Nexus on the Net: A Taxing Question

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INTRODUCTION

The art of taxation consists in so plucking the goose as to get the most feather with the least hissing.¹

With increasing financial obligations, States are eager to develop new sources of revenue.² Ever inviting is the broadening of the landscape of taxable transactions to include those transactions extending beyond the State's physical borders. Although States have had varied success in their efforts, Constitutional restraints have continuously briddled their attempts to cover out-of-state vendors with the blanket of State taxation.

This comment analyzes the taxation of sales made by out-of-state vendors over the Internet to residents of the taxing State. The question presented is whether a State may require an out-of-state vendor to collect and remit a use tax on sales made to residents of the taxing State based solely on the presence of a Web site accessible from within the taxing State.³ Although this issue bears a resemblance to the complexities inherent in the taxation of the mail-order industry, Internet sales advance new uncertainties.⁴ It is the position of the author that presently, States may not constitutionally tax sales made by out-of-state vendors over the Internet based solely on the presence of a Web site accessible from

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2. See R. Scot Grierson, Internet Symposium: Legal Potholes Along the Information Superhighway, 16 Loy. L.A. Ent. L.J. 541, 572 (1996) ("Internet Symposium") (recognizing that a fundamental purpose behind States striving to impose use tax collection and remittance duties upon out-of-state vendors which make sales over the Internet is the imposition of "unfunded [federal] mandates"). As of 1996, states and local governments generated approximately $200 billion annually in sales and use taxes; 35% of their revenue-generating potential. Id. at 573.
3. See National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 555 (1977) (recognizing that "not every out-of-state seller may constitutionally be made liable for payment of [a] use tax on merchandise sold to purchasers in the [taxing] State").
4. See Karl A. Frieden & Michael E. Porter, The Taxation of Cyberspace: State Tax Issues Related to the Internet and Electronic Commercer, 11 States Tax Notes 1363, 1376 (1996) (recognizing that the "sales and use tax issues that arise as a result of electronic catalogs or electronic advertisements are familiar ones").
within the taxing State.

Part I of this comment provides a summary of sales and use taxes, and concludes with an overview of the Internet. Part II describes the relevant case law applicable to the taxation of mail-order sales and the assertion of personal jurisdiction over an out-of-state party due to the maintenance of a Web site. Part III analyzes whether a State may require an out-of-state vendor to collect and remit a use tax on sales made to residents of the taxing State based solely on the presence of a Web site accessible from within the taxing State. Part IV presents a concise conclusion.

I. HISTORY

A. Sales and Use Taxes

A "sales tax" is a tax imposed upon the sale of tangible property and enumerated services within a State. A "use tax," by distinction, is a tax imposed on the "use, consumption, or storage of tangible property within a State." Use taxes serve two primary functions: (1) to protect a State's sales tax revenue; and (2) to protect...
in-state merchants "against out-of-state competition."

Because States impose a use tax only upon items imported into the taxing State, enforcement of a use tax poses significant challenges for the taxing authority. Ordinarily, the taxing authority must rely on the in-state purchaser to remit the appropriate use tax when goods are imported into the taxing State. Due to the administrative burden imposed upon the taxing State in assuring compliance by the in-state purchaser, States impose the collection duty upon the out-of-state vendor.

of using property within the taxing State, which would have been subject to a sales tax had it been purchased within the State." PAU L JAMES HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 162 (1953).

8. Miller Bros., 347 U.S. at 343. As a device to protect in-state merchants from out-of-state vendors in States which do not impose a sales tax, use taxes have the "same effect as a protective tariff becoming due not on purchase of the goods but at the moment of bringing them into the taxing states." Id.

9. Id.

10. See National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 555 (1977) (recognizing that by requiring the out-of-state vendor to collect and remit the use tax, "in economic consequence, it is identical with making [the vendor] pay a sales tax"). Pennsylvania attempts to impose upon out-of-state vendors such a collection duty in 72 Pa. Cons. Stat. § 7237(b). Section 7237(b) provides:

(1) Every person maintaining a place of business in this Commonwealth and selling or leasing tangible personal property or services . . . the sale or use of which is subject to tax shall collect the tax from the purchaser or lessee at the time of making the sale or lease, and shall remit the tax to the department.

(2) Any person required under this article to collect tax from another person, who shall fail to collect the proper amount of such tax, shall be liable for the full amount of the tax which he should have collected.

72 PA. CONS. STAT. ANN. § 7237(b) (West 1990). Section 7201(b) defines the phrase "maintaining a place of business" as that phrase is used in section 7237(b). Section 7201(b) provides:

(1) Having or maintaining within this Commonwealth, directly or by a subsidiary, an office, distribution house, sales house, warehouse, service enterprise or other place of business, or any agent of general or restricted authority irrespective of whether the place of business or agent is located here permanently or temporarily or whether the person or subsidiary maintaining such place of business or agent is authorized to do business within the Commonwealth; or

(2) The engaging in any activity as a business within this Commonwealth by any person, directly or by a subsidiary, in connection with the lease, sale or delivery of tangible personal property or the performance of services thereon for use, storage or consumption or in connection with the sale or delivery for use of the services described in subclauses (11) through (18) of clause (k) of this section, including, but not limited to, having, maintaining or using any office, distribution house, sales house, warehouse or other place of business, any stock of goods or any solicitor, salesman, agent or representative under its authority, at its direction or with its permission, regardless of whether the person or subsidiary is authorized to do business in this Commonwealth.

(3) Regularly or substantially soliciting orders within this Commonwealth in connection with the lease, sale or delivery of tangible personal property to or the
B. The Internet

The Internet has been defined as a "network of networks."\textsuperscript{11} It comprises a myriad of interconnected networks.\textsuperscript{12} As of the end of 1996, commentators estimated that approximately forty million people utilized the Internet, with the potential to exceed 200,000,000 by the turn of the century.\textsuperscript{13} Considering the current growth rate of Internet use, it is expected that the entire global population will have access to the Internet by the year 2004.\textsuperscript{14} With performance thereon of services or in connection with the sale or delivery of the services described in subclauses (11) through (18) of clause (k) of this section for residents of this Commonwealth by means of catalogues or other advertising, whether such orders are accepted within or without this Commonwealth.

(4) The term "maintaining a place of business in this Commonwealth" shall not include:

(i) Owning or leasing of tangible or intangible property by a person who has contracted with an unaffiliated commercial printer for printing, provided that:

(A) the property is for use by the commercial printer; and

(B) the property is located at the Pennsylvania premises of the commercial printer.

(ii) Visits by a person's employees or agents to the premises in this Commonwealth of an unaffiliated commercial printer with whom the person has contracted for printing in connection with said contract.


11. American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996), aff'd., 117 S. Ct. 2329 (1997). A "network" is defined as a group of connected computers. ACLU, 929 F. Supp. at 830. The Internet may be analyzed on several different levels. Daniel A. Tauber and Brenda Kienane have written:

At its most basic level, you can think of the Internet as a vast collection of even vaster libraries of information, all available on-line for you to look at or retrieve and use. At another level, the Internet might be thought of as the computers that store the information and the networks that allow you to access the information on the computers. And finally (lest we forget who made the Internet what it is today), it is a collection of people — people who act as resources themselves, willing to share their knowledge with the world.

12. ACLU, 929 F. Supp. at 831. The connections between the various networks allow each computer in the network to communicate with computers in that network or any other network. \textit{Id.} In this sense, the Internet is similar to a highway. TAUBER, supra note 11, at 7. "High-speed data paths, called \textit{backbones}, connect the major networks; these actually do function much like an electronic version of the interstate highways. Through lower-speed \textit{links}, local networks tie in to the Internet, much as city streets feed onto highways." \textit{Id.} (emphasis in original).

