignment or otherwise, related to sales of tangible personal property or services;
 - (4) Delivering property sold to customers;
 - (5) Installing or supervising installation at or after shipment or delivery;
 - (6) Conducting training for employees, agents, representatives, independent contractors, brokers or others acting on the out-of-state seller’s behalf, or for customers or potential customers;
 - (7) Providing customers any kind of technical assistance or service including, but not limited to, engineering assistance, design service, quality control, product inspections, or similar services;
 - (8) Investigating, handling, or otherwise assisting in resolving customer complaints;
 - (9) Providing consulting services; or
 - (10) Soliciting, negotiating, or entering into franchising, licensing, or similar agreements.

Id. (emphasis added).

630. The Multistate Tax Commission is an organization created by interstate compact with a significant number of state-members. Its purpose is to promote uniformity in the administration of state taxes. *See Multistate Tax Commission Home Page*, at <http://www.mtc.gov> (visited Mar. 31, 2000).

631. *See Public Participation Working Group Materials* (updated Apr. 24, 1998), at <http://www.mtc.gov/PPWGs/ppwglst.html>.

632. *See discussion infra* p. 739.

tor portion of the group.⁶³³ The MTC State Draft's authors would be obvious even if they were not expressly identified. The proposal consists of a number of "guideline" statements, most followed by a number of examples. The following are among the things that the draft identifies as creating "Commerce Clause nexus:" 1) an employee who "telecommute[s]" to work (with permission for an indefinite period) establishes the out-of-state employer's physical presence in the employee's home state;⁶³⁴ 2) owning real property in the state, as an investment and totally unrelated to business activities, establishes nexus in the state where the property is located;⁶³⁵ 3) storing some of a business' financial records at its auditor's office establishes the business' nexus with the state where the auditor's office is located;⁶³⁶ 4) delivering sold goods to another state by contract carrier, rather than common carrier, establishes nexus where the delivery is made;⁶³⁷ 5) the existence of a parent-subsidiary relationship automatically creates nexus for the other relationship member(s) in every state where one member has a physical presence, if there is even the slightest association between the two business activities;⁶³⁸ and 6) a business that "resells" telephone services using a prepaid phone card that is usable in other states due to arrangements made with service providers has nexus wherever a phone card purchaser actually uses the card.⁶³⁹ The examples here could be extended to include the ma-

633. MULTISTATE TAX COMMISSION, CONSTITUTIONAL NEXUS GUIDELINE FOR APPLICATION OF A STATE'S SALES AND USE TAX TO AN OUT-OF-STATE BUSINESS (State Participant Revised Participation Working Group Draft, Jan. 1998) [hereinafter MTC STATE DRAFT], <http://www.mtc.gov/PPWGs/nexus/nexus24.pdf> (visited Mar. 31, 2001). For a more extensive review of the MTC and its multi-year campaign against nexus requirements, see generally John C. Blase & John W. Westmorland, *Quill Has Been Plucked! MTC States Are Slowly Eroding the Substantial Nexus Standard*, 73 N.D. L. REV. 685 (1997) (discussing the March, 1997, draft).

634. MTC STATE DRAFT, *supra* note 633, para. II.C.1., at 7 (Example 6).

635. *See id.* para. II.C.2, at 7 (Example 2). One wonders if being a 1% member of an LLC that has 1% of its capital invested in property in a state would also satisfy the nexus requirements. Based on the general tenor of the draft, it is clear that state tax administrators answer "yes." *See id.* para. II.C.3, at 9 (Example 4).

636. *See id.* para. II.C.3, at 9 (Example 5).

637. *See id.* para. II.C.5, at 10 (Example 2). Why the state collectors feel there is any meaningful distinction between contract carriers and common carriers, under *Quill* or any other authority, is not stated. This example is, however, not atypical of the extent to which some state advocates willingly don intellectual blinders in their attempt to nullify Supreme Court decisions.

638. *See id.* para. II.C.5, at 9-11 (various examples). These examples are rather obviously contrary to state court decisions on the topic. *See, e.g., SFA Folio Collections, Inc. v. Bannon*, 385 A.2d 666 (Conn. 1991); *Bloomington's by Mail v. Commonwealth*, 591 A.2d 1047 (Pa. 1991). The only possible justification for taking these positions is that the decisions were not made by the U.S. Supreme Court. However, the decisions were based on fundamental principles of corporation law, which is essentially identical in all states, particularly with regard to the notion that corporations have separate legal existence regardless of the owners' identities.

639. MTC STATE DRAFT, *supra* note 633, para. II.C.6, at 11 (Example 1). This example obviously totally ignores *World-Wide Volkswagen*. *See generally* *World-Wide Volkswagen*

jority of the examples used in the draft, many of which are equally absurd.

Of particular interest are two statements in the draft. Paragraph II.C.4 is “reserved for a possible discussion of physical presence based upon an *out-of-state business*’ relationship to intangible property in the taxing state.”⁶⁴⁰ This statement is made more than once.⁶⁴¹ Apparently the logical impossibility of using intangible things to establish physical presence was not noticed, or was not considered relevant, by the drafters. Perhaps they also consider virtual reality real. The potential threat to use Web site locations as a basis for nexus is obvious. The second interesting statement makes that potential even more obvious: Under paragraph II.C.6, Example 2 is “reserved for a possible illustration of physical presence based upon the ownership, lease, use or maintenance of an establishment in the taxing State that facilitates the conduct of a business through computer-based telecommunications.”⁶⁴²

An “industry response” was prepared, providing individual comments on each paragraph and example in the “state participant revised” draft.⁶⁴³ The comments took issue with almost every “guideline” and example. One frequent comment was: “This example is of limited use because the conclusion reached is devoid of underlying analysis.”⁶⁴⁴ Most of the shortcomings of the state participant draft come under fire, frequently with citations to relevant court decisions.⁶⁴⁵

The industry response is not, however, totally meritorious. In more than one place, the industry response takes the position that *Quill* does not create a “safe harbor” but, instead, the Court intended to establish a “bright line” test that is independent of the situs of the sale or subsequent use.⁶⁴⁶ The comments do not say how one distinguishes between a “bright line test” and a “safe harbor” or how the seller’s or buyer’s physical location is irrelevant under *Quill*.

Corp. v. Woodson, 444 U.S. 286 (1980). However, a state tax official might argue that *World-Wide Volkswagen* deals with due process and, therefore, does not prevent finding Commerce Clause nexus.

640. MTC STATE DRAFT, *supra* note 633, para. II.C.4, at 9.

641. See *id.* para. II.C.7, at 12. Paragraph II.C.7 implies that nexus will exist even if the relationship is indirect through a representative of the taxpayer who has some relationship with in-state intangible property.

642. *Id.* para. II.C.6, at 12 (Example 2).

643. See Industry Response to State Participant Revised Public Participation Working Group Draft of the Constitutional Nexus Guidelines (presented at full Public Participation Working Group meeting of Mar. 27, 1998) [hereinafter Industry Response], <http://www.mtc.gov/PPWGs/Nexus/nexus25.PDF>.

644. *Id. passim*

645. See, e.g., *id.* at 12 (Industry Response to para. II.C.5 (Example 5)) (citing *Bloomindales by Mail v. Commonwealth*, 591 A.2d at 1047 (Pa. 1991); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991)).

646. E.g., *id.* at 5 (Industry Response to para. II.B.3).

One who reviews the MTC State draft and the Industry Response will find little hope for compromise. The draft does not appear to be an effort to reach workable or objective guidelines; instead it is a rather obvious effort to restrict the holding in *Quill* to the narrowest possible scope and to expand what is sufficient to Commerce Clause nexus to "relationships" so attenuated that the term loses all meaning. Many of the "guidelines" and examples describe situations which go beyond even the most liberal interpretations of due process limitations on judicial specific jurisdiction.

3. *Politics As Usual*

After *Quill* there has been significant political controversy concerning taxes and the Internet. While the issues are not limited to mail-order sales matters, those have featured prominently in the publicity. Congress placed a moratorium on new state Internet-focused taxes and appointed an Advisory Commission on Electronic Commerce to study the issues and report back to Congress.⁶⁴⁷ The Commission's activities have been characterized by dissension and political posturing rather than consensus making. Congress mandated that Commission membership be divided among state officials, federal officials, and industry representatives. Naturally, the Commissioners' opinions are equally divided, and there seems to have been more hardening of positions than movement toward compromise. The Commission did not produce any softening of attitudes or positions. A simple majority voted in favor of an industry-proposed recommendation, but a two-thirds majority is required to make the recommendations official.⁶⁴⁸ Perhaps the only result of the Commission process was to demonstrate that (1) a rational compromise between the directly affected parties is impossible, and (2) the expenditure of many tax dollars could prove, beyond doubt, what was only patently obvious before the process began. From any point of view that is even marginally objective, there can be no workable solution to taxing Internet-mediated sales (that is, requiring Internet sellers to collect state use taxes) unless something is done to simplify that task. Most of the more viable proposals submitted to the Commission do something along those lines.

647. See Internet Tax Freedom Act, Pub. L. No. 105-277, tit. XI, 112 Stat. 2681, 2719-21 (1998).

648. See John Schwartz, *Internet Tax Commission Ends Meeting in Deadlock*, WASH. POST, Mar. 22, 2000, at E1 [hereinafter Schwartz, *Internet Tax*]; John Schwartz, *Web Tax Panel Falls Short of Goal: After 18 Months, Commission Gives Issue Back*, WASH. POST, Mar. 31, 2000, at E3.

One such proposal was submitted by the National Governors Association, "Streamlining State Sales Tax System."⁶⁴⁹ As envisioned by the proposal, the Association has created the Streamlined Sales Tax Project,⁶⁵⁰ a pilot program by a few states that (a) makes uniform definitions, classifications, and administrative procedures, (b) limits the number of tax rates, and tax rate changes, within any state, and (c) establishes a "Certified Service Provider" system for collecting and paying use taxes.⁶⁵¹ The "Certified Service Provider" would act as a collection and distribution point, and sellers who choose to participate would be able to limit their potential liability by complying with the procedures.⁶⁵² The system would be voluntary, both for states and for sellers, and does not require federal legislation. It specifically says that there would be no change in current nexus rules, which may be a rather empty statement because opinions about what those rules are remain divergent, to say the least.

Another proposal, submitted by the "Business Caucus," has many of the same objectives, but it proposes federal legislation establishing the revised system.⁶⁵³ Among the prominent features of the envisioned federal legislation are (1) encouraging states to cooperate in creating a uniform state law that would fix uniform rates, limit rate changes, and provide uniform definitions, audits, and other standards; (2) establishing a detailed rule on when nexus exists for state taxation of business activities and use-tax collection duties; and (3) continuing or enacting federal moratoria on state tax changes pending completion of the new rules.⁶⁵⁴ One very interesting, and contro-

649. See Advisory Commission on Electronic Commerce, *Document Library*, at <http://www.ecommercecommission.org/library.htm> (visited Mar. 31, 2001).

650. See *Streamlined Sales Tax System for the 21st Century*, at <http://www.geocities.com/streamlined2000/Proposal.asp> (visited Mar. 31, 2001).

651. See Streamlined Sales Tax Project, Executive Summary 2 (Mar. 1, 2001), <http://208.237.129.206/sline/EXECSUM.pdf> (visited Mar. 31, 2001).

652. See Streamlined Sales Tax Project, Pilot 2 (Mar. 8, 2001), <http://208.237.129.206/sline/pilotprojectoverview.pdf> (visited Mar. 31, 2001); see also UNIFORM SALES AND USE TAX ADMINISTRATION ACT § 9, at 5 (Streamlined Sales Tax Project, as amended Jan. 24, 2001). A similar "trusted third party" arrangement is one of the options being considered in Europe to address similar VAT-tax collection problems. See Working Party No. 1, European Comm'n, Harmonisation of Turnover Taxes 7 (June 8, 1999) (working paper) [hereinafter EC Working Paper], available at http://europa.eu.int/comm/taxation_customs/publications/working_doc/taxation/ecommerceEN.pdf (visited Mar. 31, 2001).

653. See ACEC Business Caucus, *A Proposal for Internet Tax Reform and Reduction*, <http://www.ecommercecommission.org/document/202BusinessCaususProposal.doc> (last visited Nov. 6, 2000). The Business Caucus includes Charles Schwab Corp., America Online, Inc., MCI WorldCom Inc., AT&T Corp., Time Warner Inc., and Gateway Inc. See Curt Anderson, Associated Press, *Internet Tax Ban Extension Urged* (Feb. 9, 2000), http://dailynews.yahoo.com/htx/nm/20000209/bs/tax_internet_3.html (visited Feb. 13, 2000); Reuters, *New Internet Sales Tax Ideas Offered* (Feb. 9, 2000), http://dailynews.yahoo.com/htx/nm/20000209/bs/tax_internet_1.html (visited Feb. 13, 2000).

654. This proposal envisions a significant federal involvement and implementing legislation, both of which may be necessary. It is unrealistic to expect 50 states and all their subdivisions to agree to any single operational method or to voluntarily limit their own

versial part of this proposal would suspend state sales taxes on things like books, records, and videos, which are capable of digital distribution via the Internet. That certainly meets the rhetorical call for equal taxation of electronic and “traditional” sales (the mythical “level playing field”), but not quite in the manner state tax authorities have in mind. This proposal received the endorsement of a majority of the Commission, but not the “supermajority” required to make the result “official.”⁶⁵⁵

E. Legislative or “Prescriptive” Jurisdiction

Prescriptive (that is, legislative or regulatory) jurisdiction is both similar to and different from judicial jurisdiction. Both refer to limitations of legal authority; any attempt to act beyond those limits has no legal status. A judgment entered against a person over whom the court has no personal jurisdiction is of no greater legal significance than regulations adopted by the Ku Klux Klan to control mango harvesting in Central Mongolia, and vice versa. The same is true for laws adopted by a state legislature that control, in effect or intentionally, activities of nonresidents beyond state borders. The principles of prescriptive jurisdiction are the “subject matter jurisdiction” rules for the legislative and executive branches of government. Of course, any attempt by the judicial branch to enforce void enactments is equally void.

The basic principles behind prescriptive jurisdiction are those of international law discussed in the introduction. They are a direct result of the absolute internal sovereignty of nations and States; the acts of one government cannot have legal force within the territorial jurisdiction of another government.⁶⁵⁶ No other result is possible unless the concept of sovereignty itself is changed or eliminated.

