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Overturning *Bellas Hess:* Due Process Considerations

*Sandra B. McCray**

I. Introduction

In 1967, the Supreme Court held in *National Bellas Hess, Inc. v. Department of Revenue*[1] that Illinois could not require Bellas Hess to collect its use tax. Initially, this decision had a small and limited effect on state taxes. First, the decision was one in a long line of cases holding that the Constitution absolutely prohibited states from imposing sales taxes[2] on businesses operating in interstate commerce. Second, the holding applied to a narrow class of transactions: mail order retail sales made by an out-of-state company which had no physical presence in the market state. The Court thought that such retailers comprised only a small percentage of all retailers in existence and that the percentage would remain small for the foreseeable future.[3] Today, however, *Bellas Hess* is significant because the passage of time has changed the state of constitutional interpretation and the market share of mail order sellers.

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*Counsel to the Multi-state Tax Commission; B.A., University of California at Los Angeles, 1967; J.D., University of Colorado, 1975; L.L.M., Georgetown University Law Center, 1985. I am grateful to Professor Emeritus Paul Hartman of Vanderbilt University who read and critiqued a draft of this article. I have incorporated all of Professor Hartman's excellent suggestions into the final article and I have freely drawn upon his deep knowledge of Federal Constitutional limitations on state and local taxation as set forth in his book. P. Hartman, Federal Limitations on State and Local Taxation (1981).

1. 386 U.S. 753 (1967).

2. The term "sales tax" encompasses the following: gross receipts, gross income, retail sales, and general sales taxes. *See* Hartman, *Sales Tax in Interstate Commerce*, 9 Vand. L. Rev. 138 (1956). The term also covers privilege taxes. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 275 (1977).

3. Appellant Bellas Hess cited in its reply brief before the Supreme Court a congressional study, The Subcommittee on State Taxation of Interstate Commerce, House Comm. on the Judiciary, H.R. Rep. No. 565, 89th Cong., 1st Sess. 772 (1965), showing that total revenues from mail order sales in 1963 were approximately $2,400,000,000. By contrast, according to statistics compiled by Forbes, total revenues from mail order sales in 1963 were over $150,000,000,000. Greene, *A Boutique in Your Living Room*, Forbes, May 7, 1984, at 86.

In 1977 the Supreme Court changed constitutional interpretation when it overruled years of precedent in *Complete Auto Transit, Inc. v. Brady*.[4] In *Brady* the Court held that state taxation of interstate commerce by means of a sales tax did not *per se* violate the commerce clause.[5] Thus, at least with regard to commerce clause analysis, the Court struck a new balance in which interstate and intrastate businesses would be required to operate according to the same rules. Nevertheless, *Bellas Hess* continues to absolutely bar taxation of interstate sales transactions on due process grounds.[6]

The *Bellas Hess* bar on taxation of mail order sales has become increasingly significant as the level of such sales increases. Today, the market share of interstate mail order retail sales is no longer insignificant. In 1984 mail order or "direct marketing" sales accounted for fourteen percent of all retail transactions. Furthermore, direct marketing sales are growing faster than in-store purchases and are expected to comprise twenty percent of the retail market by 1990.[7] State and local sales taxes raise the net purchase price of goods sold by local retailers by 3 to 8.75 percent.[8] The resulting price advantage encourages consumers to purchase by mail order. Since direct marketing sales are experiencing phenomenal growth, the effect of this price advantage is significant.

Bellas Hess also has a significant influence on other types of transactions. For example, the new technology of electronic mar-

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4. 430 U.S. 274 (1977).

5. *Id.* at 288-89.

6. Because the Court initially struck down *sales* taxes imposed by a market state on interstate sales, McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944), states turned to the compensatory use tax. The compensatory use tax is levied on the privilege of using property within the taxing state if that property would have been subject to sales tax had it been purchased within the state.

The compensatory use tax serves two purposes. First, the tax permits in-state retail sellers to compete equally with out-of-state retail sellers not subject to a sales tax. Second, the tax prevents drain on state revenues by removing the tax advantage for buyers who place their orders out-of-state, *i.e.*, the state receives the same revenue regardless of where goods are purchased. The rate of use tax is identical to the rate of sales tax. *See* Henneford v. Silas Mason Co., 300 U.S. 577 (1937). Although the market state can legally impose its use tax on residents using goods in the market state that were ordered by mail and shipped from another state, the state cannot enforce the tax unless an out-of-state seller collects the tax.

7. Greene, *supra* note 3, at 86-94.

8. In 1982, states sales tax rates ranged from a low of 1% (one state) to a high of 7.5%. Local sales taxes, imposed by nearly every state, increase these percentages. J. Due & J. Mikesell, Sales Taxation 40 (1983).

keting though computers carries potential for extraordinary growth. *Bellas Hess* is cited as authority for the proposition that market states cannot tax such transactions.[9] Because the volume of interstate transactions fostered and completed through United States mail service and through electronic means will probably increase each year, the *Bellas Hess* approach will increasingly drain state revenues and place local retailers at a disadvantage because of rising state and local taxes. *Bellas Hess* will stifle the development of a rational and fair system of state taxation of interstate transactions effected through electronic technology.