13. ACLU, 929 F. Supp. at 831. The court in \textit{ACLU} noted that from 1981 to 1996, the number of computers connected to the Internet increased from 300 to an astounding 9,400,000. \textit{Id.}

14. Tauber, supra note 11, at 12.
such growth, the Internet has become an international phenomenon.\textsuperscript{15}

Two methods commonly employed to access the Internet are: (1) the use of a computer directly linked to a network linked to the Internet; and (2) the use of a personal computer and a “modem” to connect to a computer linked to the Internet.\textsuperscript{16} Personal computer users commonly access the Internet through a national “commercial on-line service.”\textsuperscript{17} Commercial on-line services provide the user with a nationwide network that permits the user to access the Internet by dialing a local telephone number.\textsuperscript{18} As of 1996, approximately 12,000,000 people subscribed to commercial on-line services.\textsuperscript{19}

Information exchange is the essence of the Internet. Information may be exchanged over the Internet in numerous ways, most commonly through “remote information retrieval.”\textsuperscript{20} Moreover, users

\textsuperscript{15} ACLU, 929 F. Supp. at 831. The Internet is not governed by an exclusive entity. \textit{Id.} at 832. The ACLU court noted that the Internet

\textit{[E]xists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers (which in turn exchange communications with still other computers). . . . there is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed over the Internet.}

\textit{Id.}

\textsuperscript{16} \textit{Id.} By using a modem, a remote computer is able to utilize the phone lines in order to communicate with a computer that is connected to the Internet. DANIEL P. DERN, THE INTERNET GUIDE FOR NEW USERS 5 (1994). A “modem” converts the electrical signals that computers utilize in communicating into tones that may be transmitted over telephone lines. \textit{Id.}

\textsuperscript{17} ACLU, 929 F. Supp. at 832. One must distinguish between “commercial on-line services” and “Internet service providers.” Traditionally, the difference between the two has been that commercial on-line services provide “their own selected and specially developed content to their subscribers- perhaps including Internet access as one of the services they provide.” TAUBER, \textit{supra} note 11, at 322. Some of the most popular commercial on-line services are Microsoft Network, Prodigy, CompuServe and America On-line. ACLU, 929 F. Supp. at 833. “Before the Internet became a viable option, these and other services were the primary destination of the modem user who wanted to tap into extensive text databases, retrieve stock quotes, make computerized airline reservations, or join worldwide discussion groups.” PAUL GILSTER, THE NEW INTERNET NAVIGATOR 78 (1995). Although Internet service providers enable users to access the Internet, they do not provide content. \textit{Id.}

\textsuperscript{18} ACLU, 929 F. Supp. at 833. “CompuServe, for example, manages its huge user base through a centralized set of computers. When you call in to local telephone numbers around the world to gain access to the system, you are connecting ultimately to a centralized set of resources.” GILSTER, \textit{supra} note 17, at 22.

\textsuperscript{19} ACLU, 929 F. Supp. at 833.

\textsuperscript{20} \textit{Id.} at 834. The most widely recognized methods of information exchange include: “(1) one-to-one messaging (such as "e-mail"), (2) one-to-many messaging (such as "listserv"),
typically conduct remote information retrieval via the "World Wide Web" ("Web").21

The Web is designed to allow people and organizations throughout the world to communicate by use of shared information.22 After information has been “published”23 on the Web, users may utilize numerous systems to search the many Web sites.24

(3) distributed message databases (such as "USENET newsgroups"), (4) real time communication (such as "Internet Relay Chat"), (5) real time remote computer utilization (such as "telenet"), (6) and remote information retrieval (such as “ftp,” “gopher,” and the "World Wide Web"). Id. “Remote information retrieval” is defined as “the search for and retrieval of information located on remote computers.” Id. at 835.

21. Id. at 836. The Web, which is presently the “most advanced information system developed on the Internet,” consists of a series of documents stored in numerous computers. Id. The Web permits users to “use the network in an intuitive, logical environment.” Gilster, supra note 17, at 461. As of 1995, approximately 30,000 Web sites were accessible, with a monthly increase of twenty per cent. Id. at 20. Although the information on the Web is stored in computers located throughout the world, “the fact that each of these computers is connected to the Internet through [World Wide Web] protocols allows all of the information to become part of a single body of knowledge.” ACLU, 929 F. Supp. at 836.

22. ACLU, 929 F. Supp. at 836. The Web utilizes a formatting language called hypertext markup language ("HTML"). Id. “Unlike regular documents, with static information on every page, hypertext documents have links built in so that readers can jump to more information about a topic by (typically) simply clicking on the word or picture identifying the item.” Tauber, supra note 11, at 18 (emphasis in original). As Gilster describes it, “It’s the difference between a typewritten document and a printed magazine.” Ginsler, supra note 17, at 461.

23. ACLU, 929 F. Supp. at 837. When a person or organization wishes to make information available on the Web, the person or organization “publishes” the information in accordance with Web standards. Id. In order to publish, the publisher either must connect to the Internet with a computer that utilizes Web software, or “lease disk storage space from someone else who has the necessary computer facilities.” Id. After the organization publishes the information, it is said to have created a “Web site.” Tauber, supra note 11, at 157. This Web site may contain one or numerous pages. Id. The main page of this collection of pages is referred to as the Web site’s “home page.” Id. Gilster defines “home page” as “simply [an] entryway[] into a particular collection of information at a given site.” Gilster, supra note 17, at 461. Whether the Web site contains one or several pages, these pages traditionally contain hypertext that permit the user to link to other sites by merely clicking the mouse on the desired word or image. Id.

24. ACLU, 929 F. Supp. at 837. In order to view Web pages, computers utilize programs called “browsers.” Tauber, supra note 11, at 23. A browser is a “program with which you can view graphically intriguing, linked documents all over the world and search and access information in a few quick mouse-clicks.” Id. A browser connects with the computer that contains the desired information, reads the relevant files, and displays the desired information on the user's computer. Id. Various browsers are on the market; the two most popular are Netscape Navigator and Microsoft Explorer.

To actually search the Web, browsers utilize programs commonly referred to as “search engines.” Id. at 156. Some of the more popular search engines include AltaVista, Excite, Lycos, Magellan, Web Crawler, and Yahoo. Id. at 169-96. Search engines permit users to search the Web for sites that relate to a desired topic. ACLU, 929 F. Supp. at 837. The user enters the topic and related descriptive words in the search field, the search engine searches through the many data bases, and provides the user with a list of relevant Web sites as well
Like the Internet, no centralized organization governs the use of, or membership in, the Web.\(^{25}\)

The Web offers its users versatility as well as easier, less expensive access to the Internet. These features have fostered a growing interest in the Web among businesses.\(^{26}\) An estimated $29,000,000,000 worth of business will be conducted on-line in 1998.\(^{27}\)

II. RELEVANT CASE LAW

A. Taxation of Mail-Order Sales

The Supreme Court of the United States has long “limit[ed] the authority of a State to assess or impose a duty to collect taxes arising out of the economic activity of a foreign business engaged in interstate commerce.”\(^{28}\) The constitutional limitations imposed on this authority derive from two sources: (1) the Due Process Clause of the Fourteenth Amendment of the United States Constitution (the “Due Process Clause”); and (2) the Commerce Clause of the United States Constitution.\(^{29}\) Though the application of these provisions to the issue of taxation of multi-state transactions were once similar in nature, they have evolved into two distinct

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25. ACLU, 929 F. Supp. at 838. As Paul Gilster illustrates, “The Internet is not CompuServe or Prodigy. Lacking any central organization, the network has no billing address. You can’t make a phone call to a network office and say, ‘Sign me up.’” Gilster, supra note 17, at 71.

26. Gilster, supra note 17, at 587. Gilster notes that the “combination of typeset quality formatting along with graphics and linkages to resources like sound and moving video has proven irresistible to marketers.” Id.

27. Michael Higgins, Forecast: Hot Spell to Continue, 84 A.B.A.J. 44, 48 (1998). It is further predicted that in 1998, approximately 546,000,000 pages of information will comprise the Web. Id. Moreover, it is estimated that the Web will be utilized by approximately 71,000,000 people in 1998. Id.