In the U.S. federal system, legal issues concerning federal prescriptive (subject matter) jurisdiction are common. Legal issues concerning state prescriptive jurisdiction are much less common. State legislators and executives are aware of their government’s geographic boundaries. However, there are situations in which otherwise valid state enactments are invalid because of their impact on persons and events outside those boundaries. Given the habit of relating restrictions on government actions to provisions in the Constitution, most state prescriptive jurisdiction issues are treated as Due Process or Commerce Clause issues.

power to impose taxes. Of course, based on the political rhetoric to date, it will probably not be much easier for Congress to find a majority to support any single plan.

655. See Schwartz, *Internet Tax*, *supra* note 648.

656. See *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 722 (1877), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977).

One case that discussed prescriptive jurisdiction principles is *Pennoyer v. Neff*,⁶⁵⁷ the foundational case on state jurisdiction over nonresidents. Though its express decision has been substantially eroded by time, technology, and theory, the principles it enunciated are as valid today as they were a century ago. The Court there enunciated “principles of public law” that apply to the States because of their fundamental independence:

One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle . . . follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory . . . and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. “Any exertion of authority of this sort beyond this limit,” says Story, “is a mere nullity, and incapable of binding such persons or property in any other tribunals.”⁶⁵⁸

Developments concerning judicial personal jurisdiction during the twentieth century appear to have significantly eroded *Pennoyer’s* strict territorial limitations on judicial jurisdiction,⁶⁵⁹ but those developments have not changed or expanded the fundamental principles on which *Pennoyer* was based. At most, the more recent cases have expanded what can be recognized as consent to jurisdiction⁶⁶⁰ and what constitutes “acting in a state” for judicial jurisdiction purposes.⁶⁶¹

More modern decisions rarely resort to these fundamental principles. Instead, reference is made to the Due Process Clause⁶⁶² or the Commerce Clause.⁶⁶³ Decisions such as *International Shoe* and *World-Wide Volkswagen* hold that due process principles preclude the exercise of state judicial jurisdiction over persons or entities that have insufficient connection with the forum’s territorial jurisdiction.⁶⁶⁴ The “principles” are those enunciated in *Pennoyer*.

657. *Id.*

658. *Id.* at 722-23 (citations omitted). For application of the same principles in a state tax setting, see *St. Louis v. Ferry Co.*, 78 U.S. (11 Wall.) 423 (1870).

659. See, e.g., *Shaffer*, 433 U.S. 186.

660. See *id.* at 201-05.

661. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

662. See *id.*

663. See, e.g., *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

664. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

With respect to legislative action and Commerce Clause principles, the connection between modern cases and those fundamental principles is less direct and sometimes obscured because many Commerce Clause cases are founded on other principles, such as discrimination. However, the connection remains. One of the purposes for delegating to Congress power to regulate commerce among the states was to eliminate the discriminatory and protectionist laws enacted by the states while the Articles of Confederation were in effect.⁶⁶⁵ The “dormant Commerce Clause” corollary to the delegation precludes states from actions that discriminate against, or unduly burden, interstate commerce.

One manner in which a State might discriminate against interstate commerce is by adopting rules that have the effect of regulating actions beyond the state’s borders. For example, *Baldwin v. G.A.F. Seeling, Inc.*,⁶⁶⁶ involved New York milk marketing regulations. To prevent the price-support provisions from being rendered ineffective by out-of-state competition, the regulations prohibited milk dealers from selling milk purchased out of state unless the price paid to the out-of-state producer was at least equal to in-state minimum prices.⁶⁶⁷ Invalidating that rule, the Court stated:

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or low ones. . . .

Such a power, if exerted, would set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid on the thing transported.⁶⁶⁸

The Court held that New York’s rules were invalid under the Commerce Clause.⁶⁶⁹ It could have just as easily held the rules nullities as being beyond the state’s prescriptive jurisdiction.

A similar result was reached in *Edgar v. MITE Corp.*,⁶⁷⁰ concerning an Illinois statute regulating tender offers for corporate shares. The scope of the act was such that it would require compliance even though there were no Illinois residents that might have been affected. The Court concluded:

665. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977); *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 720, 722–23 (1877); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

666. 294 U.S. 511 (1935).

667. See *id.* at 519 n.1 (quoting the regulation).

668. *Id.* at 521.

669. See *id.* at 522.

670. 457 U.S. 624 (1982).

[T]he Illinois statute is a direct restraint on interstate commerce and . . . has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions . . . would be thoroughly stifled. . . . The Commerce Clause also precludes application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State. . . . "[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."⁶⁷¹

In other cases, a number of state statutes intended to control interstate prices of alcoholic beverages (to obtain the best prices for residents) have been struck down on Commerce Clause grounds because their practical effect was to control the prices at which distributors could sell their products in other states.⁶⁷² The Court summarized the interaction of the Commerce Clause and state regulations with extraterritorial effect:

First, the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State" Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. . . . Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction [territory] of another State. . . . [N]o state may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.⁶⁷³

Thus, the Court uses Commerce Clause language to enforce the limiting rules inherent in state sovereignty, that is, prescriptive jurisdiction.

In cases presenting extraterritorial application of state tax rules, the Court has tended to use either the Due Process Clause or the Commerce Clause without following any particular pattern about

671. *Id.* at 642-43 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1877)) (citations omitted).

672. See *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986).

673. *Healy*, 491 U.S. at 336-37 (citations omitted).

when which is used. The earlier gasoline tax and sales tax cases, during the period when there was a bright line between interstate commerce and local commerce, frequently referred to the Commerce Clause because the parties usually contended that the tax was being imposed on interstate commerce.⁶⁷⁴ The bright line theory *precisely* limited state prescriptive jurisdiction to “local” commerce. For example, the *Silas Mason* decision applied that bright line theory and held that the state use tax at issue was not invalid under the Commerce Clause, because (among other things) the tax could not become payable until after the related goods had completed their interstate journey; in other words, the tax was on in-state use of property.⁶⁷⁵ The company argued that despite the formal incidence, the use tax was really a sales tax on the out-of-state sale, but the Court was not swayed.⁶⁷⁶ The 1941 mail-order cases, *Sears, Roebuck*⁶⁷⁷ and *Montgomery Ward*,⁶⁷⁸ applied the newer, more flexible approach to interstate commerce, but nevertheless sustained the imposition of tax collection duties by reference to cases applying the bright line theory.

When the three companion sales and use tax cases⁶⁷⁹ were heard in 1944, the Court continued to apply the bright-line theory, invalidating the Arkansas sales tax because it was being applied to an “interstate sale,” but approving the Iowa use tax because the tax did not apply until the property had come to rest in the state and was being enjoyed by the consumer.⁶⁸⁰ Justice Jackson’s *General Trading* dissent, however, directly addressed the underlying problem of prescriptive jurisdiction, arguing that the state did not have the power to impose collection duties extraterritorially, because that would be beyond the State’s fundamental powers even if there were not relevant constitutional restrictions.⁶⁸¹

When the Court made the effort in *Quill* to separate Due Process and Commerce Clause issues, the opinion was unenlightening. It applies gloss rather than principles and ignores Justice Frankfurter’s admonition quoted earlier. In the due process portion of *Quill*, the

674. See, e.g., *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934); *Pierce Oil Corp. v. Hopkins*, 264 U.S. 137 (1924); *Bowman v. Continental Oil Co.*, 256 U.S. 642 (1921); *Standard Oil Co. v. Jones*, 205 N.W. 72 (S.D. 1925).

675. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582-86 (1937).

676. See *id.* at 587-88. In *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939), the company argued that the California use-tax collection duties violated both due process and Commerce Clause rules, see *id.* at 66, and it lost both arguments, see *id.* at 68. The Court relied on cases applying the bright line rule. See *id.* at 66.

677. *Nelson v. Sears, Roebuck, & Co.*, 312 U.S. 359 (1941).

678. *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941).

679. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944); *General Trading Co. v. State Tax Comm’n*, 322 U.S. 335 (1944); *International Harvester Co. v. Wisconsin Dep’t of Taxation*, 322 U.S. 435 (1944).

680. Compare *Dilworth*, 322 U.S. at 330-32 (rejecting Arkansas sales tax), with *General Trading Co.*, 322 U.S. at 338 (upholding Iowa use tax).

681. *General Trading*, 322 U.S. at 339-40 (Jackson, J., dissenting).

majority opinion implicitly assumes that the state has legislative jurisdiction to regulate and addresses judicial specific jurisdiction gloss instead of the true issue. In the Commerce Clause portion, the majority opinion totally misses fundamentals, sliding around in Commerce Clause gloss before ultimately falling back on *stare decisis*.

The Court might have reached the same conclusion by simply referring to *prescriptive* jurisdiction limitations. State prescriptive jurisdiction does not extend to persons not doing business in the state. However, federal prescriptive jurisdiction is not affected by state boundaries. If the opinion had been written in prescriptive jurisdiction terms, it would not have invited the tax officials' manipulative interpretations discussed earlier. In *Quill*, prescriptive jurisdiction receives only a brief mention. In his three-Justice concurring opinion, Justice Scalia stated:

I agree . . . that abandonment of *Bellas Hess*' due process holding is compelled by reasoning "[c]omparable" to that contained in our post-1967 cases dealing with state jurisdiction to adjudicate. I do not understand this to mean that the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are necessarily identical.⁶⁸²

The limitations of prescriptive jurisdiction are more frequently discussed in the Commerce Clause context. If a state regulation has an impact on persons and events not associated with the state, it is invalid.⁶⁸³ In *Healy v. Beer Institute*, the Court said:

[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.⁶⁸⁴

One of the more complete and well-reasoned decisions concerning state's attempts at regulating Internet-mediated activities is *American Libraries Ass'n v. Pataki*.⁶⁸⁵ That case involved New York's criminalization of child pornography. Despite the statute's laudable intentions, after carefully exploring the nature of the Internet and its various components, the U.S. District Court for the Southern District of New York concluded that the statute was invalid under the Commerce Clause because it reached far beyond the state's boundaries

682. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 319-20 (1992) (citations omitted) (Scalia, J., concurring in part, dissenting in part).

683. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York Liquor Auth.*, 476 U.S. 573 (1986).

684. 491 U.S. at 336.

685. 969 F. Supp. 160 (S.D.N.Y. 1997).

and it was impossible to limit the effects to conduct within New York.⁶⁸⁶ Of particular interest in the current context is the district court's observation that Internet users are indifferent to the geographic location of the Web sites they visit and Web site owners have no control over the location from which their site is accessed.⁶⁸⁷

To apply prescriptive jurisdiction principles requires specificity concerning what the state is attempting to do and its effects outside the state's boundaries. Sales-and-use-tax schemes as a whole are not at issue. Neither is the state's authority to impose separate sales and use taxes on in-state activities. The only question is whether the state can impose use-tax collection duties on persons outside the state, relating to a transaction completed outside the state, simply because the related item eventually came into the state for initial use by a consumer.

A state can regulate activities, property, and events actually within the state.⁶⁸⁸ The out-of-state seller does not act within the

686. See *id.* at 169, 177.

687. See *id.* at 170-171. The district court said: "An internet user who posts a Web page cannot prevent New Yorkers or Oklahomans or Iowans from accessing that page and will not even know from what state visitors to that site hail." *Id.* at 171.

688. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1986). Section 402 lists the circumstances in which a government can establish a binding rule:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id. § 402. Section 403(1) states that even if a nation-state might otherwise validly exercise prescriptive jurisdiction under § 402, it cannot exercise that jurisdiction with respect to nonresidents if that would be unreasonable. Section 403(2) provides:

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

- (a) the link of the activity to the territory of the regulating state, that is, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;

state, the transaction is completed outside the state, and the events that trigger the tax take place after the out-of-state seller's participation ends.⁶⁸⁹ Treating the sale transaction as a discrete event, completed solely in the state where the sale occurs, is mandated by the way the concept of a "sale" has been consistently and continuously treated for sales tax purposes. *Jefferson Lines* is a good example.⁶⁹⁰ In that case, the Court reviewed the meaning of "sale" in the sales tax context. In that context the Court said:

A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed. We have . . . held [sales] taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future. Such has been the rule even when the parties . . . specifically contemplated interstate movement of the goods either immediately before, or after, the transfer of ownership.⁶⁹¹

To say that the state where sold goods are delivered has jurisdiction to regulate or tax an out-of-state sale based on the transaction is contrary to *Jefferson Lines* and the cases it cites and would effectively destroy whatever level of functionality the sales-and-use-tax combination has. *Jefferson Lines* held that the sales tax did not have to be apportioned because of this characteristic of a "sale."⁶⁹² If the definition of "sale" is stretched to include all events up to the item coming to rest in the state where it will be used, both sales and use taxes will have to be apportioned to satisfy *Complete Auto's* "fair apportionment" requirement. Thus, the question reverts back to what the out-of-state seller did within the state. Judicial specific jurisdiction rules are inappropriate. For those rules to apply, there must be some in-state event, resulting from the defendant's voluntary act

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- (e) the importance of the regulation to the international political, legal, or economic system;
 - (f) the extent to which the regulation is consistent with the traditions of the international system;
 - (g) the extent to which another state may have an interest in regulating the activity; and
 - (h) the likelihood of conflict with regulation by another state.

Id. § 403(2).

689. In *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988), the Court said that the old bright line rule between interstate movement and local situs was no longer relevant for Commerce Clause purposes. However, it is relevant to use taxes because that point is employed in use taxes to determine when a tax becomes due, which *D.H. Holmes* admits. In that case, there was no real question about nexus between the taxpayer and the state.

690. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

691. *Id.* at 186-87 (citations omitted).

692. *Id.*

that was in some way directed toward the state.⁶⁹³ Prescriptive jurisdiction rules, at least in the case of an out-of-state seller, require some connection with the state that is not dependent on the in-state event before the state can regulate the seller.

In some Internet-mediated sales, the seller may know the buyer's geographic location and may even know there is a high probability that the sold item will be used there. But in many or most cases, the seller will not need or have reliable information, but still risks a tax auditor's later, different conclusion. In economic and Internet-operational terms, there is little to distinguish between states' use-tax collection statutes and the anti-pornography law discussed in *Pataki*: the state is attempting to regulate activities and persons outside its borders. There is one significant difference, however. New York's law was intended to alleviate a significant social problem that could not be adequately addressed in a different manner. In contrast, use-tax collection statutes are intended to alleviate some of the administrative burden of state tax departments that have a clear, and constitutionally unquestionable, method of adequately addressing by other means. In Commerce Clause "undue burdens" situations, the degree of permissible burden depends, in part, on the benefit to be gained.⁶⁹⁴ If an anti-child pornography statute "can't get no sympathy," use-tax collection statutes should not get more.