However, the increase in market share of mail order sellers does not decrease the importance of due process considerations. In its brief before the Supreme Court,[10] appellant Bellas Hess made two due process arguments. First, Bellas Hess claimed that because it was not doing business in Illinois, it was not subject to *in personam* jurisdiction. Second, Bellas Hess argued that the state statute, which imposed a use tax collection duty on the company, resulted in a denial of due process because the company's contacts with Illinois were insufficient to support either the regulatory or the taxing jurisdiction of that state.[11]

Under the fact situation presented to the Court, Bellas Hess did not have a physical presence in Illinois: it neither owned or leased real or personal property nor employed salesmen, agents, or independent contractors in Illinois. Its entire business was carried on through United States mail service. Bellas Hess mailed catalogs to customers in Illinois semiannually and occasionally mailed flyers announcing specific sales. Customers made purchases by mailing an order form accepted at the company's offices in Missouri. Bellas Hess then shipped the goods by common carrier from Missouri to the customer in Illinois. On these facts, the court held that Illinois could not require Bellas Hess to collect a use tax.

9. *Bellas Hess* also impacts border sales, tax-free deliveries from across a sales tax border. That problem is not discussed here.

10. Brief for Appellant at 15, National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967).

11. *Id.* at 11. Having made the two separate due process arguments, the company then focused its attention primarily on the issue of minimum contects, stating "if the contacts were sufficient to support jurisdiction to impose the substantive tax liabilities to Illinois, then they would probably be held adequate for an enforcement action in the Illinois courts." *Id.* at 13 n.2.

This article analyzes one constitutional issue considered by the Court in *Bellas Hess:* due process barriers to state taxation of interstate mail order sales. Although the Court's holding in *Bellas Hess* appears to be based primarily on commerce clause prohibitions,[12] the opinion has due process undertones since Bellas Hess argued vigorously that the Illinois collection duty violated both the due process and commerce clauses. It is interesting to note that if the commerce clause imposed an absolute barrier against state taxation of interstate sales,[13] Congress could exercise its commerce power to exempt interstate sales from the effects of the commerce clause.[14] However, such congressional action would be futile if the Court invalidated state use taxes on due process clause grounds. Thus, an analysis of due process barriers to state taxation of interstate mail order sales is critical to a determination of the validity of such taxation.

This article will show that the due process clause does not preclude either (1) the assertion of *in personam* jurisdiction over a foreign corporation not physically present in the forum state, or (2) the assertion of jurisdiction by a market state that requires a mail order seller to collect a use tax.[15] Section II is a brief review of the history of the Court's early due process analyses. Section III is a discussion of the Court's new due process standard for both judicial and taxation jurisdiction[16] beginning with *International Shoe Co. v. Washington.*[17] According to tbis new standard, a market state is not prohibited by the due process clause from taxing interstate sales. Moreover, the satisfaction of due process requirements results in satisfaction of part of

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12. In fact, at the end of its opinion the Court invites Congress to find a legislative solution to the problem. 386 U.S. at 760.

13. I have argued elsewhere that the commerco clause no longer imposes an absolute barrier against state taxation of interstate sales. *See* McCray, *Commerce Clause Sanctions Against Taxation on Mailorder Sales: A Re-evaluation,* 17 URBAN LAW. 529 (1985).

14. The National Association of Tax Administrators has drafted federal legislation to accomplish just this end.

15. Because I conclude that the physical presence of a foreign corporation in the taxing state is neither necessary nor sufficient to support judicial, regulatory, or taxing jurisdiction, the analysis can be generalized to support stete jurisdiction over foreign corporations whose only activities in a state are carried on by electronic means as well as through the United States mail service.

16. The argument here deals only with the first requirement of the due process clause: a minimal connection between the taxpayer/collector and the taxing state. *See infra* note 18.

17. 326 U.S. 310 (1945).

the modern commerce clause test. Section IV discusses whether the due process clause allows a market state to impose a use tax collection duty on a mail order seller.

II. THE HISTORY OF DUE PROCESS LIMITS ON STATE ADJUDICATORY JURISDICTION AND STATE JURISDICTION TO TAX

The due process clause requires that a state seeking to assert authority over a nonresident must demonstrate a relationship with the nonresident. Under modern due process analysis, the nonresident must have at least "minimum contacts" with the state for the state to assert jurisdiction.[18] In the early cases, that necessary relationship was described by the phrase "doing business."

A. *Levels of Doing Business Standards*

In its early decisions, the Supreme Court articulated four levels of "doing business" standards to determine whether a foreign corporation was subject to a state's jurisdiction.[19] The level

18. According to the Court, "the Due Process Clause . . . imposes two requirements: a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise." Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436-37 (1980); *see also* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 272-73 (1978) (state can tax only if minimal connections exist between the business activity taxed and the state, and income rationally relates to values connected with the state.); Norfolk & Western R.R. Co. v. Missouri State Tax Comm'n, 390 U.S. 317, 325 (1968); National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756 (1967).

This article focuses on the first due process requirement, a minimal connection between the taxpayer or tax collector and the state, since otherwise a state cannot require a foreign corporation to collect tax at all. Section III, C, *infra* discusses the second requirement briefly—especially the interplay between the due process requirement and the fourth prong of the *Complete Auto Transit* commerce clause test. However, if the first requirement is satisfied, the second requirement should not pose a significant barrier since the rate and base of the use tax determined by the rata and base of the sales tax, have been validated by the Court on numerous occasions. *See, e.g.*, General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944); Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

19. Some commentators combine the second and fourth levels. Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925); Comment, *"Doing Business": Jurisdiction, Qualification and Taxation Applications*, 11 UCLA L. REV. 259 (1964). For examples of more recent commentators, see J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION 307 (1978); Holby, *"Doing Business": Defining State Control Over Foreign Corporations*, 32 VAND. L. REV. 1105 (1979); McLaughlin, *Territorial Due Process: Analysis of an Emergent Doctrine*, 81 W. VA. L. REV. 355 (1979); Shoemaker, *State Taxation of Mail Order Insurers*, 24 DRAKE L. REV. 825 (1975). Holby shows that the concept of "doing business" was an artificial device created in the 1800's to satisfy perceived

of "doing business" required for a state to exercise jurisdiction over nonresidents was progressively more restrictive for each of the following four categories: (1) judicial jurisdiction;[20] (2) regulatory power;[21] (3) taxing jurisdiction; and (4) qualification requirements.[22] These levels have been used by the Court to test compliance with due process requirements. An examination of relevant Supreme Court decisions reveals four major problems in the development and use of these levels of "doing business" standards as equivalent to due process requirements.