29. Orvis, 654 N.E.2d at 956. The Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. The Due Process Clause as applied to the current situation is referred to as the “jurisdiction to tax,” or the “taxing power,” of a State. Orvis, 654 N.E.2d at 956. Article I provides that “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cls. 1, 3.
The Supreme Court of the United States first addressed a State's attempt to force an out-of-state vendor to collect a use tax on sales made to residents of the taxing state in Miller Bros. Co. v. Maryland. In Miller, Maryland attempted to require a Delaware store to collect a Maryland use tax on sales made to Maryland residents. Applying the Due Process Clause, the Court concluded that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Maryland did not have the "minimum connection" with the Delaware store; the Delaware store did not, "by its acts or course of dealing . . . subject[] itself to the taxing power of Maryland," nor had it "afforded [Maryland] a jurisdiction or power to create [the vendor's] liability." Although the Court recognized that the

31. Miller Bros., 347 U.S. at 341, n. 1. The Maryland use tax statute provided, "An excise tax is hereby levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State on or after the effective date of this Act, for use, storage or consumption within this State." 81 Md. Code Ann. § 369 (Flack's 1951).
32. Miller Bros., 347 U.S. at 341 n. 2. The Maryland statute required that: Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser. 81 Md. Code Ann. § 371 (Flack's 1951). **THE STATUTE FURTHER Defined THE DUTIES OF VENDORS ENGAGED IN BUSINESS IN MARYLAND.** Id.
33. Miller Bros., 347 U.S. at 344-45. The Delaware store's sole place of business was its store in Wilmington, Delaware. Id. at 341. The store took neither telephone nor mail orders and did not employ agents to seek sales within Maryland. Id.
34. Id. at 344-47. Maryland argued that the connection between itself and the Delaware store was sufficient to require the Delaware store to collect and remit the use tax to Maryland on purchases made by Maryland residents. Id. at 341-42. Maryland based its argument on: "(1) the vendor's advertising with Delaware papers and radio stations, though not especially directed to Maryland inhabitants, reached, and was known to reach, their notice; (2) its occasional sales circulars mailed to all former customers included customers in Maryland; (3) it delivered some purchases to common carriers consigned to Maryland addresses; (4) it delivered other purchases by its own vehicles to Maryland locations." Id. at 341-42.

The Court concluded that the Delaware store had not exploited or invaded the market in Maryland. Id. at 347. Rather, the sales occurred solely as a result of Maryland residents traveling to the Delaware store to make the purchases. Id. Because the Court concluded that
Maryland residents incurred a use tax liability by importing goods into the State, the Court refused to impose the burden of collection on the out-of-state vendor.\textsuperscript{35}

In \textit{Scripto, Inc. v. Carson}, the Supreme Court significantly lessened the degree of contact an out-of-state vendor must have with the taxing State before the State may compel the vendor to collect a use tax on sales made to residents of the taxing State.\textsuperscript{36} Scripto, Inc. ("Scripto"), was a Georgia corporation that sold mechanical writing instruments to residents of Florida.\textsuperscript{37} To facilitate these sales, Scripto contracted with "advertising specialty brokers" who merely solicited sales within Florida on behalf of Scripto.\textsuperscript{38} The orders were accepted after their approval by Scripto's Atlanta office.\textsuperscript{39} Scripto had no regular employees or agents within the State of Florida, nor did they have any other physical presence within the State.\textsuperscript{40}

Florida argued that the solicitation by Scripto's ten brokers within the State permitted the State to compel Scripto to collect a use tax on all sales made to Florida residents.\textsuperscript{41} The Court followed its reasoning in \textit{Miller} in holding that Florida could constitutionally require Scripto to collect a use tax on sales made to Florida residents only if the requisite connection existed between Florida and the taxed transaction.\textsuperscript{42} The Court concluded that Florida satisfied this requirement.\textsuperscript{43} In making its determination, the Court gave great weight to the broker's "continuous local solicitation"
within Florida. The Court also focused upon the "nature and extent" of Scripto's actions within Florida. Unlike in Miller, the Court found that Florida fulfilled the constitutional requirements and, therefore, upheld the collection requirement.

The Supreme Court further refined its due process analysis in National Bellas Hess v. Department of Revenue. In Bellas Hess, the State of Illinois sought to compel a Missouri mail-order business to collect and remit to Illinois a use tax on sales made to Illinois residents. Bellas Hess argued that the Illinois collection requirement unconstitutionally burdened interstate commerce and violated the Due Process Clause of the Fourteenth Amendment.

The Court recognized that the Due Process Clause demands "some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax." Furthermore, the Court noted the absence of precedent that would permit a taxing State to compel collection of a use tax by an out-of-state vendor based solely on the vendor's delivery of items into the taxing State by either common carrier or the United States mail.

The Bellas Hess Court emphasized the difference between those mail-order businesses that have "retail outlets, solicitors, or

44. Id. The Court noted that other than the mere act of acceptance which occurred in Atlanta, the majority of the sales transaction occurred within Florida. Id. Furthermore, the Court declined to distinguish between regular employees and independent contractors. Id.
45. Id.
46. Id. 212-13.
49. Id. at 756.
50. Id. (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954)).
51. Id. at 758. National Bellas Hess was a mail-order company which had as its principal place of business in North Kansas City, Missouri. Id. at 753-54. As the Illinois Supreme Court summarized:

[National Bellas Hess] does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells; it does not own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois.

National Bellas Hess v. Dept't of Revenue, 214 N.E.2d 755, 757 (1966). The sole contacts between Illinois and Bellas Hess were use of the United States mail and common carriers. Bellas Hess, 386 U.S. at 754. Bellas Hess periodically mailed catalogues and "flyers" to customers throughout the nation, including Illinois. Id. Furthermore, orders were shipped from the Missouri plant to customers throughout the nation, including Illinois, by either common carrier or United States Mail. Id. at 755.
property” within the taxing state, and those which “do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.” The Court noted that if it were to uphold the Illinois use tax as applied to National Bellas Hess, the result would have national implications for all mail-order companies. The Court, therefore, refused to uphold the tax.

The Supreme Court departed from precedent and overruled the physical presence requirement of the Due Process Clause in *Quill Corp. v. North Dakota*. In *Quill*, North Dakota attempted to require a mail-order business with warehouses in Illinois, Georgia, and California to collect and remit a use tax imposed by North Dakota on the purchase of products for use within North Dakota. The Court noted that the Due Process Clause requires a connection between the taxing state and the subject of its taxation. However, the Court also recognized that the Court's due process jurisprudence had evolved in the period following *Bellas Hess*. Focusing on the “minimum contacts” requirement of due process jurisprudence, the Court concluded that it no longer applied a

52. *Bellas Hess*, 386 U.S. at 758. The Court “declined to obliterate” this distinction. *Id.*
53. *Id.* at 759. The Court concluded that if it permitted Illinois to oblige Bellas Hess to collect the Illinois use tax, then “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. *Id.* Such a result would entail "unjustifiable local entanglements." *Id.* at 760.
54. *Id.* at 759-60. Bellas Hess argued that the Illinois use tax violated its rights under both the Fourteenth Amendment and the dormant Commerce Clause. *Id.* at 756. In reviewing Bellas Hess' allegations, the Court noted that "the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar." *Id.* Accordingly, the Supreme Court applied a single test to the facts of *Bellas Hess*. *Id.*
56. *Quill*, 504 U.S. at 301. Quill solicited business “through catalogs and flyers, advertisements in national periodicals, and telephone calls.” *Id.* at 302. Furthermore, Quill had annual sales of $200,000,000, of which $1,000,000 were made to Quill's 3,000 North Dakota customers. *Id.* All deliveries to North Dakota customers were made by either the United States mail or common carrier. *Id.*
57. *Id.* at 306 (citing *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)).
58. *Id.* at 307. In *National Bellas Hess v. Department of Revenue*, 214 N.E.2d 755 (1966), the Court suggested that some type of physical presence within the taxing state was necessary for jurisdiction under the Due Process Clause. *Id.* at 306-07.
59. Contemporary due process jurisprudence originated in the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Since *International Shoe*, the Court has "framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice".' *Id.* at 307 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463
“formalistic” test, but examined, instead, the “reasonableness” of the vendor’s contacts with the taxing State. Accordingly, once an out-of-state vendor has “engaged in continuous and widespread solicitation of business within a State,” it matters not that the out-of-state vendor has no physical presence in the taxing State. The Quill Court thus overruled prior cases that demanded physical presence within the taxing State to satisfy due process requirements.