Limitations on prescriptive jurisdiction, whether treated as a due process issue or a Commerce Clause issue, do not preclude regulating or taxing activities or events that have a significant connection with the enacting agency's territory. The type of connection might vary, but one aspect is clear in all of the authorities: the regulated party must intentionally act with intent to have an effect in the enacting agency's territory. What is equally clear is that use-tax collection statutes and state tax authorities' assertions cast the net much wider. Even if tax authorities rarely take legal action to enforce their assertions, the threat and burden still exist.⁶⁹⁵

693. See *supra* Part III.B.

694. See *Maine v. Taylor* 477 U.S. 131, 138 (1986); *Bibb v. Navajo Freight Line, Inc.*, 359 U.S. 520, 526 (1959).

695. The *Pataki* case recognizes the burden imposed by the existence of a statute. A number of witnesses testified that they felt compelled to restrict their otherwise legal actions because of the possibility of being prosecuted under the New York statute. See *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 174-75 (S.D.N.Y. 1997). The district court found the resulting "chilling" effect to be significant. *Id.* at 180.

IV. DISCUSSION—A PATH THROUGH THIS WEB?

A. *Context—Reality Check*

The preceding materials demonstrate that what one might have predicted to be a simple problem has been transformed into something rather complex. Changes in economic patterns, legal theory thought patterns, political rhetoric, tax policy, and many other things (not to mention somewhat ad hoc court decisions) appear to have conspired. The result is not unlike the Internet—no central core, but a number of areas of concentration with many independent interconnections. Removing one connection is little loss to the structure as a whole, just as it adds little. But perhaps appearance is not all reality; a little perspective might help.

Always seeking easy means of extracting funds, states (like other governments throughout history) tax retail sales, which produces a relatively constant, not-too-painful-to-taxpayers source of state revenue.⁶⁹⁶ Paying a few cents each time a purchase is made is less traumatic than paying a much larger amount less often. Nothing is taken directly and obviously from the taxpayer's paycheck, no complex forms need to be laboriously completed and filed, and very few taxpayers would make the significant effort required to determine just how much sales tax she or he actually paid in a year. Sales taxes are relatively simple to administer: The retailers collect the tax, sending in the money frequently. Retailers also routinely keep accounting records so auditing is not a significant problem; if the retailer has not collected enough in tax, it is forced to pay the uncollected amount from its own funds. The retailer has, therefore, a strong incentive to collect the tax—it must either pay with others' money or pay with its own.

A complication arose when some tax official noticed, or speculated, that consumers were (or might be) able to buy in an adjacent state with a lower (or no) sales tax, thereby obtaining the goods without enriching the state where they lived.⁶⁹⁷ That was represented as "unfair" to residents who could not (or did not) make out-of-state pur-

696. If one were cynical, one might speculate that there is less political risk in voting to raise a sales tax by one tenth of a percent than to vote to increase income tax rates. It may also be politically expedient to dedicate any specific sales tax increase to a particular budget category with a clear public benefit (e.g., mass transit, school construction) which, incidentally of course, allows general revenue funds to be allocated to budget categories with less precise parameters.

697. With the adoption of local option and special district sales tax add-ons, the consumer's ability and incentive to adjust shopping patterns increased—it is usually not as far to the county or city line as to the state line. It would be interesting to see a study designed to determine if a new sales tax changed gross retail sales in border areas. If there is such a study it would provide a foundation for contemplating the impact of imposing tax collection duties on Internet sellers—a better foundation, certainly, than the highly speculative predictions featured in the political rhetoric.

chases; actually, it is probably more accurate to say that it was perceived as unfair to the state budget. The “solution” was to impose an equal tax on state-resident consumers who purchased things for in-state use without paying the state’s sales tax.⁶⁹⁸ Perhaps the credit for out-of-state sales taxes paid was added to preserve the appearance of fairness. That solution created more problems.

Once a tax is imposed, it should be collected. It would be highly unrealistic to expect individuals to stop by the tax office to pay a few cents each time they purchased something in another state. Auditing all of the individuals in a state to determine if they owed use taxes would, obviously, be a losing proposition. The “solution” to the use-tax collection problem was obvious—apply the same tax collection duties on all retail sellers as the sales tax imposes on in-state retailers. For the most part, state tax authorities recognized the futility of trying to vigorously enforce use taxes, and not very much potential revenue went unpaid, because businesses paid the tax on *their* consumption, only individuals did not get taxed on their consumption. As the number of states with sales taxes increased, this uncollected revenue became even smaller because of the credit for out-of-state taxes paid. Reasonably, there was not much interest in trying to collect use taxes on purchase by individual consumers.⁶⁹⁹ But, at some point, tax authorities became aware of a possible way to collect some of those unpaid taxes.

Some creative marketing person had the idea of using the U.S. mail to sell things to persons who were not able to visit the seller’s store, and mail-order catalogs were born (actually before states had sales taxes). At least for some rural states, the goods shipped into the state by mail-order sellers became a measurable portion of consumer purchases.⁷⁰⁰ Obviously, large mail-order sellers were a much more lucrative target than local farmers, who were hard-pressed anyway, or the hardware store in the town just across the state line. Sales

698. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-86 (1937). One can only speculate about the thinking that went into initial use tax enactments. At least in retrospect, it seems that the originators could not have been so naive as to think that individual consumers would ever voluntarily pay, or be forced to pay, use taxes. However, commercial operations purchasing large and/or valuable items could reasonably be expected to pay the tax. This is particularly true in states that impose a personal property tax or an income tax, which includes all, or almost all, states. A personal property tax audit (or income tax audit) could easily include a use-tax audit by merely requiring the owner supply a purchase invoice for all property purchases or expenses. If those were the originators’ thoughts, the taxes that current state officials complain about “losing” have never been collected (and therefore cannot be “lost”) and were never seriously intended to be collected.

699. State sales or use taxes are regularly enforced against individual consumers with respect to motor vehicles and the like. State vehicle registration rules typically require proof of sales taxes paid. Without proof of prior payment, the sales or use tax must be collected before the vehicle will be registered.

700. See *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 362 n.3 (1941) (noting that Iowa mail-order sales exceeded in-store sales some years).

volume, and records of where goods were sent, made mail-order sellers a feasible target for use-tax collection efforts. Thus states were willing to incur the costs necessary to take their efforts to, and through, the courts.

Taking on the biggest mail-order sellers, the states lost in 1941 because of some pesky legal theories concerning much less important things—jurisdiction, due process, and the Commerce Clause.⁷⁰¹ From that time forward, states have been trying to find routes around, or shrink the scope of, those restrictions. Changes in due process theory probably encouraged tax officials. After more than forty-five years of effort, it looked like they had finally succeeded when the North Dakota Supreme Court held that out-of-state Quill was required to remit use taxes on its mail-order sales shipped to North Dakota addresses.⁷⁰² But, hopes were dashed when the U.S. Supreme Court held that the North Dakota court made a mistake.⁷⁰³ On the positive side (for the tax collectors), the Court said that due process did not preclude enforcement against Quill, but the states lost because the dormant Commerce Clause still precludes forcing mail-order sellers to collect use taxes.⁷⁰⁴

Despite how it may sound at times, all the noise is about a small segment of taxable retail sales:

SALE TYPE	SALES OR USE TAX PAID?*
Individual, in person, home state	Always
Individual, in person, not home state	Always
Commercial consumers	Always
Individual by phone, etc., in-state seller	Always
Individual by phone, etc., out-of-state seller	Sometimes

*Assumes that all states have sales tax

Personal experience demonstrates how small the uncollected part is.

701. See *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941); *Sears*, 312 U.S. at 359.

702. *State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992).

703. See *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 317-18 (1992).

704. See *id.*

B. Post-Quill State Administrative Activities

Like most court decisions, *Quill* does not achieve total clarity on all points. However, it does support some relatively certain conclusions. The first is that *something more* is required to satisfy “Commerce Clause tax nexus” than is required to satisfy due process nexus.⁷⁰⁵ If that were not true, separate analysis would be unnecessary. The first question is whether due process requirements are satisfied. If they are not, there is no need to inquire into Commerce Clause questions. However, if due process nexus is established, then there is the *additional* question of whether Commerce Clause nexus is established. State response to *Quill* (no doubt exacerbated by exuberant predictions of e-commerce growth) was to take the assault on constitutional restrictions to a new level. The Michigan Department of Treasury’s efforts, discussed in Part III.D.2 above, are not atypical.⁷⁰⁶

The “Law and Analysis” section of RAB 1999-1⁷⁰⁷ consistently interprets *Quill* in surprising ways. For example, it states, “The U.S. Supreme Court has held that mailing catalogs into the state constitutes economic presence.”⁷⁰⁸ The referenced portion of *Quill* indicates that due process nexus exists when “a mail-order house . . . is engaged in continuous and widespread solicitation of business within a State,” even if that solicitation is accomplished by a “deluge of catalogs rather than a phalanx of drummers.”⁷⁰⁹ The distance between the Court’s actual language (“deluge of catalogs”) and the Department’s interpretation (simply “mailing”) is amazing. The Court’s nexus discussion relates to the quality and nature of contact: the point was merely that mailing can be *qualitatively* sufficient contact—assuming it is also sufficiently *extensive*. RAB 1999-1’s language suggests that nexus is satisfied by any quantity greater than one, without regard to quality or nature.

An even more obvious misconstruction is supplied with respect to *Quill*’s “bright-line.” RAB 1999-1 states, “Under the bright-line standard of *Quill* any physical presence in the state[,] such as an employee present for one day[,] constitutes substantial nexus.”⁷¹⁰ There

705. *Id.* at 313 n.7. The Court noted: “Although such comments [as in *Trinova Corp. v. Michigan*, 498 U.S. 358, 373 (1991)] might suggest that every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well true: A tax may be consistent with due process and yet unduly burden interstate commerce.” *Id.*

706. See Use Tax Nexus Standards, Mich. Rev. Admin. Bull. 1999-1 (Mich. Dep’t of Treas., May 12, 1999), Westlaw, MI TAX RAB 1999-1.

707. *Id.*

708. *Id.*

709. *Quill*, 504 U.S. at 308. Using *Quill*’s due process discussion to justify a Commerce Clause position is clearly contrary to *Quill*.

710. Mich. Rev. Admin. Bull. 1999-1.

is no citation supporting that statement. If nothing else, its accuracy is belied by the fact that in *Quill*, there was property of the seller within the state, which is some physical presence, but which the Court held was insufficient to establish nexus.

Similarly, RAB 1999-1 states that *Quill* overruled *Miller Bros. v. Maryland*⁷¹¹ to the extent that *Miller Bros.* held that the in-state presence of an out-of-state seller's trucks was insufficient to create commerce clause nexus.⁷¹² It then goes on to state that "*Miller Bros.* is no longer good law."⁷¹³ Neither of those statements is correct. In its specific discussion of due process nexus (not Commerce Clause nexus), the *Quill* decision starts with a quotation from *Miller Bros.*,⁷¹⁴ hardly what one would expect for a decision "overruled" in the quoting decision. The *Quill* decision does partially overrule some prior due process nexus decisions: "Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings"⁷¹⁵ Since in *Miller Bros.* the out-of-state seller did have some physical presence in the state, and the Court held that there was still not sufficient Commerce Clause nexus, RAB 1999-1 misstates both *Miller Bros.* and *Quill's* effect on it. It similarly mischaracterizes other Supreme Court decisions in its efforts to justify its conclusions.⁷¹⁶

Quill does not say that due process nexus requirements need not be met if Commerce Clause nexus requirements are met. It is reasonable to infer from RAB 1999-1 that the Michigan Department of Treasury thinks otherwise. One can easily propose any number of scenarios that would satisfy RAB 1999-1's Commerce Clause nexus conditions but would not come close to satisfying due process requirements.⁷¹⁷ Just one example should suffice:

711. 347 U.S. 340 (1954).

712. Mich. Rev. Admin. Bull. 1999-1 (sixth unnumbered paragraph of the "Jurisdictional Standard" discussion).

713. *Id.*

714. See *Quill*, 504 U.S. at 306 ("The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax'" (citations omitted)).

715. *Id.* at 308.

716. For example, RAB 1999-1, in unnumbered paragraph 8 of the section entitled "Law and Analysis," discusses *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), which *Quill* characterized as the "furthest extension of that power" to impose use tax collection duties." *Quill*, 504 U.S. at 306. *Scripto* involved the multi-year, continuous, in-state activities of a number of nonexclusive sales representatives. See *Scripto*, 362 U.S. at 207. RAB 1999-1 characterizes the *Scripto* salespersons as "part-time," periodic, and cyclical, which is facially inaccurate. The difference between 10 sales persons who are continuously active in a state over a number of years (*Scripto*) is orders of magnitude different from one, indirect associate handling a minor matter within the state on two minor occasions within any 12-month period. See RAB 1999-1.

717. Such a question could arise only because of the obvious misinterpretation of *Quill*. Since, per *Quill*, Commerce Clause nexus requirements are more demanding than due process

Alfa Corp. sold (across the counter in its single Ohio retail store) a \$100 cell phone to Jethro, an individual living at the time of sale in Ohio. (The store collected and submitted Ohio sales tax). Jethro moves to Michigan, closing the Ohio bank account on which the payment check was drawn. Jethro's check is returned unpaid. Alfa Corp. eventually assigns the check to Weedunum Collection Agency. Weedunum's account manager travels round-trip between Cleveland and Kansas City on personal business, both directions changing airplanes at Detroit [Michigan] Metro Airport. Both times in Detroit Metro, while waiting for her flights, the account manager telephones Jethro and leaves a message on his answering machine, threatening legal action in Ohio if the check is not made good.

According to RAB 1999-1, Alfa Corp. would be required to register as a use-tax-collecting retailer and collect and submit use taxes on all sales to Michigan residents for twelve months, starting on the day of the second telephone call. It should be obvious that the collection agent's two unsuccessful telephone calls are not sufficient contact for due process purposes. (Or what *Quill* actually holds for that matter.)

Despite its extreme position, the Michigan Department of Treasury is not the most radical state tax advocate. The state participants in the Multistate Tax Commission (MTC) nexus guideline project probably lead the pack when it comes to stretching legal logic.⁷¹⁸ The MTC is an organization of state tax officials from the majority of U.S. States. Its purpose is to promote uniformity in state taxation.⁷¹⁹ That does not prevent it from being an advocacy body.