First, the levels of "doing business" standards appeared in the Court's commerce clause opinions as well as its due process opinions—particularly in cases involving state taxing jurisdiction and qualification statutes. In fact, the case usually cited for the proposition that the power to tax must meet a higher standard than the power to regulate is *Freeman v. Hewit*,[23] a pure commerce clause case. If one removes commerce clause considerations from the analysis, distinctions between the four categories fade.

Second, in the latter half of the nineteenth century, tbese four categories were sometimes merged by state statutes; these statutes indirectly imposed a tax on out-of-state companies by requiring licensing for the privilege of soliciting business.[24] The Court has always disfavored statutes that impose prior conditions on a foreign corporation's right to do business within the state; therefore, it has prohibited imposition of taxes as a condition precedent to entry into business while it has permitted taxation of ongoing concerns.[25]

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commerce clause problems in the exercise of state control over foreign corporations. He argues that the outdated and inflexible "doing business" standard should be abandoned. Holby, *supra*, at 1137-38.

20. Judicial jurisdiction is jurisdiction over a civil dispute between a resident and a foreign corporation.

21. Regulatory power is jurisdiction to require compliance with regulations. *See* Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944).

22. A typical qualification statute requires a foreign corporation to file its charter or articles of incorporation, appoint an agent for service of process, pay recording fees, and obtain a license. Until these requirements are met a foreign corporation may not transact any business, acquire any property, or use the state's courts. *See, e.g.*, Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914). Qualification statutes are abused when a license (including a fee or tax) to do business is required for mere solicitation. In that situation the state asserts power over a foreign corporation without regard to whether solicitation results in profits. *See* Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).

23. 329 U.S. 249 (1946).

24. *See, e.g.*, Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).

25. *See, e.g.*, Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974); Nippert v. City of

Third, many Supreme Court decisions purportedly supporting the levels of "doing business" standards involve cases in which the Court engaged in statutory rather than constitutional analysis.[26]

Fourth, as is discussed in Section III, states no longer need to use the "doing business" standards to assert taxing jurisdiction over a foreign mail order seller. The Court has defined a new test with only one due process requirement—minimum contacts.

B. Judicial Jurisdiction

Prior to the passage of the fourteenth amendment in 1868, constitutional control over state court jurisdiction was exercised through the full faith and credit clause.[27] This clause required each state to give full faith and credit to the judicial proceedings of other states. However, the full faith and credit owed another state's decree was not unlimited. If the state court rendering judgment did not have jurisdiction over the property[28] or person[29] of the defendant, another state could refuse to enforce that decree even though the decree remained valid in the original state.[30]

1. Bases of Jurisdiction

According to early concepts of jurisdiction, only a state court having actual physical power over the parties or their property had jurisdiction to render a decision recognized by another state. Each state had exclusive sovereign control over all residents and property within its territorial limits, and no other

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Richmond, 327 U.S. 416 (1946); Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).

26. *See infra* notes 57-58 and accompanying text.

27. U.S. CONST. art. IV, § 1.

28. *In rem* or *quasi in rem* jurisdiction. To adjudicate an action *in rem* or *quasi in rem*, (*i.e.* an action seeking to determine claims to or rights in property even though the claimants are not subject to personal jurisdiction in the state) a court must have jurisdiction over the *res*. R. CASAD, JURISDICTION IN CIVIL ACTIONS, ¶ 1.01[3] (1983).

29. *In personam* jurisdiction. To adjudicate an action *in personam*—an action seeking to impose upon the defendants a duty to do or refrain from doing some specific act or to pay a sum of money—a court must have jurisdiction over the person of the defendant. *Id.* at ¶ 1.01[2].

30. D'Arcy v. Ketchum, 52 U.S. 165 (1851).

state could exercise jurisdiction over those persons or property. Thus each state's sovereignty was protected.[31]

In *Pennoyer v. Neff*,[32] the Court equated the jurisdictional requirement of physical power over parties or their property with a requirement of physical *presence*. The Court held that actual presence within the state was required by the due process clause. Thereafter, judicial jurisdiction based on physical presence of a defendant or his property was essential before a state court could issue a valid judicial decree entitled to full faith and credit in another state.[33]

At first, states could not meet the *Pennoyer* jurisdictional requirement of actual presence within a state's territorial limits with respect to foreign corporations. According to early nineteenth century doctrine, a corporation had no existence outside the boundaries of the sovereign that created it;[34] thus, jurisdiction was vested exclusively in the state of incorporation. However, this doctrine did not survive the subsequent growth of corporate commercial activity. The Court found the inconvenience and manifest injustice of the doctrine intolerable.[35] As a result, presence of a foreign corporate agent within a state's borders satisfied the *Pennoyer* requirement of physical presence.[36]

In the latter half of the 19th century, states began to pass statutes requiring foreign corporations conducting business within their borders to appoint an agent to accept service of process. The Court upheld these state statutes on a consent theory. Because a state could prohibit a foreign corporation's entry into its territory, the state could place conditions on corporate entry. A foreign corporation that chose to operate within a state in compliance with its regulations was said to have consented thereto. Foreign corporations that operated within a state without appointing an agent as required by statute were subject to the state's judicial jurisdiction on a theory of implied consent.[37]

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31. *See* G. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 77-100 (1918).