2. Personal Jurisdiction Based on Maintenance of a Web Site

The power of a court to exercise personal jurisdiction over an out-of-state party based solely on the maintenance of a Web site accessible from within the court’s jurisdiction greatly contributes to the present discussion. Whether a court has the power to exercise such personal jurisdiction has not been resolved. As States

(1940) (emphasis added)). If the defendant had “minimum contacts” with the forum State such that it was reasonable to require the defendant to defend suit in that State, due process requirements were satisfied.

When determining whether suit in the forum State was reasonable, the Court would weigh the burden of defending suit in that forum, as well as the forum state’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff’s right to choose the forum; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.” World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1985) (citations omitted).

60. Quill, 504 U.S. at 307. The Court recognized that it no longer required an actual physical presence within a State seeking to exercise judicial jurisdiction. Id.; See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (holding that personal jurisdiction is proper where a “commercial actor” has “purposefully directed” his activities toward a State’s residents even though the “commercial actor” has no physical contacts with that State). Rather, the Court applied a more flexible approach which examined the reasonableness of requiring a defendant to defend suit in that jurisdiction. Quill, 504 U.S. at 307.


62. Id. at 308. The Court opined that, in “modern commercial life,” it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers.” Id.

63. Id. The Court concluded that Quill had “purposefully directed” its resources toward residents of North Dakota, that the due process requirement of sufficient contacts between Quill and North Dakota was satisfied, and that the use tax was sufficiently related to the benefits that access to the market in North Dakota provided to Quill. Id.

struggle to apply traditional laws to this emerging concern, courts are faced with complex new variants on familiar themes.

The Supreme Court of the United States has not addressed the extension of personal jurisdiction over an out-of-state party based solely on the existence of a Web site on the Internet. However, several federal and state courts have confronted the issue. In *Inset Systems, Inc. v. Instruction Set, Inc.*, Inset Systems, a Connecticut corporation, brought an action against Instruction Set ("ISI"), a Massachusetts corporation, for infringement of a trademark. Advancing the argument that Connecticut lacked personal jurisdiction, ISI sought a motion to dismiss.

The United States District Court for the District of Connecticut recognized that due process jurisprudence requires "that a nonresident corporate defendant have 'minimum contacts' with the forum state such that it would reasonably anticipate being haled into court there." Moreover, the court noted that "maintenance of the suit in the forum state cannot offend traditional notions of fair play and substantial justice." The court concluded that ISI intentionally directed its resources toward Connecticut. Furthermore, ISI's Internet advertisements were continuously accessible by Connecticut residents. Thus the court held that ISI "should have foreseen the possibility of being subjected to suit in Connecticut."

The United States District Court for the Southern District of California refused to exercise personal jurisdiction over an out-of-state corporation based solely on the maintenance of a Web

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67. *Id.* ISI sought a dismissal of the action pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(3). *Id.*
68. *Id.* at 164 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). The court further noted that the concept embodied in the "minimum contacts" test is "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." *Id.* at 164-65 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
69. *Id.* (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
70. *Id.* at 165.
71. *Inset*, 937 F. Supp. at 162. ISI did not regularly engage in business in Connecticut, nor did they have an office or any employees in the State of Connecticut. *Id.* at 162-63. However, ISI advertised within Connecticut not only via a toll-free number, but also over the Internet. *Id.* at 165. The court concluded that this advertising was directed towards the entire country, including Connecticut. *Id.* The court noted that ISI could reach as many as 10,000 residents of Connecticut over the Internet. *Id.* at 165. Unlike print media and radio advertisements that are "disposed of quickly," Internet advertisements, once posted, "are available to Internet users continually, at the stroke of a few keys of a computer." *Id.* at 165.
site in *McDonough v. Fallon McElligott, Inc.*72 McDonough was a professional photographer residing in Encinitas, California.73 Fallon McElligott, Inc. ("McElligot") was an advertising agency with its principle place of business in Minneapolis, Minnesota.74 Advancing the argument that California had the power to exercise personal jurisdiction over McElligott, McDonough pointed to a Web site maintained in California by McElligott.75 The court concluded that maintenance of a Web site on the Internet was insufficient to constitute "minimum contacts."76 Consequently, the court flatly rejected the possibility that maintenance of a Web site would suffice to establish general personal jurisdiction77 over an out-of-state party.78

The United States District Court for the Eastern District of Missouri based a finding of personal jurisdiction in part on the maintenance of a Web site in *Maritz, Inc. v. Cybergold, Inc.*79 In *Cybergold*, Maritz brought an action against Cybergold alleging unfair competition and trademark infringement with respect to its Internet activities.80 Maritz argued that Cybergold's maintenance of a Web site, and the use of the site to solicit customers within Missouri, sufficed to grant Missouri the authority to exercise

73.  Id. at 1827.
74.  Id. McElligott had clients throughout the world, but none in California. *Id.* at 1828. Furthermore, McElligott had no office in California, no bank accounts in the State, did not pay any taxes to California, and did not have any permanent employees in California, although they had employed independent contractors based in California at times. *Id.*
75.  *Id.* at 1828.
76.  *Id.*
77.  "General personal jurisdiction" is obtained when "the Defendant's activities in the state are 'substantial' or 'continuous and systematic.'" *Id.* at 1828 (citing Data Disc, Inc. v. Systems Tech. Ass'n., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977)). In contrast, "specific personal jurisdiction" is obtained "if a plaintiff's cause of action arises out of a specific forum-related activity or event." *Id.* (citing *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993)).
78.  *McDonough*, 40 U.S.P.Q.2d at 1828. The court concluded that "[b]ecause the Web enables world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists. . . ." *Id.* The court refused to take such action. *Id.*
80.  *Cybergold*, 947 F. Supp. at 1329. Cybergold's Web site was "continuously accessible to every Internet-connected computer in Missouri and the world." *Id.* at 1330. The site made available to users information about Cybergold's proposed advertising service. *Id.* Though the Web site was operational, the advertising service was not yet available. *Id.* The court noted that Cybergold's Web site had been accessed from within Missouri approximately 131 times. *Id.* Absent the Web site, Cybergold had no other contacts with Missouri. *Id.*
personal jurisdiction over Cybergold.\textsuperscript{81} Cybergold filed a motion to dismiss, arguing that the Missouri court lacked personal jurisdiction.\textsuperscript{82}

The court recognized that the Internet posed unique due process problems regarding the exercise of personal jurisdiction.\textsuperscript{83} In deciding Cybergold’s motion, the court applied a five-part test, developed by the Eighth Circuit for measuring minimum contacts, which consisted of the following factors: “(1) the nature and quality of the contacts with the forum state; (2) the quantity of those contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties.”\textsuperscript{84} The court opined that the number of times the Web site was accessed from within Missouri, in addition to Cybergold’s purpose in maintaining the Web site, evidenced an intention on behalf of Cybergold to avail itself of the privileges of conducting business in Missouri.\textsuperscript{85} Therefore, the court denied Cybergold’s motion.\textsuperscript{86}

The United States District Court for the Southern District of New

\textsuperscript{81} Id. Maritz argued that Cybergold’s Web site served as a “statewide advertisement.” \textsuperscript{Id.} Maritz also argued that the Web site permitted Cybergold to actively solicit residents of Missouri. \textit{Id.}

\textsuperscript{82} Id. Cybergold sought to dismiss Maritz’s claim pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. \textit{Id.} at 1329.

\textsuperscript{83} Id. at 1332. The court opined that the Internet was an “entirely new means of information exchange” and, therefore, not sufficiently analogous to cases involving telephone and mail use with respect to “determining whether [Cybergold] had ‘purposefully availed’ itself of this forum.” \textit{Id.} The court reasoned:

“Unlike use of the mail, the Internet, with its electronic mail, is a tremendously more efficient, quicker, and vast means of reaching a global audience. By simply setting up, and posting information at, a website in the form of an advertisement or solicitation, one has done everything necessary to reach the global internet [sic] audience.” \textit{Id.} Although a toll-free telephone number requires publication, the court noted that users can search the Internet and locate many desired Web sites. \textit{Id.} Even though the Internet utilizes telephone lines to communicate information, the Court opined that the Internet is a more efficient and effective manner of reaching a global audience. \textit{Id.} at 1332-33.