Quill's "bright-line" test is negative, not positive as wished by state tax authorities and *Orvis*. The Supreme Court *did not* say "sufficient Commerce Clause nexus is established by any physical contact with a state, direct or indirect, between property or associates of an out-of-state seller *unless* the contact is solely and exclusively via mail and common carrier." The Court *did* say that regardless of the extent to which an out-of-state seller has directed its activities toward a state, there is not sufficient Commerce Clause nexus if that seller's only physical contacts with the state's use-tax payers are via mail or common carrier. *Quill* only creates a safe harbor for some mail-order

ess nexus requirements, if the former is satisfied, the latter would also be satisfied. The fact that RAB 1999-1 finds Commerce Clause nexus in situations that would not satisfy due process requirements proves its misinterpretation.

718. See *supra* text accompanying notes 630-646. The draft even goes beyond the line in some instances, probably on the rationale that the court decisions which the proposals ignore are only state court decisions that are not mandatory precedent for all states. See, e.g., *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991).

719. See *Multistate Tax Commission Home Page*, at <http://www.mts.org>.

vendors. It adds very little, if anything, to understanding which other vendors may or may not have Commerce Clause nexus.⁷²⁰

C. Post-Quill Politics

Quill probably would have been only one more in a series of minor state losses if the Internet had not sprung into existence about the same time. Tax officials correctly noted that there is no legally significant difference between an out-of-state seller who receives an order by old-fashioned mail and one who receives an order by e-mail or webpage form. Responding to that, and to hype about the expansion and power of commerce via the Internet, state tax officials turned to propaganda and politics. (The Supreme Court provided advance encouragement in *Quill*.) Use-tax collection moved from a nagging problem, albeit minor and obscure, to a near-center-stage political performance cum brouhaha.⁷²¹

Both in general and before Congress and its Electronic Commerce Advisory Commission, state and local government officials have loudly and repeatedly contended that any restriction on states' ability to collect use taxes on Internet-mediated sales will have a disastrous impact.⁷²² If one mistakes the rhetoric for fact, one would believe that the federal government will soon totally control state budgets, and in a few years the states will be bankrupt, many of their schools and other educational programs closed, public transportation crippled, and other basic services stopped or severely restricted. Not only that, but most physical-reality-based retail businesses would be bankrupt—"brick and mortar" "home town" business will be a thing of the past. In their enthusiasm, state officials seem to have forgotten that the "home town business" they imply will disappear has already mostly disappeared; they have become Wal-Marts,

720. This safe harbor aspect has been recognized by at least one state court. In *Florida Dep't of Revenue v. Share Int'l, Inc.*, 667 So. 2d 226 (Fla. 1st DCA 1995), *aff'd*, 676 So. 2d 1362 (Fla. 1996) (adopting appellate court opinion), the state contended that *Quill* established a bright-line which, when crossed, automatically established Commerce Clause nexus. The court rejected that argument:

If the "bright line" is crossed and the out-of-state vendor no longer falls within the safe harbor, it must then be determined whether the vendor's activities within the state establish a substantial nexus with the taxing state such that imposing the duty to collect and remit . . . does not violate the Commerce Clause.

Id. at 230. The court held that sponsoring a yearly three-day seminar, for persons from all over the United States at which products were sold, did not establish sufficient presence to allow imposition of tax collection duties with respect to orders delivered by mail and common carrier. *Id.*

721. One might be tempted to call it a "debate," but that word implies some degree of reason is utilized, which seems to be a rare occurrence.

722. Rather than include extensive notes concerning the rhetoric, which would be marginally appropriate for an academic discussion, samples and comments (with citations) are included in Appendix B.

K-Marts, and shopping malls full of franchise stores, all of which are busy creating and promoting their own Internet Web sites (and collecting sales taxes). If one recalls that states can and do collect sales taxes from mail-order sales made by companies that have stores or distribution facilities in the buyers' state, it is easy to see why states use the "Main Street Business" "spin." It evokes the image of small rural towns with historical brick-front buildings with stores that have been operated by generations of the town's outstanding citizens. In addition, those officials conveniently overlook the fact that with an Internet Web site, a small "home town" business can compete on almost even terms with international marketers, unless tax collection costs increase Web site costs beyond the smaller businesses' budgets.

A significant portion of the "factual" basis for the hype and doom-saying comes from predictions about the growth of the Internet and Internet-mediated sales. Since the Internet is a new thing, both unpredictable and unpredictable, those "facts" must be carefully examined, particularly because a superficial examination shows most of them to be based on assumptions (some stated) and equally speculative predictions of others. Many of the relied-upon predicted "facts" are published by persons or groups having a financial interest in the directions predicted.⁷²³

Perhaps the most disturbing thing is that state officials seem to believe their own rhetoric, or are intentionally misleading by omission, or both. The rhetoric constantly and vociferously decries "lost" tax revenues, claiming amounts that are unimaginably huge for the average person, that is, tens or hundreds of billions of dollars. They always omit at least two very important facts.

The first is that the tax revenues "lost" have never before been collected, despite the fact that they have been, are, and will remain legally due and collectable from state residents. There is a significant difference between losing something and not gaining something one never had before. The states' claims are not different from those of a person who never studied for the bar exam and then complains that he "lost" \$5 million because he failed the exam.

The second omission is that the "spin" never provides any context for the stated amounts. Despite the apparently huge amounts involved, the proportion of sales and use tax revenues potentially uncollected is minuscule. One report filed with the Advisory Commission on Electronic Commerce points out that the Internet-mediated sales (and thus potential tax revenues) are 0.2% to 0.3% of total business-to-consumer sales.⁷²⁴

723. See Appendix B.

724. AARON LUKAS, CATO INST., TAX BYTES: A PRIMER ON THE TAXATION OF ELECTRONIC COMMERCE n.17 (draft version), <http://www.ecommercecommission.org/library.htm>.

Concerning mail-order retailers and use taxes, there is a strain of argument, sporadic but persistent, with an alluring “logic” that could be very dangerous. The argument is, in one disguise or another, that a particular target is so economically successful that imposing a tax collection duty on it would not be a significant burden. It has superficial appeal because the question, after all, is whether the state action places an “undue burden” on interstate commerce. The word “burden” invites matching load against ability. What may be a great burden for the average ten-year-old would be nothing for the average twenty-five-year-old body builder. That argument is inherent in the *National Bellas Hess* dissent, which starts by noting that the seller was a “large retail establishment” with \$60 million in net sales in 1961 and over \$2 million in Illinois sales during a fifteen-month period.⁷²⁵ The dollar volume of business that will be exempted by the *National Bellas Hess* decision runs through the dissent.

A similar strain runs through the North Dakota Supreme Court’s initial decision in *Quill*.⁷²⁶ It emphasizes not only *Quill*’s success, but also the success of the mail-order business in general. Success may be somewhat relevant for due process considerations, as evidence of the defendant’s purposeful direction of activities toward a state. However, the interstate business’ financial standing is not generally relevant to Commerce Clause issues. The Court’s Commerce Clause decisions require a comparison between the financial or other burden placed on interstate commerce, as compared to the burden on intrastate commerce. Economic strength is not a factor on either side.

If economic success were a factor in Commerce Clause analysis, what measure should be used? Gross income? Net income (before or after taxes)? Total assets? Return on investment? Ratio of gross sales to net income? Would the cost of compliance (however estimated) be compared to income (however calculated) and a percentage fixed at which a burden becomes “undue”? The difficulties that would be created by such an approach are obvious.

However, that is indirectly what the North Dakota court did in *Quill*. Had the North Dakota court’s decision been affirmed, it may not have been a substantial blow to *Quill*’s financial strength. But that minor legal theory known as “precedent” would take over and an untold number of other companies might have been dealt disabling financial blows. The Internet is touted as a means through which one can go into a global business with very little capital—where the little guy can compete on even terms with the big guy. That would no longer be true if every Internet Web site seller had to be prepared to

725. See *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 760-61 (1967) (Fortas, J., dissenting).

726. *State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203 (N.D. 1991), *rev’d*, 504 U.S. 298 (1992).

collect taxes for every consumption-taxing jurisdiction or face financial disaster when it became successful enough for some tax auditor to take notice, and a court, *à la Orvis*, to impose ex post facto collection obligations.

In the political debate, some proposals have been made (supported by some state officials) that actually address the problem. A significant factor in Supreme Court decisions concerning use-tax collection, especially *National Bellas Hess* and *Quill*, is the heavy burden on interstate businesses, as compared to the burden on in-state businesses, if they were required to collect use taxes on all sales. The burden comes solely from the astonishing complexity, number, and variety of state sales and use tax laws.⁷²⁷ It is not rational to expect a retailer with less than \$100s of millions in sales to be able to afford the personnel and computing power necessary to keep up with the thousands of tax rates, rules, and reports that nationwide collection duties would presently require.

It has been proposed that states embark on simplification, restricting the number of sales tax rates per state and the number of rate and rule changes per year, and establishing a national collection service that will calculate and remit taxes to states.⁷²⁸ Such proposals have been attacked by other state officials,⁷²⁹ some asserting that uniformity would somehow impinge on state sovereignty, which, ironically, is the cause of the jurisdictional restrictions against which they are struggling.

Of course, the Supreme Court has not done much to resolve issues relating to state use taxes. Changes in the application of due process and dormant Commerce Clause theories over the past sixty years have, in general, made application more uncertain rather than less.

D. State Jurisdiction and Extraterritorial Acts

In due process cases,⁷³⁰ the Court has recognized that technological, political, and social changes since the Constitution was written (or even during the past century) require some flexibility in interpreting the Constitution. It may seem illogical to apply rigid, geographically prescribed limits on state jurisdiction at a time when persons travel across and throughout the nation in a matter of hours and routinely take actions (via electronics or otherwise) that have

727. See generally II HELLERSTEIN & HELLERSTEIN, *supra* note 56. In Missouri alone, there was, in 1994, over 1000 sales-taxing jurisdictions, each of which could have a unique tax rate. See *Associated Indus. v. Lohman*, 511 U.S. 641, 644 (1994).

728. ACEC Business Caucus, *A Proposal for Internet Tax Reform and Reduction*, at <http://www.ecommercecommission.org/library.htm>; National Governors Ass'n, *Streamlined Sales Tax System for the 21st Century*, at <http://www.ecommercecommission.org/proposal.htm>.

729. See Appendix B.

730. See *supra* Part III.

some connection with a remote state or country. However, the federal system embodied in the Constitution and the theory behind that (not to mention international law principles) require that political boundaries be recognized. Contemporary theories of government prevent states from exercising governmental powers beyond their boundaries, notwithstanding wishes of government officials.

That is not detrimental to a state's individual interests. Territorial limits on a state's ability to impose its will equally protect all states from actions of other states. The reciprocity that makes the international system work also operates on the interstate level. The issues in *Quill*, and the current political posturing, involve much more than a minute portion of state tax revenues. They involve the fundamental rules that circumscribe the exercise of all government powers, not just the power to tax.

Because fundamental principles are involved, it is mandatory that the questions be precisely focused. Thus, getting past the rhetoric requires clarity concerning what the discussion really is, and is not, about:

It is not about:

- A. State sales taxes.
- B. If, when, or from whom, use taxes are due and payable.

It is about:

A. State officials' attempt to shift the burden of use-tax collection from their own shoulders to the shoulders of out-of-state sellers, from whom no tax is due.

B. Long-standing constitutional limitations (1) on government efforts to impose burdens on (take property from) persons beyond the government's geographic boundaries, and (2) on state government actions that unreasonably impinge on the national economy.

The fact that the Supreme Court has not consistently or clearly articulated the jurisdictional theory to be applied has led directly to the current political row. The clear trend over the past half-century has been toward further attenuating the connection required to satisfy due process requirements in judicial specific jurisdiction cases. Court opinions do not clearly discourage applying the same rules in tax cases. The *Quill* majority opinion does just that, though it is not obvious that was an intentional choice.⁷³¹ On their surface, use-tax

731. *Quill* also consistently identifies Quill as the taxpayer, which it is not. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, *passim* (1992). If the Court's usage indicates a conscious decision to look at some "economic reality," rather than continuing the formality applied to sales and use taxes from the beginning, it should say so. *Silas Mason* expressly declined to treat the use tax as a sales tax on an out-of-state seller. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). If the Court has changed its point of view, *Silas Mason* should be overruled, or at least disavowed.

collection actions appear to present specific judicial jurisdiction problems, that is, whether a sufficient connection between the defendant and the subject matter of the legal action exists, or more specifically, whether the defendant is connected with the nonpayment of tax. But if one looks beyond surface appearances and casual language, the actual issue is whether the state has prescriptive jurisdiction, which is a very different problem. As the connection required for judicial jurisdiction becomes even more attenuated, the need to clearly distinguish prescriptive jurisdiction rules becomes more important.

One reason that Internet-mediated activities excite controversy is because they can be made to appear to justify stretching the already tenuous judicial specific jurisdiction limitations. In large part, the attempted justification is based on a misconception (purposeful or not) of who does what in Cyberspace. As described in Part II, a Web site is, in and of itself, passive. The Web site program remains dormant until it is contacted from the outside.⁷³² On external request, the Web site program sends information to the inquirer. That is true whether the Web site is or is not "interactive." At this point, the geographic location of the inquirer is totally irrelevant. Decisions such as *Inset Systems* place the situation entirely on its head, effectively concluding that a Web site program somehow ventures out uninvited and forces itself onto the computer screen of Internet users.⁷³³ Persons who actually do that are called "spammers," "hackers," or "crackers," not Web site programs. Programs that do that are called "viruses." Connecting a computer containing Web site programs to the communication system merely makes it possible for others to contact the site, if they find the address, very much like having one's telephone number listed. The browser initiating contact with a Web site is no more intruded upon by the Web site than someone voluntarily opening a telephone "Yellow Pages" book.

Until a browser provides it, a Web site has no information about where the browser might be geographically. If that information is not necessary to the Web site's function, such as when selling and downloading digital products, there is no business reason why that information should be obtained or retained.⁷³⁴ It is likely that Internet digital-products sellers in the future will have even less opportunity to obtain information about the purchaser's location. "E-cash" is as untraceable as cash, and there is a growing sentiment favoring

732. An interesting philosophical question might be posed: Does a Web site inhabit Cyberspace, or exist anywhere, when it is not communicating with an external terminal? Of course that attributes a personality, or entity-ness, to a computer program, which is not justified given the present state of the art.