32. 95 U.S. 714 (1878).

33. The discussion of due process was *dicta* because the fourteenth amendment had not been ratified at the time of the Oregon judgment.

34. Bank of Augusta v. Earle, 38 U.S. 519 (1839).

35. St. Clair v. Cox, 106 U.S. 350, 355 (1882). According to Justice Taney, "[t]he great increase in the number of corporations . . . and the immense extent of their business . . . made this inconvenience and injustice more frequent and marked."

36. *Id.* at 353. The agent's presence must be business related.

37. Mutual Life Ins. Co. v. Spratley, 172 U.S. 602 (1899); Lafayette Ins. Co. v.

The consent and implied consent theories were based on a state's right to exclude a foreign corporation entirely. However, foreign corporations operating entirely in interstate commerce challenged these theories. These corporations successfully argued that, according to the commerce clause, a state could not prohibit a foreign corporation engaged solely in interstate commerce from operating within its borders.[38] In *Green v. Chicago, Burlington & Quincy Railway*,[39] a foreign corporation prevailed on its argument that because it was engaged in the wholly interstate activity of mere solicitation, it was not doing business within any state. The fiction of consent—pushed beyond its limits—fell.

The rule of *Green* that "mere solicitation" in a state does not constitute doing business was put in doubt seven years later in *International Harvester Co. v. Kentucky*.[40] The Court held that a foreign corporation engaged in a *continuous course of business* soliciting orders within the market state and then filling and shipping the ordered goods from outside the state was doing business within the state and was therefore subject to service of process.[41] The Court flatly rejected International Harvester's argument that a foreign corporation engaged solely in interstate business was not amenable to service of process in a state other than its domicile. After *International Harvester* the

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French, 59 U.S. 404 (1856).

38. *See* Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914); International Textbook Co. v. Pigg, 217 U.S. 91 (1910); Crutcher v. Kentucky, 141 U.S. 47 (1891).

39. 205 U.S. 530 (1907).

40. 234 U.S. 579 (1914). Some modern courts continue to follow a "mere solicitation" rule. *See, e.g.*, Caso v. Lafayette Radio Elec. Corp., 370 F.2d 707 (1st Cir. 1966); J. Baranello & Sons v. Hausmann Indus. Inc., 86 F.R.D. 151 (E.D.N.Y. 1980); Hutton v. Piepgras, 451 F. Supp. 205 (S.D.N.Y. 1978); Furmen v. General Dynamics Corp., 377 F. Supp. 37 (S.D.N.Y. 1974); Amco Transworld, Inc. v. M/V Bambi, 257 F. Supp. 215 (S.D. Tex. 1966); Chandler Leasing Co. v. Trus Joist Corp., 90 Ill. App. 3d 875, 414 N.E.2d 15 (1980); Gilliam v. Moog Indus., 239 Md. 107, 210 A.2d 390 (1965); Sheldon Estates, Inc. v. Perkins Pancake House, Inc., 48 A.D.2d 936, 369 N.Y.S.2d 806 (1975).

Under the "mere solicitation" rule, a corporation does not "do business" in a state even though it has active agents in that state if those agents may only solicit orders that are transmitted to another state to be accepted or rejected. These courts are reviewing issues brought under the state's "doing business" standard which, as argued in Section III, is no longer necessary if the state has an applicable long arm statute and the cause of action arises out of or is related to the corporation's contacts with the state. Most tax jurisdiction cases are decided under the new test. The result of continuing to use the old test for judicial jurisdiction and the new test for taxing jurisdiction is unusual: judicial jurisdiction is denied in the same situation in which taxing jurisdiction is upheld. *See, e.g.*, Scripto, Inc. v. Carson, 362 U.S. 207 (1960).

41. *International Harvester*, 234 U.S. at 589.

Court made no distinction between foreign corporations engaged in intrastate and interstate business in determining judicial jurisdiction.[42]

The Court's result in *International Harvester* was based on presence rather than on consent. The Court held that a foreign corporation that "carr[ied] on business in such sense as to manifest its presence . . . [was subject to service of process upon its agents] although . . . [its] business may be entirely interstate in its character."[43]

2. Service of Process

In the cases considered thus far, states asserted jurisdiction over foreign corporations by personally serving process upon a corporate agent present in the state. Such service of process satisfied the two elements of *in personam* jurisdiction: basis and process.[44] However, the Court recognized certain circumstances in which personal service on an agent within the state was not required.

For example, in *Mutual Reserve Fund Life Association v. Phelps*[45] the Court upheld a state statute providing for "substituted service" (service upon the Insurance Commissioner with a copy mailed to the company at its principal office) on foreign insurance companies whose licenses had been canceled. Mutual Reserve's only activity in the state was the collection of premiums on policies which had remained in effect after license cancellation. The Court reasoned that personal service within the state was not required if the company was still doing business within the state (basis) and if, under the state statute providing for substituted service, the company received notice of the suit (process).[46]

Later, in *Milliken v. Meyer*,[47] the Court delineated the due process standard for substituted service in *in personam* actions:

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42. *See* O'Melia, *Jurisdiction by Implied Consent*, 29 MARQ. L. REV. 31 (1945).