\textsuperscript{84} Id. at 1332 (quoting \textit{Bell Paper Box, Inc. v. U.S. Kids, Inc.}, 22 \textit{F.3d} 816, 819 (8th Cir. 1994)).

\textsuperscript{85} \textit{Cybergold}, 947 E Supp. at 1334. The court concluded that “[t]hrough its website, Cybergold ha[d]d consciously decided to transmit advertising information to all Internet users, knowing that such information w[ould] be transmitted globally.” \textit{Id.} at 1333. Though the court determined that the maintenance of the Web site constituted sufficient contact with the State of Missouri, the court recognized that the contacts were of “a very new quality and nature for personal jurisdiction jurisprudence.” \textit{Id.} The court also found that the exercise of personal jurisdiction over Cybergold did not offend “traditional notions of ‘fair play and substantial justice.’” \textit{Id.} at 1334.

\textsuperscript{86} \textit{Id.} at 1337.
York in *Bensusan Restaurant Corp. v. King*,\(^87\) declined to exercise personal jurisdiction over an out-of-state corporation whose sole contact with New York was the maintenance of a Web site accessible by residents of New York.\(^88\) In *Bensusan*, a New York corporation brought suit against a Missouri corporation alleging unfair competition, trademark dilution, and infringement.\(^89\) Richard King ("King"), moved to dismiss the action, arguing that the New York court lacked personal jurisdiction.\(^90\)

Bensusan argued that a Web site posted on the Internet by King that promoted the Missouri "Blue Note" operated as a basis for personal jurisdiction over King.\(^91\) The court declined to adopt this position, recognizing that King's sole contact with the State of New York was the maintenance of a Web site accessible from within New York.\(^92\) The court held that this conduct was insufficient under due process jurisprudence to grant New York personal jurisdiction over King.\(^93\)

The United States District Court for the District of Columbia in *Heroes, Inc. v. Heroes Foundation*,\(^94\) strongly suggested that maintenance of a Web site on the Internet by an out-of-state party would suffice under due process jurisprudence.\(^95\) In *Heroes*, a charitable organization located in the District of Columbia sued a New York charitable organization alleging unfair competition and trademark infringement.\(^96\) Heroes, Inc. ("Heroes"), argued that the District of Columbia could exercise personal jurisdiction over

\(^{88}\) *Bensusan*, 937 F. Supp. at 301.
\(^{89}\) *Id.* at 297. Bensusan operated "The Blue Note" jazz club in New York City. *Id.* Bensusan also owned the title, rights, and interest to and in "The Blue Note" trademark. *Id.* King operated a club in Columbia, Missouri, also named "The Blue Note." *Id.*
\(^{90}\) *Id.* King filed a motion to dismiss Bensusan's claim pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. *Id.*
\(^{91}\) *Id.* The Web site maintained by King was accessible by anyone who had Internet access. *Id.* It contained information about King's club, ticketing information, and a schedule of upcoming events at the club. *Id.*
\(^{92}\) *Id.* at 301.
\(^{93}\) *Bensusan*, 937 F. Supp. at 301. The court concluded that King did not intentionally pursue the benefits of New York. *Id.* "Creating a site, like placing a product into the stream of commerce, may be felt nationwide — or even worldwide — but, without more, it is not an act purposefully directed toward the forum state." *Id.* The court recognized that King conducted no business in New York, nor did he encourage residents of New York to access his site. *Id.* Mere foreseeability that King's Web site would be accessed by residents of New York did not suffice to satisfy the requirements of due process. *Id.*
\(^{95}\) *Heroes*, 958 F. Supp. at 5.
\(^{96}\) *Id.* at 1.
Heroes Foundation ("Foundation"), because the Foundation advertised in the *Washington Post* and maintained a Web site accessible by residents of the District of Columbia. Denying the Foundation's motion, the court concluded that the Foundation "purposefully availed itself of the benefits of the District by maintaining a home page on the Internet." Though the court did not determine whether the site alone would serve as a basis for personal jurisdiction under a due process analysis, the court implicitly suggested that it would suffice.

The Internet's influence on personal jurisdiction jurisprudence was recently addressed by the United States District Court for the Western District of Pennsylvania in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* In *Zippo*, Zippo Mfg. ("Zippo"), a Pennsylvania corporation, brought an action against Zippo Dot Com ("Dot Com"), a California corporation, alleging false designation as well as trademark infringement and dilution. Dot Com filed a motion to dismiss for lack of personal jurisdiction.

97. *Id.* at 6. Heroes Foundation maintained a Web site that permitted users to obtain information about the Foundation and its members. *Id.* at 10. The Web site also permitted interested users to e-mail the Foundation, and it actively solicited donations to the Foundation. *Id.* at 11.

98. *Id.* at 1. Heroes Foundation argued that its Web site was nothing more than a "passive" site that was "not really targeted at any particular forum." *Id.* at 11. Furthermore, Heroes Foundation argued that users could access the Web site only after engaging in affirmative steps. *Id.*

99. *Id.* at 14.

100. *Heroes*, 958 F. Supp. at 14. The court's conclusion that due process permitted the District of Columbia court to exercise personal jurisdiction over the Foundation was based upon the combined effect of the newspaper advertisements and maintenance of the Web site. *Id.* at 13-14. Accordingly, the court did not determine whether the maintenance of a Web site alone would suffice. *Id.* at 14. However, the court expressly recognized that it weighed heavily the existence and use of the Foundation's Web site. *Id.*


103. *Id.* Dot Com, a provider of an Internet news service, maintained its principal place of business in Sunnyvale, California. *Id.* Dot Com maintained a Web site that offered users who accessed the site general information about the Internet News Service, an application for the service, and advertisements. *Id.* Dot Com had no offices, agents, or employees in Pennsylvania. Their offices, Internet servers and employees were located solely within California. *Id.* Approximately 3,000 of Dot Com's 140,000 subscribers were Pennsylvania residents. *Id.* These Pennsylvania residents subscribed to the Internet News Service by filling out an electronic application available through Dot Com's Web site. *Id.* Furthermore, Dot Com contracted with seven Pennsylvanian Internet access providers to enable their subscribers to access Dot Com's Internet news service. *Id.*
In concluding that personal jurisdiction could be exercised over Dot Com, the court recognized that technological advancements had necessitated the broadening of personal jurisdiction jurisprudence. The court further recognized that “the permissible scope of personal jurisdiction based on the Internet use is in its infant stages.”

The Zippo court noted that personal jurisdiction based on Internet use has developed along a “sliding scale.” The out-of-state entities that utilize the Internet to conduct business are located at one end of the scale whereas the out-of-state entities that maintain a passive Web site accessible by residents of the forum State are located at the opposite end of the scale. Those out-of-state entities that maintain interactive Web sites in which users may communicate with the host computer may be found between the two extremes. Although recognizing that entities that strive to do business with foreign residents have traditionally been subject to the exercise of personal jurisdiction in the forum States, the court refused to find a different result “simply because business is conducted over the Internet.” The court concluded that Dot Com purposefully availed itself of the benefits of Pennsylvania, and therefore, was subject to personal jurisdiction in Pennsylvania.

104. Id. at 1123. Quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985), the court noted, “It is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.

Id.

105. Id. at 1123.

106. Id. at 1124. The court recognized that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” Id.

107. Zippo, 952 F. Supp. at 1124. The court concluded that if the out-of-state entity contracts with residents of the forum state and continuously sends computer files over the Internet to that forum resident, the exercise of personal jurisdiction would be proper. Id. However, a site which did no more than make available general information to those who access the site would not suffice under due process jurisprudence; personal jurisdiction would be improper. Id.

108. Id. Whether or not maintenance of a Web site of this sort would suffice under contemporary due process jurisprudence depends on “the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.” Id.

109. Id. The court recognized that generally, an entity that purposefully engages in business outside of its boundaries, may be subject to the exercise of personal jurisdiction by a foreign jurisdiction. Id.