733. *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

734. Even when a credit card is used to pay, the seller may not obtain or retain information about the purchaser. See *E-Data Corp. v. Micropatent Corp.*, 989 F. Supp. 173 (D. Conn. 1997).

browsers' privacy and actively opposing the collection and retention of information by Web site operators.⁷³⁵ A product recently introduced by a Canadian company guarantees browsers' anonymity, so a Web site seller cannot know who the browser is or where she is physically located.⁷³⁶

Many of the cases which have held that the Web site owner purposefully directed its acts toward the forum state are correct, if the question is judicial specific jurisdiction. When anyone sends information (through the Internet or otherwise) to a person or company whose physical location is known, the act is intended to have some result at the destination. It cannot, however, be concluded that due process requirements are therefore automatically satisfied for use-tax collection purposes. When a browser purchases tangible products that must be physically delivered, the Web site seller is acting in the same manner as any other seller who receives orders from distant purchasers. This returns one to the problems discussed above, that is, that the use-tax collection rules are retroactive and assume the seller has information it cannot obtain with certainty. An Internet buyer, should he so desire, is equally or more capable of concealing his identity and purposes than a person making an in-person purchase.

In contemporary political/legal thought, a fundamental principle of personal jurisdiction is the subject's ability to know when he or she may be within the reach of a government's authority. That is the reason behind the "purposefully directed toward" language in the due process cases. Having notice of the rules, allows avoidance of particular jurisdictions. Even though geographical political boundaries may be easily crossed, they still give notice of which government presides over the geographic area. Because physical boundaries do not exist in Cyberspace, that notice is lacking. Without other objective and reliable boundaries, a Cyberspace user is unable to purposefully put himself within, or purposefully avoid, any particular jurisdiction.

735. On e-cash, see, for example, eCash Technologies, Inc., *eCash Global Software Solutions*, at <http://digicash.com> (last visited Mar. 31, 2001); *Editorial, E-Cash 2.0*, THE ECONOMIST, Feb. 17, 2000, <http://www.economist.com/editorial/freeforall/current/fn7284.html> (last visited Feb. 18, 2000); Mondex International, Ltd., *All About Mondex*, at <http://www.mondex.com> (last visited Mar. 31, 2001). On privacy, see, for example, Mike Brunker, *Privacy Tools Usher in an Era of Net Anonymity*, MSNBC, Dec. 14, 1999, at <http://www.msnbc.com/news/345954.asp>; *Americans for Computer Privacy*, at <http://www.computerprivacy.org> (last visited Feb. 4, 2000) (discussing encryption and federal legislation); *Electronic Privacy Information Center*, at <http://www.epic.org/privacy> (last visited Feb. 4, 2000); *Zero-Knowledge Systems [Home Page]*, at <http://zeroknowledge.com> (last visited Feb. 4, 2000). Regulators, at least in Europe, are concerned about the tracing problems posed by e-cash. See EC Working Paper, *supra* note 652, at 9; UK'S TAXATION AGENDA, *supra* note 40, at pt. 4

736. See *Zero-Knowledge Systems [Home Page]*, at <http://zeroknowledge.com> (last visited Feb. 4, 2000).

This holds equally true for passive Web sites. When a Web site responds to a request and transmits information to an Internet address, the Web site owner is unaware of the destination. Therefore, the Web site owner is not consenting to the jurisdiction of the address owner's physical political government any more than a person who is kidnapped, blindfolded, and carried across political boundaries. The basis upon which "implied consent" to jurisdiction is founded does not exist in Cyberspace.

The lack of actual or implied consent is not the only problem. Most discussions overlook a jurisdictionally significant factor: what is legally involved when states try to impose use-tax collection duties on out-of-state sellers. Those discussions (including court decisions) appear to proceed on the assumption that a use tax is imposed on the seller. Some sales taxes are technically imposed on the seller.⁷³⁷ In contrast, all use taxes are imposed on the buyer, the terminology in *Quill* notwithstanding.⁷³⁸ On the out-of-state seller, some states impose the burden of collecting the use tax the consumer might have to pay to some state. If the seller fails to collect a tax that later actually becomes due from the purchaser, the penalty is paying the amount it should have collected.⁷³⁹ Mistakenly treating a use-tax case as one to collect a tax due from the defendant might be understandable, but it is the product of, and results in, imprecise analysis. The object of a "use tax" action against an out-of-state seller is to exact a penalty for

737. A thorough review of state sales taxes is provided in HELLERSTEIN & HELLERSTEIN, *supra* note 56, at tbl. 12.1. That source indicates that in 18 states the seller is the sales-tax payer. The name used for a tax may be "retailers' occupation tax" or "gross receipts tax" or "gross sales tax," but functionally they are identical: The seller separately states, and collects from the purchaser, an amount equal to a percentage of the purchase price. It is common (regardless of name or technical incidence of the tax) to refer to them all as "sales taxes" and to admit the practical reality, which is that the consumer is aware that she or he is paying a specific amount to the government, that is not part of the item's purchase price. For reasons mentioned earlier, seller-incident sales taxes are coupled with a "use tax" just like the purchaser-incident sales taxes. *See id.*

738. The use tax can only be imposed on the consumer and still be logical. The taxable event is the "use" of goods that somehow escaped being subject to a sales tax when purchased (mail- or Internet-order purchase is not the sole possibility). If a use tax could be imposed on a transaction at the time of sale, it would be a sales tax. Only after a purchase transaction can it be determined that no sales tax has been paid to the possessor's state. By definition, the seller has no connection with the sold item's use. This distinct characteristic of use taxes was recognized in *Miller Bros. Corp. v. Maryland*, 347 U.S. 340, 343-44 (1954), when sales taxation was relatively new. However, during the ensuing 45 years, "sales and use taxes" have so frequently been identified as a unit that their fundamental differences have largely disappeared from consciousness. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992), consistently refers to the out-of-state seller as the "taxpayer."

739. It would seem that the seller would have a legal right to go back to the purchaser and collect the tax. It is unlikely that a seller would take that action in an average retail sale, however, since the cost of collecting would be greater than the tax collected. The out-of-state seller would not have the legal abilities of a state in collecting minor amounts of taxes from state residents of other states.

failing to comply with the state's regulations. If the tax was not collected, which is usually the case, the defendant-seller's bank balance is decreased based on the extent to which he failed to comply, plus penalties and other costs. But regardless of loose language, the legal issue is what the law required (or can require) the seller to *do*, not how much tax he owes.

Collecting sales taxes on in-state sales is a burden on the seller, but one to which sellers are generally resigned, one that clearly can be imposed under the state's general regulatory powers, and one that is relatively simple—one tax rate, one set of rules, one submission form. Collecting use taxes on sales to residents of other states is a different problem.⁷⁴⁰ Use taxes are payable by a state's residents but are difficult and costly for the state to collect. Through the use tax-collection rules, what states are trying to do is transfer the burden to the out-of-state sellers, *because it is not cost-effective for the state to do its own collection work*.⁷⁴¹

The cost-transferring rules are an attempt to exercise the state's general regulatory power over persons beyond the state's boundaries. In the due process context, such an exercise of prescriptive jurisdiction is indefensible. The decisions "expanding" the scope of state court judicial jurisdiction concern particular defendants in particular fact situations where the litigation specifically relates to the defendants' particular actions in or directed toward the states involved.⁷⁴² Those decisions make a clear distinction between "specific" judicial jurisdiction and "general" judicial jurisdiction.⁷⁴³ "Specific" jurisdiction looks to the particular defendant's acts and whether the alleged cause of action arises out of those acts. To base the state's authority

740. The most complicated task for in-state retailers is determining which items are taxable and which are not, which often cannot be determined logically. Use-tax collectors have the same problem, but it is complicated when states each have different rules. Any one state's taxable -vs.-nontaxable rules do not frequently change and, as the North Dakota court discussed, computerization has eased that problem. "UPC" codes and laser scanners have eliminated the need for individual judgment, and that technology is essentially universal in retail stores. Significantly, UPC codes and code readers have multiple functions that benefit the retailer's general operations, justifying the cost. But the additional computer hardware and software needed to collect use taxes would be expensive, and the only benefit would accrue to the tax collection agencies, which would bear none of the costs.

741. In *Miller Bros.*, 347 U.S. at 343, the Court recognized this: "The collection of the use tax from inhabitants is a difficult administrative problem, and if out-of-state vendors can be compelled to collect it and remit it to the taxing state, it simplifies administration [for the state tax authorities]." *Id.* at 343.

Many states allow use-tax collectors a "discount" as compensation for the administrative burden. But those same states allow an identical discount to sales-tax collectors (i.e., in-state retailers who collect only for one state). See HELLERSTEIN & HELLERSTEIN, *supra* note 56. Moreover, it is unlikely that the discounts cover the actual collection costs, particularly when any "shortage" in collection effectively reduces the discount dollar-for-dollar.

742. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

743. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

to collect a use tax, as a tax, on specific judicial jurisdiction, the question must be, "Is the use tax due because of the seller's acts?" The answer to that is, "No, the use tax is imposed on in-state use by someone other than the seller." A state legal action to make the out-of-state seller collect use taxes is not based on the sale contract but on the state's general law applicable to residents.

That is more like the province of "general" judicial jurisdiction. If one tries to apply general judicial jurisdiction rules to use-tax collection actions against nonresidents, the question is whether the actions of the defendant have been such that it has become, effectively, a resident of the state.⁷⁴⁴ Are the defendant's activities within the state sufficiently "continuous and systematic" to constitutionally justify the state's imposition of its general regulatory authority over that defendant?⁷⁴⁵ If the answer in a mail- or Internet-order situation is "yes," then there is no limit on the extent to which state regulations can be enforced against a person with less contact with the state than is required for *special* judicial jurisdiction. That the scope of general jurisdiction would become broader than the scope of "specific" jurisdiction is contrary to logic and Supreme Court decisions.⁷⁴⁶

If use-tax collection actions are treated as merely questions of judicial special jurisdiction problems, there must be a case-by-case analysis to determine the quality and nature of the defendant's acts directed toward the forum. The Internet-related due process cases discussed earlier show significant disagreement about what is sufficient. Based on the better-reasoned cases, there should be a showing that the defendant at least had the opportunity to choose not to engage in transactions with persons from the forum state. The best analyses, like the U.S. District Court for the Northern District of Alabama in *Butler v. Beer Across America*,⁷⁴⁷ treat a Web site as a relatively trivial factor and, instead, look at the actual commercial transactions connected with the state. There can be no reason-based assumption that merely connecting to the Internet, without active efforts to avoid a particular forum, is a positive choice to interact with that forum.

It is somewhat more logical to treat use-tax collection actions as judicial general jurisdiction questions. There is no legal connection between the in-state taxable event and the out-of-state seller. The seller does not cause the consumer to use any item at a particular lo-

744. See *Millennium Enter., Inc. v. Millennium Music, L.P.*, 33 F. Supp. 2d 907 (D. Ore. 1999).

745. *Helicopteros*, 466 U.S. at 415-16 (quoting *Perkins v. Banguet Consolidated Mining Co.*, 342 U.S. 437 (1952)). In *Perkins*, the defendant company's president had been carrying on all possible corporate functions from within the state of Ohio during the time that its physical facilities, in the Philippine Islands, were in the hands of hostile Japanese forces.

746. See *Millennium*, 33 F. Supp. 2d 907.

747. 83 F. Supp. 2d 1261 (N.D. Ala. 2000).

cation. Connecting the out-of-state seller to the independent in-state use is contrary to *World-Wide Volkswagen*.⁷⁴⁸ However, if the seller has a systematic, continuing association with the state, to the extent that the in-state activities are functionally equivalent to a resident's, then it is not unreasonable to subject that person or entity to all the state's laws. Imposing a legal duty on a resident is not a violation of due process, even if the duty relates to out-of-state activities. As discussed earlier, there are no cases that have found a defendant subject to judicial general jurisdiction based solely on Internet-mediated events. That does not mean it is impossible. The state-related actions of Internet-based companies like Amazon.com are only slightly different (that is, mode of physical delivery) from their reality-based in-state competitors.

Even if a particular out-of-state mail-order seller is held subject to state judicial jurisdiction, the second question (Commerce Clause) remains. Does this exercise of jurisdiction discriminate against, or impose an undue burden on, interstate commerce? Examined in the light of Commerce Clause *regulatory* cases, the answer should be "yes" to both: Use-tax collection regulations, by definition, discriminate against interstate commerce because they are imposed on out-of-state vendors. Based on cases such as *Maine v. Taylor*,⁷⁴⁹ the state would have to show that there is no other way in which it could collect the use taxes due from its own citizens, something that a state could not do. Decisions such as *Raymond Motor Transport, Inc. v. Rice*⁷⁵⁰ teach that in such situations, the proper inquiry is the potential for multiple states to impose related, but different, regulations and the burden that would impose on interstate commerce, *as compared to the burden on intrastate commerce*. Rather obviously, the burden of complying with the thousands of differing state and local collection regulations is substantially greater than complying with one state's sales tax regulations. If use-tax collection cases are treated as business-regulation enforcement actions, which they are, and then tested against Commerce Clause rules about state regulation (not taxation) of commercial activities, the collection regulations are not enforceable.

However, when the issues are clearly posed, it becomes obvious that this is not merely a Commerce Clause problem. In most, if not all, Commerce Clause cases, the state clearly has territorial jurisdiction over the defendant or its acts, for example, the defendant's

748. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

749. 477 U.S. 131 (1986) (sustaining discriminatory regulation only because there was no other means of protecting a very important state interest).

750. 434 U.S. 429 (1978) (holding regulation on length of trucks on state highways invalid because the state could not demonstrate a state benefit that outweighed the substantial burden such regulations would place on interstate commerce).

trucks drove through the state,⁷⁵¹ its trains traversed the state,⁷⁵² it brought fish into the state,⁷⁵³ it imported alcoholic beverages⁷⁵⁴ or waste⁷⁵⁵ into the state, or it otherwise engaged in some overt act within the state. The question in those cases is thus, "Given the state's jurisdiction in the matter, can it nevertheless not enforce its regulation because of the burden on, or discrimination against, interstate commerce?" In the *use-tax collection* situation, the question is whether the state has the power to impose the regulation in the *first* instance. That brings into question the scope of legislative, or prescriptive, jurisdiction, which is a due process issue, not a Commerce Clause issue.