43. *International Harvester*, 234 U.S. at 589; *see also* Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1917).

44. R. CASAD, *supra*, note 28, P 1.01[2], [3]. Basis is the relationship between the foreign corporation and the state. This requirement is satisfied if a corporation is doing business in the state through its agents. Process refers to the method by which the foreign corporation is given notice of an action.

45. 190 U.S. 147 (1903).

46. *Id.* at 157; *see, e.g.*, Connecticut Mutual Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

47. 311 U.S. 457 (1940).

the form of substituted service provided for by statute must be "reasonably calculated to give [the defendant] actual notice of the proceedings and an opportunity to be heard."[48] The Court held that a statute providing for personal service on a resident outside the state met the test.[49]

C. *Jurisdiction to Tax: Foreign Insurance Corporations*

After its decision in *International Harvester,* the Court continued to analyze judicial jurisdiction cases solely under the due process clause. However, the Court's analysis of taxation jurisdiction is not so limited; the issues to be resolved in taxing jurisdiction cases almost invariably apply the commerce clause. There is one exception: state taxing jurisdiction over foreign insurance corporations. Until 1946, the Court held that the business of insurance was not commerce; thereafter, Congress exempted insurance from the effects of the commerce clause.[50] Therefore, by focusing on cases involving state taxation of premiums paid by state residents to foreign insurance corporations, one can isolate due process limitations on state taxing jurisdiction and contrast the Court's due process analysis in taxing jurisdiction with that of judicial jurisdiction.[51]

The early cases involving taxing jurisdiction over foreign insurers were and often are misinterpreted. For example, some courts and commentators have construed early Supreme Court decisions as imposing a due process prohibition on a state's authority to regulate or tax foreign insurers whose activities within the state consist solely of mail order sales. In fact, none of the Court's early decisions stand for that proposition.

The following four cases are often incorrectly cited for the proposition that the due process clause prohibits state regulation and taxation of foreign insurers involved solely in mail or-

48. *Id.* at 463.

49. *Id.* at 462-63.

50. *See* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); Paul v. Virginia, 75 U.S. 168 (1869).

51. The Supreme Court applies the same standards to insurers as to other businesses in determining whether a state has the right, under the due process clause, to tax a foreign corporation. *See* State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451 (1962); Illinois Commercial Men's Ass'n v. State Bd. of Equalization, 34 Cal. 3d 839, 671 P.2d 349, 196 Cal. Rptr. 198 (1983). In the latter case, the California Supreme Court upheld the state's gross premium tax assessed against foreign mail order insurers, citing Scripto Inc. v. Carson, 362 U.S. 207 (1960) as its authority.

der sales: *Allgeyer v. Louisiana*,[52] *State Board of Insurance v. Todd Shipyards Corp.*,[53] *Connecticut General Life Insurance Co. v. Johnson*,[54] and *St. Louis Cotton Compress v. Arkansas*.[55] Each of these cases concerned foreign insurers that did not solicit business in any manner within the taxing or regulating state. For tbat reason, the Court held in each case that the attempted exercise of taxing jurisdiction violated the due process clause.[56] Because none of the foreign insurers ever solicited busi-

52. 165 U.S. 578 (1897).

53. 370 U.S. 451 (1962).

54. 303 U.S. 77 (1938).

55. 260 U.S. 346 (1972).

56. The factual situations of the four cases are as follows:

(1) In *Allgeyer*, a New York corporation engaged in the business of exporting cotton from Louisiana to Great Britain contracted with a New York insurer for marine insurance covering its shipments of cotton. The contract was formed in New York between the two New York domiciliaries, and all premiums were paid in New York. The insurer never solicited any business in Louisiana and had not attempted to comply with that state's qualification statute. Nevertheless, Louisiana sought to impose a fine on the Allgeyer company for the violation of a statute prohibiting corporations from contracting for marine insurance with a foreign insurer not qualified in Louisiana.

(2) The *Todd* case also involved a business which was domiciled in New York. Todd contracted with a British insurance company to insure property in Texas. The British insurer had never solicited any business in Texas. Once the policy was in effect, Texas sought to tax the premiums Todd paid to the British insurer under a statute which imposed a 5 percent premium tax on foreign insurers not qualified to do business in Texas.

(3) In *Connecticut General*, California sought to tax premiums paid to Connecticut General, a Connecticut domiciliary, by a California insurer on a reinsurance contract. According to the contract, Connecticut General agreed to reinsure certain insurance contracts covering California residents. Connecticut General's only duty was to indemnify the primary insurer against loss on its California policies. It had no relationship with or duty to California residents.

(4) In *St. Louis Cotton Compress*, Arkansas had sought to tax premiums paid by a Missouri corporation to a foreign corporation that insured its property in Arkansas; the insurer had not solicited business in Arkansas.

A fifth case, Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140 (1922), is also cited as authority for the proposition that a state cannot tax an out-of-state mail order insurance company. In *Benn*, the Minnesota Commercial Men's Association was a mutual insurer domiciled in Minnesota. It solicited members from various states, including Montana, through mailed advertisements and through existing members. The Association had no offices or agents within Montana. The executrix of the estate of a deceased Montana resident, Benn, sued the Association to recover on Benn's policy. Process was served on the Montana Secretary of State and on the Montana Insurance Commissioner (substituted service). According to the fects, there was no personal service of process or service by mail. The Montana court entered a default judgment against the Association. This decree was challenged by the insurer. On appeal, the Supreme Court held that the Montana decree had heen rendered without jurisdiction and therefore violated the due process clause.