110. Id. at 1126. The court concluded that Dot Com’s conducting of electronic commerce over the Internet with residents of Pennsylvania constituted “doing business over the Internet;” it was not merely an advertisement. Id. at 1125. Neither did the court accept Dot Com’s argument that access by Pennsylvania residents of Dot Com’s Web site was
A more recent case, *Hearst Corp. v. ARI Goldberger*, 111 examined the exercise of personal jurisdiction based on the maintenance of a Web site. In *Hearst*, the United States District Court for the Southern District of New York considered whether a Web site that was accessible by New York residents constituted sufficient contacts with New York to warrant the exercise of personal jurisdiction. 112 Hearst asserted that maintenance of the Web site was sufficient to establish personal jurisdiction over Goldberger in Hearst's trademark infringement claim. 113 Goldberger countered by arguing that personal jurisdiction could not be exercised by the New York Court solely on the basis of Goldberger's maintenance of the Web site. 114

The court refused to exercise personal jurisdiction, concluding that to do so would be inconsistent with public policy and traditional personal jurisdiction jurisprudence. 115 The court noted that Goldberger's Web site resembled an advertisement in a national magazine. 116 Although Goldberger's Web site was accessible to all Internet users, the court refused to conclude that this fact alone necessitated the conclusion that Goldberger targeted New York residents. 117

The United States District Court for the District of Massachusetts exercised personal jurisdiction based largely on the maintenance of

“merely fortuitous.” *Id.* Rather, the court pointed out that Dot Com knowingly and willingly accepted applications from Pennsylvania residents, as well as transmitted electronic files to these residents. *Id.* The court noted that “[i]f Dot Com had not wanted to be amenable to jurisdiction in Pennsylvania, the solution would have been simple — it could have chosen not to sell its services to Pennsylvania residents.” *Id.* at 1126-27. Furthermore, the court rejected Dot Com’s argument that its forum-related conduct was not “numerous or significant enough,” noting that one contact can be sufficient. *Id.* (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

112. *Hearst*, 1997 U.S. Dist. LEXIS at *1. Although Goldberger's Web site had been accessed by New York residents, Goldberger had not sold products or services to any New York residents. *Id.* at *14.
113. *Id.* Hearst, a New York corporation, alleged that Goldberger's Web site "ESQWIRE.COM" infringed on Hearst's "ESQUIRE" trademark. *Id.*
114. *Id.* at *1-2. Goldberger worked in Philadelphia, Pennsylvania, and resided in Cherry Hill, New Jersey. *Id.* at *2. Though the service was not yet operational at the time of suit, Goldberger's Web site sought to offer "law office infrastructure network services" and "legal information services" to lawyers. *Id.* at *1-2.
115. *Id.* at *2. The court noted that if it exercised personal jurisdiction over Goldberger, "there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site." *Id.*
116. *Id.* at *31.
a Web site in *Digital Equipment Corp. v. AltaVista Tech.*\(^1\) In *Digital*, Digital Equipment ("Digital") brought a claim against AltaVista Technology ("AltaVista"), for trademark infringement and dilution, as well as unfair competition.\(^1\) AltaVista argued that its maintenance of a Web site that was accessible from within Massachusetts was not a sufficient contact with Massachusetts to warrant the exercise of personal jurisdiction.\(^2\) AltaVista moved to dismiss Digital's claim for lack of personal jurisdiction.\(^3\)

The *Digital* court concluded that "[w]hen business is transacted over a computer network via a Web-site accessed by a computer in Massachusetts, it takes place as much in Massachusetts, literally or figuratively, as it does anywhere."\(^4\) The court held that AltaVista's maintenance and use of its Web site for commercial purposes put AltaVista "over the line," and, thus, Massachusetts had personal jurisdiction.\(^5\)

3. **Commerce Clause**

The Commerce Clause explicitly permits Congress to regulate all aspects of interstate commerce.\(^6\) Implicit in this express grant of


\(^{120}\) *Id.* In addition to the maintenance of the Web site, the court noted that AltaVista contractually agreed to be bound by the laws of Massachusetts, used its Web site to solicit business from Massachusetts residents, and made three sales to residents of Massachusetts. *Id.* at 462, 464.

\(^{121}\) *Id.* at 459, 461. AltaVista moved to dismiss the action pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. *Id.* at 472.

\(^{122}\) *Id.* at 462. The court understood the complexities that the case presented. On the one hand, it is [sic] troubles me to force corporations that do business over the Internet, precisely because it is cost-effective, to now factor in the potential costs of defending against litigation in each and every state; anticipating these costs could make the maintenance of a Web-based business more expensive. On the other hand, it is also troublesome to allow those who conduct business on the Web to insulate themselves against jurisdiction in every state, except in the state (if any) where they are physically located. *Id.* at 471.

\(^{123}\) *Id.* at 463. The court limited its holding to the facts of the case, noting that it does not reach the issue of whether any Web activity, by anyone, absent commercial use, absent advertising and solicitation of both advertising and sales, absent a contract and sales and other contacts with the forum state, and absent the potentially foreseeable harm of trademark infringement, would be sufficient to permit the assertion of jurisdiction over a foreign defendant. While it raises some troubling issues, and while the traditional analyses must be informed by this new technology, ultimately, this is not the day nor the forum to resolve them. *Id.*

\(^{124}\) Article I provides that "Congress shall have Power . . . [t]o regulate Commerce
authority is the understanding that State regulation of interstate commerce that unduly burdens or discriminates against interstate commerce is void.\textsuperscript{125} It is this "dormant" Commerce Clause that has proven to be the greatest hindrance to the taxation of out-of-state vendors.\textsuperscript{126}

In \textit{Complete Auto Transit, Inc. v. Brady},\textsuperscript{127} the Supreme Court of the United States shaped contemporary Commerce Clause jurisprudence with respect to the taxation of interstate commerce. In \textit{Complete Auto}, Mississippi imposed a sales tax on Complete Auto for the privilege of doing business within the State.\textsuperscript{128} The Court concluded that a tax will be upheld "against Commerce Clause challenge when the tax [1] 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."\textsuperscript{129}

Shortly after \textit{Complete Auto}, the Supreme Court decided \textit{National Geographic Soc'y v. California Bd. of Equalization}.\textsuperscript{130} In \textit{National Geographic}, California sought to require National Geographic to collect and remit a use tax imposed on purchases made by California residents who used the product within California.\textsuperscript{131} The Court held that the California use tax, as applied to National Geographic's mail-order business, withstood a

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with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cls. 1, 3.
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\item \textsuperscript{125} Although the Commerce Clause grants Congress an affirmative power to regulate interstate commerce, it "has a negative sweep as well." Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 231-232, 239 (1824) (Johnson, J., concurring)). Also referred to as the "negative" Commerce Clause, the dormant Commerce Clause embodies the belief that the "constitutional grant of power to Congress 'to regulate commerce... among the several States' (citation omitted)... implicitly prohibit[s], even in the absence of Congressional regulation, unduly burdensome or discriminatory State taxation of transactions or entities engaged in interstate commerce." Orvis v. New York, 654 N.E.2d 954, 956 (N.Y. 1995).
\item \textsuperscript{126} See, e.g., Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
\item \textsuperscript{127} 430 U.S. 274 (1977).
\item \textsuperscript{128} \textit{Complete Auto Transit}, 430 U.S. at 275. Complete Auto was a Michigan trucking corporation that transported vehicles to Mississippi dealers on behalf of General Motors Corporation. \textit{Id.} at 276.
\item \textsuperscript{129} \textit{Id.} at 279. The Court opined that the proper approach in Commerce Clause analysis is not to analyze the "formal language of the tax statute but rather its practical effect." \textit{Id.} Complete Auto did not allege that the requirements of Commerce Clause jurisprudence were not satisfied. \textit{Id.} at 277-78. Rather, Complete Auto alleged that "a tax on the 'privilege' of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce." \textit{Id.} at 278.
\item \textsuperscript{130} 430 U.S. 551 (1977).
\item \textsuperscript{131} \textit{National Geographic Soc'y}, 430 U.S. at 553.
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Commerce Clause challenge. In reaching its conclusion, the Court did not clearly distinguish between the mandates of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. National Geographic argued that it did not have a sufficient "nexus" with California. The Court rejected this argument, concluding that as long as some "minimum connection" existed between California and National Geographic, the collection duty is constitutional.