A state does not have the power to regulate or tax nonresidents with respect to events that are completed outside the state's geographic boundaries.⁷⁵⁶ Thus, states cannot tax, or otherwise regulate, sales transactions completed in other states or countries, regardless of who the parties are.⁷⁵⁷ That is why use taxes were enacted. A use-tax obligation is triggered by a consumer's use of property in the state, regardless of the user's residence or citizenship, and regardless of where or how the property was acquired. Attempting to impose tax collection duties on nonresident sellers runs squarely into the Due Process Clause; nonresidents are not subject to state prescriptive jurisdiction without some connection to the state. The loosening of due process requirements, according to *Quill*, eliminates the due process barrier when the nonresident seller enters into a contract to sell something to, or deliver something to, a state resident.⁷⁵⁸ In due process terms, that allows the state to exercise specific judicial jurisdiction with respect to that contract or delivery, or its subject matter. However, the more difficult question remains, when a state imposes

751. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

752. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

753. See *Maine v. Taylor*, 477 U.S. 131 (1986).

754. See *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989).

755. See *Oregon Waste Management Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93 (1994).

756. See *supra* Part III.E. States can tax a resident's income earned outside the state, but that jurisdiction is based on the taxpayer's continuing association with the state, not on the acts that earned the income.

757. See *supra* Part III.E. In theory, a state could enact a consumption tax that requires residents to pay a tax whenever and wherever they spend money, which could be justified on the same basis as taxing residents whenever and wherever the residents earn income. An all-encompassing consumption tax on residents, however, would create the same administrative problems encountered concerning use taxes.

Actions based on product liability rules, commenced against an out-of-state seller, do not violate this rule if some of the resulting damages were incurred in the forum state and the defendant-seller had reason to believe that the product might be in that state. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

758. See *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992).

use-tax collection duties, what type of jurisdiction is it attempting to exercise?

It is respectfully suggested that judicial jurisdiction rules do not apply. "Specific" judicial jurisdiction theory allows a state's courts to enter a judgment against a nonresident *concerning injuries suffered in that state due to that nonresident's actions*. The legal rules applied are those of the forum. Thus, in a specific-jurisdiction-type case, the court is applying local law to a local event that is connected to an external event. Due process requires a direct connection between the nonresident and the local event. That a nonresident is involved does not change the state's ability to enforce its laws with respect to the in-state event. While the obligation to pay a use tax is internal to the taxing state, imposing tax collection obligations on nonresident sellers is not. This was recognized in *Miller Bros.*⁷⁵⁹

If judicial jurisdiction rules are applied in the use-tax collection situation, the result is always retroactive and constitutionally unfair. Liability is imposed on a nonresident because of subsequent actions taken in another state by an unrelated person, which actions the nonresident could not control nor reliably predict. Regardless of a sale's circumstances, the seller can never be certain that a particular item will become subject to any particular state's use tax. Sending an item to a state does not guarantee that the item will be taxably used there unless the state's use tax is so broad as to impose a tax whenever an item physically appears in the state, however briefly, for whatever purpose.⁷⁶⁰ The seller would be responsible for collecting (or failing to collect) the use tax of whatever state in which the ultimate consumer first uses the item. Sellers would frequently be correct if they guessed that the first use would be in the state to which an item is being shipped.⁷⁶¹ But the fact that a seller may guess correctly does not grant jurisdiction.

759. See *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954).

760. It *should* be obvious that a use tax so broad would run afoul of the Commerce Clause because it would impose a tax both on instrumentalities of interstate commerce and things moving in interstate commerce, which has been known to violate Commerce Clause restrictions for over 100 years.

761. A court might conclude that a seller could reasonably foresee use in the purchaser's state of residence. But what is reasonably foreseeable if the purchaser directs delivery to someone in a different state? Or to herself at an address different from her claimed residence address? What if the purchaser lives in New Jersey, has his credit card bills sent to New York, and directs the item shipped to himself at a Post Office box in Montana? Foreseeability alone is insufficient to support specific judicial jurisdiction. See *World-Wide Volkswagen*, 444 U.S. at 287. Logically, foreseeability also should be insufficient to support prescriptive jurisdiction. Justice Scalia's concurring opinion in *Quill* says the two are similar, not the same. See 504 U.S. at 299. Prescriptive jurisdiction usually requires more definite connections, not more tenuous ones. Would a seller be safe if she obtained an affidavit from every purchaser concerning the state in which the item(s) will be used? Or that the purchaser will pay the use tax? Probably not.

A use-tax collection duty is inherently retroactive (also known as, *ex post facto*). No use-tax obligation arises until the property is first used by a consumer. Based on current understandings of temporal physics, no tax is due until after the sale is consummated and the item has been taken from the seller's control.⁷⁶²

Regardless of verbiage and lofty theory, legislation imposing use-tax duties on nonresident sellers should be legally treated as what it is in reality and economic effect, the retroactive imposition of sales tax on out-of-state sales by a nonresident seller, which violates both the Commerce Clause and the Due Process Clause. To date the Supreme Court has not seen fit to look behind the labels, so sellers and tax officials are left with trying to make sense of the decisions.

E. *Reconciling the Unreconcilable*

If there is any way to reconcile Supreme Court decisions concerning use-tax collection duties and out-of-state sellers, it is that the seller is, at least for those limited fact situations, a "constructive" resident. In fact, that is about the only way the Court's decision in *National Geographic*⁷⁶³ makes sense. That case cannot be explained under judicial specific jurisdiction rules because the taxpayer's in-state presence was not related to either the out-of-state sale or the in-state use. If the National Geographic Society is treated as a resident, the tax collection duties can be imposed *because it is a resident*, and the state, therefore, had prescriptive jurisdiction. Similarly, the analysis in *Scripto* emphasizes the congruence between the in-state activities attributed to the defendant and the activities of a state resident.⁷⁶⁴ The Court treated *Scripto* Corporation in the same manner it would treat a resident who just happened to have its distribution warehouse in another state. The same logic can be applied, admittedly less comfortably, to *Quill*. There, the Court held that judicial specific-jurisdiction-type due process requirements were met, but that *something more* is needed to satisfy Commerce Clause requirements. The things mentioned that might satisfy the "something more" were things typical of a state resident, that is, some type of significant, long-term physical presence. If *Quill* had been a constructive North Dakota resident, there would have been no constitutional limitation on imposing use-tax collection duties, regardless of the number of other states in which it might do business, which is probably why the Court ultimately relied on *stare decisis*.

762. That might be partially ameliorated by giving the purchaser the right to a refund. But that would not help the cash flow of the seller who guessed wrong, or the customer-relations of the seller who insists on collecting use taxes that never become payable.

763. See *National Geographic Soc'y v. California*, 430 U.S. 551 (1977).

764. See *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

Even though the term was mentioned only in *Quill*, and there only briefly in a concurring opinion, in tax cases the Court has frequently indulged in considerations more appropriate to prescriptive jurisdiction than to general or specific judicial jurisdiction. If it were directly presented with the question, it is not likely that the Court would say that rules governing general jurisdiction, *à la Helicopteros*,⁷⁶⁵ would have to be satisfied to legislatively create a constructive resident for use-tax collection duties.

Even if due process requirements can be satisfied under a constructive resident theory, that does not automatically eliminate Commerce Clause requirements, as was made clear by *Quill*.⁷⁶⁶ The temptation to equate the nexus requirement in *Complete Auto* with judicial specific jurisdiction (due process) nexus is understandable because they are usually satisfied by similar actions—and the Court has rarely made the distinction.⁷⁶⁷ But outside the tax context, it is fairly obvious that regulations which are otherwise clearly within a state's jurisdiction sometimes cannot be applied, even to persons with unquestioned contact with the state, because of the undue burden that enforcement would impose on interstate commerce. The cost of complying with the complicated and inconsistent use-tax regulations of different states and localities is no less burdensome than the cost of complying with less complicated but inconsistent truck-length regulations of different states.⁷⁶⁸ Imposing additional costs on out-of-state sellers is not conceptually different from imposing additional costs on out-of-state waste producers.⁷⁶⁹

The states' rhetoric in the current political controversy about how any federal involvement in any resolution violates principles of federalism and infringes on state's rights is ludicrous. They are fighting a battle that was decisively lost long ago. The last time the federal government was precluded from acting in a way that might have a negative effect on state revenues was the day before the Constitution

765. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

766. 504 U.S. at 301-02.

767. If the tax question involves a tax on an out-of-state person, the question of prescriptive jurisdiction and judicial specific jurisdiction are effectively combined. If a state has prescriptive jurisdiction to tax a particular event, judicial specific jurisdiction is essentially automatic because of the connection between the taxpayer and the taxable event. That is why the habit of saying "sales and use taxes" (implying unity) is unfortunate; imprecise language can lead to imprecise analysis.

The *Quill* majority opinion fell into that trap. See 504 U.S. at 317. It clearly states that what North Dakota statute requires is that the out-of-state seller collect and remit use taxes imposed on North Dakota consumers. See *id.* at 302. Despite that, the opinion's language addresses the issue as if *Quill* is the taxpayer, making no distinction between the case before it and the prior cases actually involving a tax on the defendant. See *id. passim*.

768. See *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978).

769. See *Oregon Waste Management Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93 (1994).

was ratified. Any lingering doubts were well laid to rest when the Commerce Clause “affectation doctrine” was adopted.⁷⁷⁰

What additional connection is needed so that the imposition of use-tax collection duties on out-of-state sellers like *Quill* or Amazon.com does not violate Commerce Clause restrictions? To say that the Supreme Court has given little guidance is an understatement of immense proportions. The Court expressly rejected California’s “more than the slightest presence” formulation in *National Geographic*,⁷⁷¹ but it did not offer any other formulation. Neither *Quill* nor any other Supreme Court decision has quantified what is enough. While failing to offer a precise quantification is no doubt consistent with the case-by-case approach used for Due Process and Commerce Clause issues, it provides little solace to taxpayers, involuntary tax collectors, or tax authorities. The lack of guidance merely enables states to take positions that are, from a common sense point of view, outrageous; the lack of clear and precise legal rules means that, from a legal-formalist point of view, they cannot be found to violate any specific rule.

V. SUMMATION—THIS DOESN’T LOOK LIKE A KANSAS WEB

The variety, background, history, and politics of the issues currently associated with state use taxes is intriguing and sometimes astonishing. Whether one starts with the 1648 Treaty of Westphalia, or *Gibbons v. Ogden*⁷⁷² in 1824, or the Babbage Difference Engine in 1833, or the 1908 Sears, Roebuck catalog, or William Gibson’s 1984 *Neuromancer*, one inevitably has to go back and pick up other strings from other beginnings. The web of history is more complicated than the World Wide Web, and its interconnections are often less obvious. The legal portions of that history web may not have as much variety as the technological, or be quite so contrived as the political, but it is not so continuous or easily followed. One tracing the development of legal rules about constitutional restraints frequently becomes disoriented by the multiple, and often unstated, interconnections between cases. The courts cannot be faulted if they sometimes appear to have strayed or failed to leave a clear route to follow; courts are made up of people, who are influenced by their times. Judges and lawyers constantly study history (otherwise known as precedent) to find support for desired results. But how a court’s decision is written depends as much on the parties’ pleadings and contentions as it does on the weight of precedent. A court must decide the controversy before it

770. See, e.g., *United States v. Robertson*, 514 U.S. 669 (1995); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980); *Wickard v. Filburn*, 317 U.S. 111 (1942).

771. *National Geographic Soc’y V. California*, 430 U.S. 551, (1977).

772. 22 U.S. (9 Wheat.) 1 (1824).

(including its social and economic context), not a clean hypothetical situation created to demonstrate hypothetical solutions. Legal theory development does not follow a logical or preplanned route, but jumps from one “real-world” problem to the next.

Supreme Court decisions concerning states’ power over persons and events that have connections beyond state boundaries do not provide a clear, steady progression. They have also been significantly influenced by judicial interpretation of the Commerce Clause, particularly the watershed reevaluation in the 1930s. Cases presenting issues relating to state taxation of interstate commerce have come before the courts less frequently or consistently than other issues. Perhaps because of that, there appears to be a delay or hesitation in applying more recent theory to developing issues. Finding principled bases for predicting future results is rather difficult. The language of a particular decision, when compared to the language of other decisions, often provides generous room for interpretation and disagreement. That is certainly true with respect to state use taxes and electronic commerce. Therefore, going back to the most basic foundations of government authority is not only justified, it is probably required.

One foundational principle supporting the U.S. Constitution is that no government has power beyond the permission granted by the persons to be governed. Having specific geographic boundaries is a characteristic common to governments. Beyond its geographic boundaries, a government’s pronouncements may be interesting information, but they are not rules that anyone must heed. In United States legal theory, boundaries on governmental action (geographic and others) are gathered under the term “jurisdiction.” While there are different types and classifications of jurisdiction, the underlying principle is constant: A government trying to act beyond its legal authority is, and should be, as effective as a shark trying to fly to the Moon. Thus, when any question is presented concerning what a government can or should do, the first question must always be: “What are the boundaries of the government’s permission in this type of situation?”

The basic question in this discussion is the scope of state governments’ ability to require out-of-state sellers to act as those governments’ involuntary tax collection agents. The answer is that there is presently no certain answer. The ultimate answer will depend, in significant part, on how the problem is ultimately framed, that is, as a question of personal jurisdiction, or as a Commerce Clause question, or as a question of government jurisdiction.

If the question is addressed principally in due process (personal jurisdiction) terms, geographic borders will largely be ignored and the only questions will be fact questions. The preceding discussion concerning judicial specific jurisdiction demonstrates that jurisdic-

tional limitations are based on the particular defendant's acts in relation to the forum. But those limitations are few and the courts are far from agreement on the minimum acts necessary to subject a person to a distant government. Some cases indicate that merely connecting a Web site to the Internet is sufficient to support geographic jurisdiction in any forum reached by the Internet. Other cases indicate that a person may have to take undefined affirmative steps to avoid particular geographic jurisdictions. Still others hold that the person must knowingly take some act with the intent of causing some result in a particular geographic location. What any specific court might decide in any specific case is, of course, inherently unpredictable.

Thus, a prudent businessperson would act in a manner calculated to satisfy the most restrictive potential rule. If that prudent businessperson takes into account both court decisions and state tax administrators' published positions, he or she has three possible options: The first is to attempt to collect sales or use taxes on all sales to persons in the United States. At the present time, that would likely be an extremely costly, if not impossible, task. The second possible option is not to make sales to persons in the United States. That is obviously not a very good business decision if the person wishes to stay in business; a very substantial majority of potential Internet customers are in the United States.