The Court's holding in *Benn* directly conflicts with its holding in an earlier case with similar facts: Pennsylvania Lumhermen's Mutual Ins. Co. v. Meyer, 197 U.S. 407 (1905). Lumbermen's only contact with New York was by mail. Nevertheless, the Court upheld a

ness in the taxing state, it is not surprising that the Court held the state taxes unconstitutional.

The Court's decision in *Provident Savings Life Assurance Society v. Kentucky*[57] has been similarly misinterpreted. In that case the Court struck down a Kentucky statute imposing a tax on premiums collected from Kentucky residents after a foreign insurer had ceased doing business in the state. The Court held that taxing jurisdiction required *continuing* activity in the state. For some time this holding was viewed as a constitutional prohibition on such taxes. However, in *Continental Assurance Co. v. Tennessee,*[58] the Court upheld a Tennessee tax on gross premiums collected after an out-of-state insurer had ceased to do business in Tennessee. The Court distinguished *Provident Savings,* noting that its holding there had been based on the Kentucky statute as construed by Kentucky courts.[59] Thus, the tax in *Provident* was not *per se* unconstitutional.

In sum, none of the early taxing jurisdiction cases compel the conclusion that because of the due process clause a state may not tax the gross premiums of out-of-state insurers soliciting business within the state.[60]

One development in this early period of taxing jurisdiction analysis is particularly relevant here. In 1940, in *Wisconsin v. J.C. Penney Co.,*[61] the Court merged its taxing jurisdiction and due process concerns into one test: "whether the taxing power bears fiscal relation to the protection, opportunities and benefits given by the state."[62] It is important to note the precise require-

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New York judgment against Lumbermen's. The sole distinction between the two cases is personal service of process on Lumbermen's. Thus *Benn* may stand only for the proposition that a judgment taken without proper notice to the defendant violates due process. *Cf.* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 443-44 (1952). In any event, the *Benn* case has been discredited. *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943); Osborn v. Ozlin, 310 U.S. 53 (1940).

57. 239 U.S. 103 (1915).

58. 311 U.S. 5 (1940).

59. *Id.* at 6.

60. In fact, in a different context, Jerome Hellerstein cited the early Supreme Court insurance premium tax cases as authority for the position that courts will permit taxation of an out-of-state correspondent bank or an out-of-state underwriting syndicate of banks based upon loans generated to customers within the state. *See* Hellerstein, Federal Constitutional Limitations on State Taxation of Multistate Banks, in COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 92d CONG., 2d SESS., STATE AND LOCAL TAXATION OF BANKS PARTS I, II, III, AND IV 505 (Comm. Print 1972).

61. 311 U.S. 435 (1940).

62. *Id.* at 444.

ments of this test. While the test requires a taxing state to provide benefits, opportunities, and protection to the taxpayer, it is clear that the Court never contemplated a dollar-for-dollar match between the value of specific benefits and the amount of a tax. Rather, the tax measure merely needs to be "tied to earnings which the State . . . has made possible, insofar as government is the prerequisite for the fruits of civilization for which . . . we pay taxes."[63] The Court also applied a benefits and protections analysis to the contacts necessary for judicial jurisdiction.

III. MODERN DUE PROCESS ANALYSIS

A. *Modern Judicial Jurisdiction:* International Shoe *and its Progeny*

In 1945, in *International Shoe Co. v. Washington*,[64] the Court announced the first of a series of decisions that were to change due process analysis of civil jurisdiction dramatically.

1. *Bases of Jurisdiction*

In *International Shoe*, the Court considered a two-part jurisdictional issue. It examined whether the activities of International Shoe (a Delaware corporation) in Washington were sufficient to allow that state to: (1) subject the foreign corporation to *in personam* jurisdiction in a suit to recover unpaid contributions to Washington's unemployment compensation fund and (2) subject a foreign corporation to its taxing jurisdiction by requiring contribution to the fund. No commerce clause issues were implicated because the state's unemployment fund was created pursuant to a federal statute expressly permitting taxation of interstate business for a state unemployment fund.

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63. *Id.* at 446. The Court recently reaffirmed this view of the relationship between the amount of benefits provided by a state and the level of tax. In Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), the taxpayer challenged Montana's coal severance tax as excessive and thus not "fairly related to the services provided by the taxing state." In rejecting the taxpayer's commerce clause argument the Court applied the rationale of its due process cases: "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the costs of government. *The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." Id.* at 622-23 (quoting Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 522 (1937)) (emphasis added).

64. 326 U.S. 310 (1945).

International Shoe conducted its activities in Washington through approximately eleven salesmen. These employees, who resided in Washington, solicited orders for sales accepted outside the state. The Company had no offices, no stock or merchandise, and no intrastate deliveries in Washington.

In its opinion, the Court reviewed its prior jurisdictional tests and found them inadequate. According to the Court, the doing business test was developed to bolster the "legal fiction" that a foreign corporation had consented to jurisdiction. The presence test was inadequate because it avoided the central jurisdictional issue; the term "presence" was "used merely to symbolize those activities . . . within the state which courts will deem to be sufficient to satisfy the demands of due process."[65]

Upon rejecting both the "doing business" test and the presence test for determining *in personam* jurisdiction over a nonresident defendant, the Court announced a new test: due process requires only that the defendant must have such minimum contacts with the state that maintenance of a suit does not offend "traditional notions of fair play and substantial justice."[66] Because International Shoe's business activities in Washington were systematic and continuous, it enjoyed a large amount of interstate business within Washington. During the course of its business, the company received the benefits and protections of the state of Washington—such as the right to resort to its courts. Thus, Washington could exercise *in personam* jurisdiction over International Shoe without violating the due process clause.