In *Quill Corp. v. North Dakota*, the Court dispelled the belief that the requirements under the Due Process Clause and the Commerce Clause were identical. The *Quill* Court recognized

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132. *Id.* at 562. National Geographic solicited advertisers for *The National Geographic Magazine* from two California offices. *Id.* at 552. These offices provided no assistance to National Geographic mail-order business. *Id.* Rather, all orders were mailed to National Geographic's headquarters in Washington, D.C. *Id.* Merchandise was subsequently shipped from National Geographic offices in either Washington, D.C. or Maryland to residents within California. *Id.*

133. *Id.* at 555-62. The Court opined that the issue presented in *National Geographic* was "whether the Society's activities at the offices in California provided sufficient nexus between the out-of-state seller appellant and the State- as required by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause . . . ." *Id.* Though the Court concluded that a sufficient nexus existed, the Court did not expressly distinguish between the two constitutional limitations. Rather, the Court applied a single test — "whether the facts demonstrate 'some definite link, some minimum connection between [the State and] the person . . . . it seeks to tax.'" *Id.* at 561 (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954)).

134. *Id.* at 560. National Geographic argued that even if the maintenance of the two offices would constitute a sufficient nexus between its mail-order business and California, the two offices would not suffice in this case because the maintenance of the offices was not related to the mail-order sales. *Id.* at 560. The Court concluded that National Geographic's "maintenance of two offices in the State and solicitation by employees assigned to those offices of advertising copy in the range of $1 million annually" established a sufficient nexus between National Geographic and California. *Id.* at 556. However, the Court disagreed with the California Supreme Court's conclusion that all that is needed to satisfy the nexus requirement of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), is a party's "slightest presence." *Id.* The Court distinguished *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), from the facts at hand, noting that "[i]n addition to the almost total lack of contacts between Maryland and the Delaware store — Marylanders went to Delaware to make purchases, the seller did not go to Maryland to make sales — the seller obviously could not know whether the goods sold over the counter in Delaware were transported to Maryland prior to their use." *Id.* at 559. Furthermore, the Court distinguished *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), overruled in part by *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), noting that the only contacts National Bellas Hess had with Illinois were via the United States mail and common carriers. *Id.* Unlike the National Geographic's California offices, the out-of-state vendors in *Miller* and *Bellas Hess* had no physical presence in the taxing state.

135. *National Geographic Soc'y*, 430 U.S. at 561. The Court noted that the collection duty need not relate to National Geographic's activities within California as long as there is "some minimum connection" between California and National Geographic. *Id.*

that although the tests to be applied under the Due Process Clause and the Commerce Clause were similar, "the Clauses pose distinct limits on the taxing powers of the States."

In Quill, the State of North Dakota sought to require Quill, an out-of-state vendor, to collect and remit a use tax imposed on goods purchased through the mail for use in North Dakota. The State of North Dakota argued that the Commerce Clause and the Due Process Clause had identical nexus requirements. Accordingly, North Dakota argued that if the use tax satisfied the requirements of the Due Process Clause as applied to an out-of-state vendor, the use tax automatically satisfied the comparable requirements of the Commerce Clause. The Court rejected this argument, however, recognizing that the Due Process and Commerce Clauses focus on different Constitutional concerns.

The Court noted that the "substantial nexus" requirement of the Commerce Clause "is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." Recognizing that it had already eliminated the physical presence requirement of the Due Process Clause in favor of a more flexible approach, the Court refused to eliminate the corresponding requirement in the Commerce Clause.

137. Quill, 504 U.S. at 305. The Court noted that "while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause." Id. The Court recognized that although the distinction between the two clauses had not always been expressly maintained, a distinction did exist. Id.

138. See supra notes 55-63 and accompanying text.
139. Quill, 504 U.S. at 312.
140. Id.
141. Id. The Court noted that "[d]espite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical." Id. Due process concerns "fundamental fairness," whether the out-of-state vendor's contacts with the taxing state are "substantial enough to legitimize the State's exercise of power over [it]." Id. The Commerce Clause, by distinction, is concerned with protecting interstate commerce from suppressive state regulation. Id.
142. Id. at 313. The Court noted that "[a] tax may be consistent with due process and yet unduly burden interstate commerce." Id. at 313-14, n. 7.
143. Id. at 314-18. Recognizing that the "bright-line rule" of National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967), advanced the policies and concerns of the Commerce Clause, the Court opined that such a test would help protect interstate commerce from undue burdens. Id. at 314-15. The Court further concluded that such a test "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." Id. at 315. Additionally, the bright-line rule "encourages settled expectations and, in doing so, fosters investment by
Quill teaches that a State may not compel an out-of-state vendor to collect a use tax on sales made to residents of the taxing State unless the out-of-state vendor is physically present within the taxing State. Although the Supreme Court enunciated what appeared to be a "bright-line" test, post-Quill cases demonstrate that States have not uniformly interpreted "physical presence."

The New York Court of Appeals specifically addressed the scope of the "physical presence" requirement in Orvis Co. v. Tax Appeals Tribunal. Orvis, a Vermont corporation, sold fishing, camping, hunting and other outdoor products. Most of Orvis' sales to New York residents were conducted through its mail-order catalogue. However, to facilitate wholesale sales to New York retail establishments, Orvis employees periodically visited New York. Orvis argued that New York would have to show that Orvis had a "substantial" amount of property or people within the State in order to compel it to collect use taxes.

The New York Court of Appeals rejected Orvis' argument, concluding, instead, that Quill does not demand that the out-of-state vendor have a "substantial physical presence" within the taxing State. The Court concluded that Quill must not "be read as equating a substantial physical presence of the vendor in the taxing State with the substantial nexus prong of the Complete businesses and individuals." Id. at 316. The Court also opined that adherence to the principle of stare decisis favored maintaining the bright-line test. Id. at 318. "Stare decisis" is a principle by which a court will abide by prior determinations of law. See BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). In upholding the physical presence requirement of Bellas Hess, the Court recognized that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today." Quill, 504 U.S. at 311.

144. 654 N.E.2d 954 (N.Y. 1995). The New York Court of Appeals addressed the case of Vermont Info. Processing, Inc. v. New York at the same cite. Vermont Information Processing ("VIP"), sold computer hardware and software to New York beverage distributors. Orvis, 54 N.E.2d. at 955. A majority of VIP's sales to the New York distributors were by common carrier or the United States mail service. Id. However, VIP employees periodically traveled to New York to assist the New York distributors in operating the VIP computer software. Id. at 956.

145. Id. at 955-56. Orvis sold its goods at both wholesale and retail. Id.

146. Id. The goods were shipped from Vermont to buyers via common carrier or the United States mail service. Id.

147. Id.

148. Id. at 959.

149. Orvis, 654 N.E.2d at 956. The Court of Appeals interpreted Quill "in the context of its position in the evolution of Supreme Court doctrine limiting the authority of a State to assess or impose a duty to collect taxes arising out of the economic activity of a foreign business engaged in interstate commerce." Id.
Rather, all that is required is that the out-of-state vendor's physical presence within the taxing State be greater than a "slightest presence." Periodic visits to New York by Orvis employees constituted a sufficient physical presence within the State.

III. ANALYSIS

The Due Process and Commerce Clauses of the United States Constitution, though similar, set forth distinct constitutional requirements. The Due Process Clause is concerned with fairness and notice, while the Commerce Clause is principled on a national market unfettered by state regulation.