The third possible option is not selling from a location within the United States; even if it is decided that states can enforce their use-tax collection rules throughout the United States, they will still be limited to the United States. There are places in the world that do not have consumption or transaction taxes and welcome business enterprises, especially "clean" ones like electronic sales. All things considered, it would seem that the most prudent business decision would be to move business operations out of the United States. For state tax collectors that is akin to killing the goose that laid the golden egg.⁷⁷³ It is, however, the most rational response to the positions those administrators are currently taking.

If it is decided that this is a Commerce Clause issue, as *Quill* appears to say, the resolution will depend on what Congress decides to do, if anything. The present state of affairs is less than satisfactory for all interest groups. If Congress does not act, the obscure and malleable definition of Commerce Clause "nexus" invites actions by state tax administrators similar to those discussed earlier, that is, taking

773. Not only would they "lose" previously uncollected use taxes, they would lose taxes that have actually been previously collected, like income, property, and sales taxes. Also, those losses would be multiplied by the cascading effect of persons changing their business location to avoid taxation. Those potential losses are much greater than the potential use-tax collections that might be gained.

all possible logical steps, and even a few illogical ones, to compress the scope of the *Quill* holding and to minimize what is required to establish nexus. That would have the same result as treating the question as a personal jurisdiction one; the most logical response of prudent businesspersons would be to move their Web sites out of the country. If Congress does act, it will also have to address the nexus question or the result will be the same. The current proposals for creating uniform state sales and use-tax rules with centralized administration may substantially alleviate some of the problems associated with minimal nexus requirements, but it seems highly unlikely that states will voluntarily limit their taxing powers and nearly as unlikely that Congress will impose such a solution.

If it is decided that this is a problem of fundamental state power, that is, a prescriptive jurisdiction issue, the results will probably be better, but what that might be remains uncertain. One thing, however, seems fairly certain: The scope of a state's prescriptive jurisdiction is not so broad as that of a state court's specific jurisdiction. The most consistent reading of Supreme Court cases is that prescriptive jurisdiction requires that the potential subject be acting in much the same manner as a resident, that there be a measurable, continuing business presence in the state. As electronic commerce grows and becomes more versatile, it is possible that the Supreme Court would narrow or eliminate a tangible physical presence requirement. But it seems very unlikely that the Court would eliminate the requirement for systematic and continuing participation in a particular geographic market.

Of the three potential answers, the one least likely to encourage persons to move their electronic commerce sites out of the United States is prescriptive jurisdiction. If for no other reason, that is because other countries in the world will most likely adopt similar rules. Prescriptive jurisdiction rules are not unique to the United States and have been tested in many controversies over the years. Thus a person would find it difficult to escape the reach of such rules, in or out of the United States.

Additional Considerations

There is no doubt that the issue(s) related to state taxation of Internet-mediated transactions will be resolved. There is, however, substantial uncertainty about how and when. It is rather naive to believe that the resolution will be wholly rational—politics is involved, which automatically eliminates complete rationality. Power is also involved, which means many persons and groups will be more intent on preserving and expanding their power than on reaching a rational solution. When power and wealth are at stake, long-term and universal interests are ignored for short-term and personal interests. That

much is clear in the political rhetoric surrounding State taxation of Internet-mediated sales. State tax officials are intent on not surrendering any power they think they now have, and on expanding that power as far (geographically, politically, and legally) as they possibly can; reasonable interpretation of court decisions and business operations is not nearly so important.

One thing that many of the players in the current drama seem not to understand is that the “playing field” to which they are so fond of referring is not just their own city, county, state, or nation—it is the entire world. It is incredible that those persons are not aware of their setting. They speak of the “global information infrastructure” and “Cyberspace” and Internet, but they ignore the reality behind those labels. It is possible for a city or county government to decide what rules it will adopt, but enforcing those rules will be impossible unless they are consistent with the relevant state rules. Similarly, state governments can decide what rules to adopt (via court or legislation), but enforcing those rules will be impossible unless they are consistent with national rules. Similarly again, the national government can decide what rules to adopt, which will also prove ineffective unless they are consistent with international law. Only one example should suffice. The European Union is considering legislation that would require the collection of VAT taxes on electronic sales to EU persons.⁷⁷⁴ VAT taxes in the EU vary from 12% to more than 20%, substantially more than state sales taxes. If the United States decides that states can enforce their sales and use-tax rules against out-of-state sellers, it will not be in a position to say that EU-member countries have no authority to enforce their VAT taxes on similar transactions. Of course, other countries in other parts of the world can and will follow suit. It is said that within the United States there are over 7000 jurisdictions that impose some type of consumption tax. How many thousands more will be added when an Internet seller must account to the entire world?

The playing field is also not limited to tax regulations. If a government has the legal power to impose its tax collection regulations on out-of-area persons, it can also impose other types of regulations, for example, language used (such as French in France-sited Web sites), content (such as doctrinally acceptable publications in Iran-accessible Web sites, or politically acceptable statements in PRC-accessible Web sites), aesthetics (such as no nudes in Cleveland-

774. See Edmund L. Andrews, *Europe Plans to Collect Tax on Some Internet Transactions*, N.Y. TIMES, Mar. 2, 2000, LEXIS, News Library, NYT File; EC Working Paper, *supra* note 652, at 7 (discussing many of the same problems: difficulty in determining purchaser's location, inconsistent rules, enforcement limitations, taxpayer deception, e-cash, etc.); THE UK'S TAXATION AGENDA, *supra* note 40 (mirroring the European Commission's opinion).

accessible Web sites), pornography (as defined wherever, in sites accessible from wherever), permissible products (such as no birth-control devices on Vatican-accessible Web sites), and so on. The same governmental power lies behind all adopted regulations. Until they wake up to practical reality, government officials struggling to assert and expand their power are bound to fail, ultimately if not immediately.

The practical reality is that businesses selling goods or services will stay in operation only so long as they are making a profit. Businesses will, to the extent possible, establish themselves in locations that enhance their profit potential, which usually includes lower taxes and fewer regulations. Internet-based businesses do require some physical space in some real-world location. But those requirements are minimal, an office or two. If the business does not hire a computer-operating company to "host" its Web site, then it will also need a room big enough to hold the necessary computers (which are getting smaller daily), and a high-quality connection to the electronic-communications network. Almost everyone, and certainly every government tax official, has heard of international "tax havens." It takes no imagination whatever to envision international "Internet havens."⁷⁷⁵ There are many places in the world that are capable of, and would substantially benefit from, becoming an Internet haven. Perhaps states will gain the power to force out-of-state sellers to collect use taxes, but it may well be a hollow victory when the discover they find their own businesses moving to more receptive locations. In exchange for a few more dollars in use-tax revenue, they stand to lose many more dollars in income tax revenues, and sales tax revenues, and technological development, and other areas as well.

State and local officials, and federal officials as well, who are not willing to consider the larger context will soon find that they have lost much more than a minuscule percentage of potential use tax revenues. Rational, functional regulation of Internet-mediated transactions and events can only be done on a global basis.

775. See Andrea Wilson, *E-Commerce Goes to Bermuda*, E-COMMERCE TIMES, Feb. 8, 2000, available at <http://www.sidsnet.org/archives/other-discussion/9905/0002.html> (Ms. Wilson is co-founder and Senior V.P. of First Atlantic Commerce, Ltd., which provides services to companies interested in a Bermuda address).

It takes only slightly more imagination to envision an Internet haven that does not require a physical location within any country. A not-so-large ship with generators and satellite dishes could satisfy the physical requirements. The inherent space limitations and living conditions may limit the number of operations that would go to that extent to avoid regulation, but the possibility remains.

APPENDIX A: INFORMAL DEFINITIONS OF INTERNET-RELATED WORDS AND WORD USAGES

ACCESS: (used as a verb) The act of connecting one's computer to the *Web* as a whole or to individual *Web sites*.

BROWSER: (a) A computer user employing a "browser" program to explore and/or manipulate information available through the *Web*; (b) A computer program for use in individual computers that enables the user to access the *Web* and *Web sites*.

DOMAIN NAME: A form of *Web address* that is commonly used to access a *Web site*. The *Web* includes a directory that matches domain names with technical addresses. A *browser* (person and program) generally uses the domain name, but the *GII* uses the *IP address*. A company's or individual's domain name frequently includes the site owner's name or some variation on it. The assignment and ownership of domain names have created a number of controversies, all of which are beyond the scope of this article.

DOWNLOAD: The act or operation of copying a computer program from one computer to another via the *GII*. The actor requests or directs that digital information be transmitted from the remote computer to the actor's computer. The program at the source computer is not altered or removed. The copy at the receiving computer may be stored temporarily or permanently. "Download" is generally used to indicate a purposeful copying intended to allow the downloader to use the program in the future. Any information that can be converted to digital format can be transmitted through the *GII* and Internet via downloading or *uploading*.

GLOBAL INFORMATION INFRASTRUCTURE or *GII*: The electronic communications system (telephone wires, optical cables, switching systems, and so on), including both the tangible ("hardware") and the intangible ("software") components that enable electronic communication throughout, and beyond, the Earth.

HOST or SERVER: A computer which contains a *Web-site* program or related information. A *browser*-program enables the *browser*-person to view the information contained in the host-contained *Web site*. Depending on the programming of the *Web-site* program, a *browser* may be able to *upload* or *download* information, from e-mail to complete, digitalized movies and sophisticated programs.

HTML: The common computer programming language or protocol that enables different computers at different locations to communicate with each other. The development of HTML ("hyper-text mark-up language") is what made the *World Wide Web* possible and popular.

HYPertext: A part of a *Web site* (text or graphic) containing concealed programming code that, when triggered, causes the local computer to display a different part of the current *Web page* or directs the remote computer to *download* a different *Web page*, which the local computer then displays.

INFORMATION PACKET or PACKET: Units of information packaged by the Internet protocol for transmission. The Internet protocol divides each communication into a number of small parts, each with instructions concerning where the information is being sent. The packets are re-assembled into a complete communication by the destination computer. Each packet may journey by a different route, and the packets comprising a given communication may arrive in a different sequence than that in which they were sent.

INTERNET SERVICE PROVIDER or ISP: A computer owner and/or operator that mediates access to the *Web*. An individual *browser* first connects to an ISP, which in turn connects the *browser* through the communications system with the *Web*. The browsing individual's computer becomes part of the *Web*, but without a *Website* program and address, that computer cannot be contacted by other *browsers*.

IP ADDRESS: The technical address of a *Web site*: a series of numbers and periods, much like a telephone number, but more elaborate. The *Web* includes a directory that matches *domain names* with IP addresses. The *GII* employs IP addresses in essentially the same manner it employs telephone numbers, that is, to establish a connection between communicating locations.

ONLINE SERVICE PROVIDER or OSP: A company which has computers connected to the *GII* that contain information developed by that company and available to subscribers. These companies started before the *Web* and *browser*-programs developed, but they have since been absorbed into the *Web*. The most well-known OSPs are Prodigy? and AOL? .

ROUTER: A computer that is part of the *GII* and mediates the physical route that a given communication takes from one location to another; one of the "traffic signals" and flow controllers of the *GII*, and therefore the *Web*. The router functions independently of the *browser*, who is indifferent to the number or location of routers, except to the extent that the location or number might slow or delay communications.

SURFER or SURFING: A popular term for what a *browser*-person is, or is doing, while using the *Web*. It sometimes implies that the activity is somewhat random, with the *browser* following one link to another with no specific goal in mind.

UPLOAD: The act or operation of copying a computer program from one computer to another via the *GII*, and the functional opposite of *download*. To upload, the actor requests or directs that digital information be transmitted from the actor's computer to a remote computer.

VISIT: To contact, as a *browser*, a remote *server*-computer and directs that computer to *download Web-site* information. This term causes conceptual confusion because the "visiting" *browser*-person does not "go" anywhere. In fact, the opposite occurs; the information from the *server* comes to the *browser's* computer. It is possible for a person to manipulate (change) the information on a remote computer, but this is usually not done via the *World Wide Web*.

WEB, THE (a/k/a WORLD WIDE WEB): That portion of the communications infrastructure, plus the computers attached to it, that uses a standard programming language/protocol that can be manipulated by a *browser* program. It is not a location or system separate from other communications systems. The information contained in computers connected to the *Web* is the apparent substance of the *Web*. It utilizes the *GII*, but the latter name has not gained popular use. Most persons would not think there is any difference between the *Web* and the *GII*.

WEB PAGE: A portion of a *Web site* that is transmitted as a unit but may fill more than one computer screen; *Web site* programs normally transmit one page at a time. A *Web site* may contain more than one page; multiple pages are connected by *hyperlinks* that allow a *browser* to "move" from one page to another, or to different locations on a single page. The page that is communicated first when a *browser* reaches a particular address is normally called that site's "home page."

APPENDIX B: RHETORIC FLOURISHES

The political/lobbying/sound-bite campaign mentioned in the main text often seems to be coming from a reality as separate as Cyberspace or Carlos Castaneda's. It is, however, a product of that popular pastime called "spin doctoring," which is a euphemism for consciously calculated misinformation by omission, implication, innuendo, misdirection, and (frequently) distortion. This sort of manipulation is fashionable and is apparently considered ethical except when a U.S. President makes statements about personal affairs. The examples included here are not meant to be exhaustive, but they are representative.

National League of Cities

The National League of Cities (NLC) says it represents over 18,000 cities and towns of all sizes and its mission is to promote cities as "centers of opportunity, leadership, and governance." In August 1999, the NLC published a booklet it called *High Stakes in Cyberspace: Ensuring Tax Fairness in the Electronic Marketplace*.⁷⁷⁶ The booklet was apparently distributed to "local leaders" nationwide. Among other things, a chart says that (as of that date) municipal sales tax revenues "sacrificed from non-taxation of Internet purchases" would be about \$500 million by the end of 1999, \$1000 million by 2002, and \$1226 million by 2003.⁷⁷⁷ The chart does not say if those figures are cumulative or annual; one suspects the former though the latter is implied. The projection data is from Forrester Research (see below). The entire booklet is a well-"spun" incitement to advocacy, but an advocacy camouflaged to appear spontaneous and "grass roots." Interesting things include:

(1) It says that consumers "were expected" (apparently by Forrester) to spend \$13 billion in 1998.⁷⁷⁸ The booklet was published in 1999, after real figures were available, but the actual numbers are not mentioned. The U.S. Commerce Department reported in March 2000 that consumers spent \$5.3 billion via Internet in the Christmas-shopping quarter of 1999, about 0.64% of total consumer spending in the period.⁷⁷⁹ Conventional wisdom is that significantly more than half of consumers' discretionary spending is done in the Christmas-shopping quarter.

776. <http://www.nlc.org/ecommm.pdf> (visited and downloaded Feb. 5, 2000).