The new test was also used by the Court to determine whether Washington could tax the foreign corporation. No greater contacts were required for taxing jurisdiction than were required for *in personam* jurisdiction. In fact, the Court specifically equated the standards for the two types of jurisdiction, holding that: "The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax."[67]

For some time after *International Shoe*, commentators and lower courts pondering the extent of the Court's holding reached two views. According to the first view, minimum contacts re-

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65. *Id.* at 317.
66. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
67. *Id.* at 321.

quired a physical connection between the state and the defendant. Under the second view, minimum contacts required merely that a court weigh and balance interests relevant to litigation fairness. As it turned out, neither view was correct.

The Court rejected the first view in 1957 in *McGee v. International Life Insurance Co.*[68] It upheld California's exercise of *in personam* jurisdiction over a foreign insurance company whose only contact with the state consisted of soliciting an insurance contract by mail. The contract was accepted outside the state and the insured (a California resident) mailed premiums to the insurer outside the state. The Court's holding in this classic mail order situation established the principle that due process does not require physical presence for a state to assert judicial jurisdiction over a foreign corporation.

A year later, the Court dismissed the second view in *Hanson v. Denckla.*[69] In this case, two state courts sought to adjudicate competing claims to the estate of a Florida resident. The litigation centered around the validity of an *inter vivos* conveyance. The conveyance had been made pursuant to a trust formed in Delaware by the decedent and administered by a Delaware trustee. The Florida court ruled that it had *in personam* jurisdiction over the Delaware trustee and could adjudicate the competing claims. It found the *inter vivos* transfer invalid. The Delaware court refused to give the Florida decree full faith and credit and instead upheld the transfer.

The Supreme Court held that the Florida court did not have *in personam* jurisdiction over the Delaware trustee. The Court noted that the trust company had no office in Florida, transacted no business there, and never solicited business there. On that factual situation, the Court held:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with 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.[70]

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68. 355 U.S. 220 (1957).
69. 357 U.S. 235 (1958).
70. *Id.* at 253. The Court also applied a benefits and protections analysis in connection with state exercise of taxing jurisdiction. *See supra* note 63 and accompanying text.

Thus, the contacts between the defendant and the forum state must arise from purposeful action by the defendant.

In *Shaffer v. Heitner*,[71] the Court considered the application of the new minimum contacts test to *quasi in rem* jurisdiction. The plaintiff, a nonresident of Delaware, brought a shareholder derivative suit in a Delaware court against a Delaware corporation and twenty-eight corporate officers and directors who were nonresidents of Delaware. Because the individual defendants were not present in Delaware, plaintiff began his suit by sequestering their property.

The sequestered property—shares of the Delaware company's common stock—that formed the basis of plaintiff's asserted *quasi in rem* jurisdiction was present in Delaware. Therefore, under the old *Pennoyer* test mandating physical presence, the Delaware court clearly had jurisdiction. However, the Court held tbat because the cause of action was not related to the *res* and the defendant had no other contacts with the state, the relationship between the defendant and the state was not sufficient for Delaware jurisdiction. In other words, the Court, applying the new minimum contacts standard, held that mere presence within the forum state was not a sufficient basis for *quasi in rem* jurisdiction under the due process clause.

A recent case in the series of Supreme Court cases altering the due process tests for *in personam* jurisdiction is *World-Wide Volkswagen Corp. v. Woodson*.[72] In this products liability case, the Court held that Oklahoma could not constitutionally subject a nonresident automobile retailer to *in personam* jurisdiction when its only connection with Oklahoma was the sale of a New York automobile in New York to New York residents who were involved in an accident in Oklahoma. The Court found no ties or "affiliating circumstances" between the retailer and the state. As examples of such necessary "affiliating circumstances," the Court listed the following: (a) closing sales in the forum state, (b) soliciting business in the forum state either through

71. 433 U.S. 186 (1977).

72. 444 U.S. 286 (1980). In an even more recent case, Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408 (1984), the Court held that the contacts between the state of Texas and a South American corporation, Helicol, were insufficient to support the assertion of jurisdiction over Helicol in a cause of action not arising out of or related to the corporation's activities within Texas. According to the Court, Helicol's activities within Texas did not meet the stricter test required under Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952), for suits in which the cause of action is unrelated to activities of the foreign corporation in the forum state.

salespersons or through advertising reasonably calculated to reach the state, (c) regularly selling cars to Oklahoma customers or residents, (d) directly or indirectly serving or seeking to serve the Oklahoma market.[73]

World-Wide Volkswagen had limited its market to a tristate area—New York, New Jersey, and Connecticut. It had not sought to market vehicles in Oklahoma; thus, it had not purposefully availed itself of Oklahoma's market or the benefits and protections of that state.[74] The only contact it had with Oklahoma was the result of an auto accident—an entirely isolated and fortuituous happening not related to any purposeful activity of the defendant as required by the due process clause. The minimum contacts requirement had not been met.[75]

2. *Service of Process*

In addition to having minimum contacts with the forum, the corporation must be properly served with process. Prior to *International Shoe*, the Court permitted service of process on nonresident foreign corporations through substituted service. However, the foreign corporation served in this manner had to be "doing business" in the state.

After *International Shoe, McGee,* and the other cases previously cited, doing business was no longer required as a basis for jurisdiction. Therefore, states passed "long-arm" statutes authorizing service of process outside the state when a defendant's activities within the state fulfilled the new basis for jurisdiction.[76] According to a typical long-arm statute, a nonresident

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73. *World-Wide Volkswagen,* 444 U.S. at 295.