A. Due Process Clause

Upon review of contemporary due process jurisprudence, it is evident that little protection exists for the out-of-state vendor that engages in business through the Internet. As the Court stated in Quill, physical presence within the taxing jurisdiction is not a prerequisite under contemporary due process jurisprudence. All that is required is that "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" exist. The requisite connection is present if the out-of-state vendor "purposefully avails" itself of the benefits of the

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150. Id. at 959.
151. Id. at 961 (quoting National Geographic v. California Bd. of Equalization, 430 U.S. 551, 556 (1997)). The Court concluded that the requirement of a physical presence within the taxing state can be "manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf." Id.
152. Id. The Court also concluded that VIP maintained a sufficient physical presence within New York, thus enabling the State to compel VIP to collect a use tax on sales made to New York residents. Id. at 962. The record showed that VIP had visited New York at least 41 times during the period in question. Id.
jurisdiction seeking to exercise personal jurisdiction over the out-of-state vendor.\textsuperscript{155}

If an out-of-state vendor sells to residents of the taxing State through the maintenance of a Web site continuously accessible from within the taxing State, an out-of-state vendor may be characterized as "doing business over the Internet."\textsuperscript{156} One may successfully argue that the maintenance of a Web site, through which residents of the taxing state may order goods from the out-of-state vendor, is evidence that the out-of-state vendor "purposefully availed" itself of the taxing State's market. Such a Web site, which permits users who access it to purchase goods, is more than an advertisement; it is a solicitation of business. As such, the out-of-state vendor could be compelled to collect and remit a use tax to the taxing State.

Accordingly, contemporary due process jurisprudence offers little, if any, protection to the out-of-state vendor that seeks to avoid collection and remittance of a use tax imposed by a foreign State.

\section*{B. Commerce Clause}

As the Supreme Court of the United States clarified in Quill, the tests applied by the Due Process and Commerce Clauses are far from identical.\textsuperscript{157} The Due Process Clause no longer requires a physical presence by the out-of-state vendor within the taxing State. The Commerce Clause, however, demands such a presence.\textsuperscript{158}

Maintenance of a Web site on the Internet through which sales are made by an out-of-state vendor does not constitute a "sufficient nexus" with the taxing State under contemporary Commerce Clause jurisprudence.\textsuperscript{159} Maintenance of a Web site is no more of a physical presence within the taxing State than the advertising of a telephone number in a telephone directory or the mailing of fliers

\begin{itemize}
\item \textsuperscript{155} Quill, 504 U.S. at 307.
\item \textsuperscript{156} See Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119 (W.D. Pa. 1997); see also supra notes 101-110 and accompanying text.
\item \textsuperscript{157} See Quill Corp. v. North Dakota, 504 U.S. 298 (1992); see also supra notes 55-63 and accompanying text.
\item \textsuperscript{158} Quill, 504 U.S. at 317-18.
\item \textsuperscript{159} See Gregory A. Ichel, Internet Sounds Death Knell for Use Taxes: States Continue to Scream over Lost Revenues, 27 SETON HALL L REV. 643, 655 (1997) (concluding that under contemporary Commerce Clause jurisprudence, a State may not compel an out-of-state vendor to collect a use tax on sales made through the Internet to residents of the taxing State where the only contact the out-of-state vendor has with the taxing State is the maintenance of a Web site accessible from within that State).
\end{itemize}
to residents of the taxing State. Some courts have opined that the continuous presence of a Web site on the Internet differentiates the Internet from print media, however, such reasoning is flawed. The mere presence of a Web site on the Internet does not create a presumption of physical presence anymore than the printing of a toll-free number within a local phone directory. The Web site may constitute a solicitation of business within the taxing State, however, it does not constitute a physical presence within the taxing State.

Until the United States Congress determines that the effective and efficient operation of the American economy no longer demands Commerce Clause protection from the imposition of use taxes on out-of-state vendors, vendors may refuse to engage in use tax collection. It is apparent that the Supreme Court will not alter the current physical presence requirement adopted in Quill. Instead, the Court has invited Congress to determine the best interests of the American economy and legislate accordingly. Until Congress accepts the Supreme Court's invitation, contemporary Commerce Clause jurisprudence will protect out-of-state vendors from the required collection of use taxes on sales made over the Internet to residents of the taxing State.


162. This Comment is based on the assumption that the only contact the out-of-state vendor has with the taxing State is the maintenance of a Web site that is accessible from within the taxing State.

163. The Court noted that its decision to maintain the physical presence demarcation between the Due Process and Commerce Clauses was based in part on “the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.” Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992). The Court further recognized that “[n]o matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.” Id.

164. See Ichel, supra note 159, at 662-63 (concluding that the United States Congress must enact legislation with respect to the State’s authority to compel out-of-state vendors to collect and remit use taxes.).

165. But see Adam L. Schwartz, Note, Nexus or Not? Orvis v. New York, SFA Folio v. Tracy and the Persistent Confusion over Quill, 29 CONN. L. REV. 485, 487 (1996) (stating that because “[n]either the Congress, nor the states acting in concert, can produce the kind of tax regime that will provide a set of settled expectations under which business competition may adequately take place,” the Supreme Court of the United States must enunciate a “bright line rule” which governs collection and remittance of use taxes by out-of-state vendors).
IV. CONCLUSION

Taxation of Internet sales will continue to be a hotly debated topic in the coming months and years. As States continue to seek new ways to increase revenue, out-of-state vendors will become prey to the sly legislature. Presently, out-of-state vendors selling over the Internet escape use tax duties because the Commerce Clause requires a physical presence within the taxing jurisdiction. However, this constitutional requirement will survive only as long as Congress continues to believe that such a requirement is vital to the preservation of interstate commerce.

Brian G. Ritz

166. See Grierson, supra note 2, at 576 (opining that "the nexus hurdle is an all-important one for state tax administrators to impose a tax" and that "we're going to see a lot of interesting battles here in the future over the issue."). see also R. Scot Grierson, State Taxation of the Information Superhighway: A Proposal for Taxation of Information Services, 16 LOY. L.A. ENT. L.J. 603, 665 (1996) (recognizing that "we have hardly scratched the surface of an ongoing nexus debate."); Frieden, supra note 4, at 1389 (opining that "[n]exus issues, as they relate to electronic commerce, will undoubtedly be a major topic of discussion in state taxation throughout the next decade."); Thomas Steele, Nexus at the Dawn of the Electronic Commerce Revolution, 12 STATE TAX NOTES 1073, 1073 (1997) (noting that the "question[] of whether and how state and local governments may tax electronic commerce . . . [is] among today's most controversial state and local tax issues").

167. As of the writing of this Comment, bills were pending in both the United States House of Representatives and the Senate which would create a three-year moratorium on new Internet taxation. Known as the "Internet Tax Freedom Act," this legislation would "establish a national policy against State and local interference with interstate commerce on the Internet or online services . . . and . . . exercise congressional jurisdiction over interstate commerce by establishing a moratorium on the imposition of exactions that would interfere with the free flow of commerce via the Internet . . . " Internet Tax Freedom Act, H.R. 3529, 105th Cong. (1998). The House version of the bill has already gained the endorsement of President Clinton, the National Governors Association, the National League of Cities, and the United States Council of Mayors. David Einstein, 3-Year Ban on Internet Tax Backed, SAN FRANCISCO CHRONICLE, Mar. 20, 1998, at B1. The bill recognizes that the new challenges the Internet presents are best addressed through Congressional action:

(10) A consistent and coherent national policy regarding taxation of electronic commerce conducted over the Internet, and the concomitant uniformity, simplicity, and fairness that is needed to avoid burdening this evolving form of interstate and foreign commerce, can best be achieved by the United States exercising its authority under Article I, section 8, clause 3 of the United States Constitution to encourage a cooperative solution among Federal, State, and local levels of government. H.R. 3529 § 2(10). During the three-year moratorium, "neither any state nor any political subdivision thereof shall impose, assess, collect, or attempt to collect any of the following specified taxes: . . . (6) discriminatory taxes on electronic commerce." H.R. 3529 § 3(a)(6). The Act defines "electronic commerce" as "any transaction comprising the sale, offer, or delivery of goods or services (including Internet access and online services) via the Internet." H.R. 3529 § 9(4).

The Act is an effort to protect Internet commerce from the estimated 30,000 federal, state
and local taxing jurisdictions. Internet Tax Freedom Act, H.R. 1054, 105th Cong. § 2(7) (1997). Whether the Act will become law, and what effect it will have, is yet to be seen.