777. *Id.* at 1.

778. *Id.* at 11.

779. See Doug Brown, *States Discuss the Internet Tax Pact*, INTER@CTIVE WEEK, Mar. 8, 2000, <http://www.zdnet.com/intweek/stories/news/0,4164,2457905,00.html> (visited Mar. 16, 2000).

(2) It also says business-to-business commerce is projected to grow to \$1.3 trillion by 2003.⁷⁸⁰ It does not say that almost all of those sales are not subject to sales or use taxes.

(3) Based on predictions by Jupiter Communications (in the same business as Forrester), it says “mouse clickers” will eclipse catalog buyers “within a decade.”⁷⁸¹ It does not mention that the switch will have no effect on use-taxes collections since states also cannot force catalog sellers to collect use taxes.

(4) Its “sector by sector” business-to-business sales forecast (source: Forrester) projects the greatest ratio of Internet sales to total sales will be in computers and electronics (only some of those might be taxable); the other high-range categories are not taxed or covered by other means (for example, vehicle sales), the lower range categories are ones that may include a larger portion of taxable sales.⁷⁸² Despite the huge total Internet-mediated sales predicted, the bottom line indicates that only 9.4% of total sales will be Internet-mediated. The total taxable sales would be an even lower percentage.

(5) The final pages are “sample Op-Ed” articles to which recipients are invited to add their personal “by line” and submit to local news papers.⁷⁸³

(6) In numerous places throughout the booklet, the NLC takes the position that only Congress can solve the problems and thus urges recipients to contact federal officials. Other groups, including the National Governors Association, on the other hand, are contending that congressional involvement in the solution would be a violation of the Constitution and States’ rights and undermine the federal character of the nation.

National Governors Association

The National Governors Association (NGA), in a publication generally supporting simplification of the state-sales-tax quagmire, states:

Myth: States’ ability to fund essential public services like education, law enforcement, and transportation infrastructure will not be affected by creating a tax loophole for electronic commerce.

FACT: More than 40% of state revenues come from sales taxes. States and local governments could lose more than \$10 billion per year by 2003 in uncollected sales tax revenues on Internet and mail-order sales. Not only that, but more than 40% of state spending goes towards education, law enforcement, and transportation. If this problem is not addressed, America would have 200,000

780. See *id.*

781. *Id.*

782. See *id.* at 12.

783. See *id.* at 13-16.

fewer teachers and police officers educating out children and keeping our communities safe.⁷⁸⁴

One rather obvious comment: No one is proposing a “tax loophole” for electronic commerce. The taxpayers who are not paying the tax are the governors’ voting constituents, not the nonvoting out-of-state sellers. Yet somehow, a constitutional limitation on state action has apparently become a tax loophole. There is no indication who made the \$10 billion-per-year loss prediction.

Interestingly, a few lines before the above quotation, the publication praised the governors (themselves) for cutting state taxes by over \$20 billion in the preceding five years. A little math shows the governors could have lessened their politically motivated tax cuts by one-half and completely eliminated the projected “shortfall.” One might ask who received the benefit of the tax cuts, and not be surprised if the beneficiaries were a more select group than the group that is not paying the use taxes they owe.

Forrester Research and Other Prognosticators

State rhetoric generally uses specific figures, asserting that large volumes of sales *will be* made via Internet (not “might” be or are “predicted” to be). Most of those figures come from predictions made by Forrester Research, whose name makes it sound like a scientific, objective organization, and which makes an effort to appear that way. In addition to publishing its prognostications, Forrester Research is in the business of assisting companies in opening and operating Internet-mediated businesses. Its Web site states, among other things: “Whether you’re developing your ebusiness strategy or re-assessing your corporate web site, Forrester’s Advisory Services can offer you guidance.”⁷⁸⁵ High-numbers predictions about how many businesses, and how much business, will be generated via the Internet enhance Forrester’s business opportunities; one should expect that Forrester’s predictions will be the highest that it can “justify,” however thinly. Perhaps state officials have not questioned the numbers, because high numbers make the states’ position appear to have a rational basis. It should be no surprise that Forrester has joined the fray on the side of the states, even if at the same time it is somewhat tarnishing its assumed image of objective research.⁷⁸⁶ Forrester’s February 2000 release saying that online sales should be taxed

784. NATIONAL GOVERNORS ASS’N, SALES TAXES AND THE INTERNET—MYTHS AND FACTS (1999), <http://www.nga.org/Internet/Facts.asp> (downloaded Dec. 5, 1999).

785. <http://www.forrester.com/ER/Products/Advisory/0,1525,1,FF.html> (visited Apr. 10, 2000). It is unlikely that the guidance is gratis.

786. See Chet Dembeck, *Forrester: Online Sales Should and Will Be Taxed*, E-COMMERCE TIMES, Feb. 17, 2000, <http://www.ecommercetimes.com/news/articles2000/000217-6.shtml> (downloaded Feb. 18, 2000).

claimed \$535 million in sales tax was “lost” in 1999, which exceeds its mid-1998 projections of about \$200 million by year-end 1999.⁷⁸⁷ One article resulting from Forrester’s announcement notes: “Though it usually bills itself as an unbiased third-party research firm” Forrester publicly supports imposing sales (and maybe use) taxes on Internet-mediated sales. Forrester is quoted as saying: “New technology will enable companies to easily collect taxes across multiple locations.”⁷⁸⁸ Of course, those businesses will need advice and assistance to implement those programs as part of their then-more-complicated Web sites, as will the “trusted third parties” who would be intermediaries in the NGA’s proposal.⁷⁸⁹

The second “research” source cited by State and local tax officials is Jupiter Communications, which bills itself as “the worldwide authority on Internet commerce,” which “provides its business-to-business and business-to-customer clients with comprehensive views of industry trends, accurate forecasts and today’s best practices, all backed by proprietary data.”⁷⁹⁰ As more and more businesses become interested in Internet-based operations, and as the potential benefits and costs of those operations increase, Jupiter will have a larger potential client base.

On the other hand, studies sponsored by opposing factions, such as those published by Ernst & Young,⁷⁹¹ tend to predict lower growth, particularly in the field of commerce that would produce use-tax revenues. The variance between predictions makes all of them suspect. The author has been unable to make any detailed comparison of the bases used by the predictors, because while Ernst & Young’s free publications clearly state their bases and assumptions, the Forrester studies are priced far beyond the author’s budget.

The importance of having some information on the assumptions and details of these predictions is underscored by a report issued by the U.S. Commerce Department.⁷⁹² Appendix Five to that report discusses e-commerce sales of retail goods, the principal target of use tax collectors. In the endnotes is a table showing various organiza-

787. See Mary Hillebrand, *Report: \$525M in E-tail Sales Tax Not Collected in 1999*, E-COMMERCE TIMES, Feb. 25, 2000, <http://www.ecommercetimes.com/news/articles2000/00022-5.shtml> (downloaded Feb. 27, 2000).

788. *Id.*

789. See NATIONAL GOVERNORS ASS’N, *STREAMLINED SALES TAX SYSTEM FOR THE 21ST CENTURY* (1999), <http://www.nga.org/Internet/Proposal.asp> (downloaded Dec. 4, 1999).

790. Jupiter Communications, *Analysis, Insight, Success*, http://jup.com/company/company_profile.jsp (visited Apr. 10, 2000).

791. Robert J. Cline & Thomas S. Neubig, Ernst & Young, *The Sky Is Not Falling: Why State and Local Revenues Were Not Impacted by the Internet in 1998* (Jun. 1999), available at <http://www.ey.com> (downloaded Sept. 21, 1999).

792. See U.S. DEP’T OF COMMERCE, *SECRETARIAT ON ELECTRONIC COMMERCE, THE EMERGING DIGITAL ECONOMY* (1999), <http://www.ecommerce.gov> (downloaded Sept. 1999).

tions' predictions for those sales.⁷⁹³ The Commerce Department thought it necessary to provide a list of the goods included in the three companies' estimates. There is a significant difference between the goods categories included in the different estimates, making any comparison illogical. Interestingly, it is there noted that Forrester (whose predictions are used) "normally includes travel in its overall retail spending estimates."⁷⁹⁴ In this particular set of predictions, that was not included. But International Data Corporation's predictions (also included) did include travel spending. IDC's prediction for 2000 of \$37 billion contrasts sharply with Forrester's \$7.3 billion prediction. Travel services are generally not subject to sales tax. One wonders if the Forrester figures so often cited by tax authorities are from one of Forrester's "normal" estimates, 80% or more of which could be untaxable travel services.

Federal Legislation as Violating the Constitution

The National Governors' Association's Web site contains at least one release that takes the position that legislation introduced in Congress "violate[s] the Constitution by stripping the states of the power to decide what happens entirely within their own borders," and that "[Congressman] Kasich's and [Senator] McCain's proposals are clearly unconstitutional."⁷⁹⁵ One will look a long time to find a provision in the Constitution that says Congress cannot pass legislation that has some effect within the states. That is why the article quotes from a Supreme Court decision (*McCulloch v. Maryland*⁷⁹⁶) in support of the statement that taxing is a fundamental power of states. Perhaps the Web site's author should read the entire cited opinion, and quite a few others by the Supreme Court, all of which say that the Federal Government can enforce rules that limit states' "fundamental" powers.⁷⁹⁷ The power to tax may be a fundamental feature of government, but the Constitution delegates to Congress power to regulate various things, including "[c]ommerce . . . among the states;"⁷⁹⁸ it also provides that laws adopted by the Federal Government (within the limits of the authority delegated) is the "su-

793. *Id.* at app. 5 A5-18 n.10 (Retail Sales of Tangible Goods: Analysis and Case Studies).

794. *Id.*

795. NATIONAL GOVERNORS ASS'N, HOW ARE WASHINGTON POLITICIANS TRYING TO VIOLATE THE CONSTITUTION?, at <http://www.nga.org/Internet/Federal.asp> (visited Apr. 10, 2000).

796. 17 U.S. (4 Wheat) 316 (1819).

797. See, e.g., *id.* at 326-27 (explaining that governments have fundamental powers, and when the state and the federal government powers collide, the state must surrender to the federal government).

798. U.S. CONST. art. I, § 8, cl. 3.

preme law of the land.”⁷⁹⁹ Which means that the Constitution authorizes the legislation the governors say would violate the Constitution. Perhaps the substance of the bills under attack is not wise, but unfortunately (perhaps), the Constitution does not allow only wise legislation. Ironically, it is a Supreme Court decision that says the states cannot do what they want in this arena.

On “Discrimination” Against “Main Street” Business

A common theme of state officials and parties who support them is that “exempting” Internet-mediated sales from sales taxes “discriminates” against “Main Street” business.⁸⁰⁰ There are a number of spin items in those statements. One of the more important (because it is almost subliminal) is that the complaints are aired in a manner calculated to invoke a mental picture of a small town’s main street lined with brick-facade buildings and retail stores that have been run by generations of the town’s leading families. That is not where the states’ sales tax revenues are produced; such retailers probably produce a very small percentage of those revenues. The bulk of the revenue comes from stores like Wal-Mart, K-Mart, and mall-based franchise and department stores, most of whom are setting up their own online sites. The second fallacy in the argument is that the Internet sales are subject to different rules, which they obviously are not. Sales or use tax is owed on Internet-mediated sales. To the extent use taxes are not collected, it is because the state-resident purchasers are not paying the legally owed taxes.

Discriminating Against the Poor

A relatively new wrinkle is that the “exemption” of Internet-mediated sales from sales tax discriminates against lower income families. That is supported by somewhat reliable statistics showing that persons with lower incomes tend to own fewer personal computers. (One wonders how many thousands in research dollars were spent to reach that less-than-surprising conclusion.) Thus, the spin goes, lower income people cannot take advantage of the “exemption.”⁸⁰¹ The statistics do not show the proportion of low-income persons that can or do access the Internet through computers at work or at the local public library. The spin does not mention that politicians have pledged to lessen the “digital divide” by spending a lot of money

799. *McCulloch*, 17 U.S. (4 Wheat) at 165 (“The [federal] constitution . . . declares, that the constitution itself, . . . shall be the supreme law of the land . . .”).

800. See, e.g., NATIONAL GOVERNORS ASS’N, HOW ARE WASHINGTON POLITICIANS TRYING TO VIOLATE THE CONSTITUTION?, at <http://www.nga.org/Internet/Federal.asp> (visited Apr. 10, 2000). In this publication, legislation introduced in Congress is blamed for the discrimination. In other locations, other things are blamed, frequently the *Quill* decision.

801. See *id.*

to make computers more accessible to those who cannot afford their own.

On the Continuation of the Mail-Order Fight

The National Governors' Association Web site, in describing its sales tax simplification proposal, states that the issue results from the Supreme Court decisions in *Bellas Hess* and *Quill*.⁸⁰² Those two decisions concerned out-of-state mail-order sales, and the NGA makes a clear link between those and Internet-mediated sales. As the text demonstrates, states have been trying to force out-of-state sellers to collect use taxes for sixty years, with some success. Yet they have consistently failed when out-of-state sellers have no significant activities or properties in the state, that is, catalog sellers. The tax collectors' arguments have not changed; they have simply substituted "Internet" for "mail-order." What *has* changed is the number of dollars predicted to go uncollected. Those predictions have persuaded states to make higher profile efforts—and spend money—to obtain a change in the applicable law. Perhaps they should spend the time and effort to educate the real taxpayers and enforce those taxpayer's obligations. A few states have lines on their individual income tax returns on which the taxpayer is supposed to enter the use tax due for purchases during the preceding year. One wonders how often any attempt is made to audit that portion of an individual's return.

On a "Level Playing Field"

Everyone involved in the political rhetoric states that "a level playing field" is all they want. Another nice mental picture is invoked, but—How many major league pitchers would really like to have a level playing field? It is another spin. What a level playing field would look like is as subjective as "what justice is." Perhaps the remark is being made with tongue in cheek, but the Advisory Commission "Business Caucus" called the states' bluff on this "argument": There is more than one way to level the field.

The Business Caucus proposal included a suggestion that the non-Internet sale of products also sold in digital form (computer programs, books, video, audio, and so on) be exempt from sales taxes. Rather obviously, if both types of sales are exempt from tax they are just as equal as if they were both subject to tax. That, of course, is not the level that the tax authorities want.

802. NATIONAL GOVERNORS ASS'N, SALES TAX SIMPLIFICATION: THE ISSUE, at <http://www.nga.org/106Congress/SalesTax.asp> (visited Apr. 11, 2000).