74. *Id.* at 297-98.

75. The Court recently reaffirmed the principles articulated in *World-Wide Volkswagen.* In Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1985) the Court held that:

> Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id. at 2183-84 (citations omitted; emphasis by the Court); *see also* Keeton v. Hustler Magazine, Inc., 104 S. Ct. 1473, 1478 (1984) (out-of-state defendant is subject to suit if he has "purposefully directed" his activities at residents of the forum).

76. "Unless a state's legislature has enacted statutory authorization, the courts of the stata are generally powerless to exercise jurisdiction where the basis upon which ju-

corporation can be served outside the state for *in personam* actions arising out of at least the following acts: (1) the transaction of any business in the state; (2) the commission of a tortious act in the state; (3) the ownership, use, or possession of real estate in the state; and (4) contracting to insure any person, property or risk located in the state at the time of contracting.[77] Typically, service of process is effected by personally serving the nonresident corporation outside the state or by serving the Secretary of State of the forum state and sending a copy to the defendant by registered mail.

It is noteworthy that long-arm statutes replaced the early phrase "doing business" with a new phrase "transacting business." Transacting business is said to be both more inclusive than the old doing business test since it may encompass single acts, and more specific than the doing business test since service can be made on out-of-state defendants only for causes of action arising from contacts in the state.[78]

3. *Summary of Modern Due Process Analysis*

In summary, one can identify seven principles from modern due process analysis:

(1) Doing business is an old test based upon the consent theory of jurisdiction. An analysis using levels of doing business translated into levels of due process is no longer necessary or relevant.[79]

(2) Solicitation conducted in the market state only by United States mail is constitutionally sufficient to support judicial jurisdiction over a foreign corporation.[80]

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risdiction is asserted did not exist at common law." Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 NOTRE DAME LAW. 587, 596 n.38 (1979).

77. This list represents only some of the activities which are considered bases for jurisdiction in state long-arm statutes. For a complete list of such activities, see R. CASAD, *supra* note 28, app. A-32.

78. Service under a long arm statute is said to support specific jurisdiction. However, many "doing business" statutes subject a foreign corporation to jurisdiction for causes of action completely unrelated to the corporation's business in the state, an exercise of general jurisdiction. *See* von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

79. In fact the application of the old "doing business" test in judicial jurisdiction cases and the new minimum contacts test in taxing jurisdiction cases leads to unusual results. *See supra* note 40.

80. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

(3) Solicitation conducted regularly and continuously is sufficient minimum contacts for both judicial and taxing jurisdiction.[81]

(4) Physical presence is neither necessary[82] nor sufficient[83] for due process purposes.

(5) The nonresident must purposefully and voluntarily avail himself of the privilege of conducting activities in the forum state, thus invoking its benefits and protections.[84]

(6) The reasonableness standard of *International Shoe* also requires the state to consider both the interest of the forum/market state in adjudicating a dispute and a plaintiff's interest in obtaining convenient and effective relief.[85]

(7) More contacts are required if the cause of action sued upon is unrelated to the defendant's activities in the forum state.[86]

4. *Application of the Modern Due Process Standards to Interstate Buyers and Sellers: Benefits and Protections*

In applying the new due process standards to jurisdiction over interstate (mail order and telephone) sellers and buyers, courts have identified a distinction between buyers and sellers when the buyer is a passive purchaser not conducting business in the forum state.[87] A distinction under those circumstances

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81. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

82. *McGee,* 355 U.S. at 220.

83. Shaffer v. Heitner, 433 U.S. 186 (1977).

84. Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1985); Hanson v. Denckla, 357 U.S. 235 (1958); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940).

85. *Burger King,* 105 S. Ct. at 2184-85; *McGee,* 355 U.S. at 220; *see also* Kulko v. California Superior Court, 436 U.S. 84 (1978).

86. *International Shoe,* 326 U.S. at 310; *see also* Perkins v. Benguet Mining Co., 342 U.S. 437 (1952). If the cause of action arises out of an activity connecting the defendant to the state, the state is exercising specific jurisdiction and a lower standard is applied. *See* von Mehren and Trautman, *supra* note 78. The use tax collection duty is subject to this lower standard since the duty arises from a seller's continuous and regular solicitation. *See International Shoe,* 326 U.S. at 320.

87. *See, e.g.,* Scullin Steel Co. v. National Ry. Utilization Corp., 676 F.2d 309 (8th Cir. 1982); Lakeside Bridge & Steel Co. v. Mountain State Constr., 597 F.2d 596 (7th Cir. 1979), *cert. denied,* 445 U.S. 907 (1980); Whittaker Corp. v. United Aircraft Corp. 482 F.2d 1079 (1st Cir. 1973); In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); *see also* Anderson v. Shiflett, 435 F.2d 1036 (10th Cir. 1971); Southern Idaho Pipe & Steel v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977), *cert. denied,* 434 U.S. 1056 (1978); "Automatic" Sprinkler Corp. of America v. Seneca Foods Corp., 361 Mass. 441, 280 N.E.2d 423 (1972); Architectural Bldg. Components Corp. v. Comfort, 528 P.2d 307 (Okla. 1974). The Supreme Court has not specifically considered this buyer/seller, passive/active distinction. However, the distinction is im-

obeys the Court's admonition that unilateral activity of a claimant against a nonresident defendant cannot satisfy the requirement of contact with the forum state. The contacts of the nonresident must be with *the forum*, not merely with one present in the forum.

Thus, if the buyer is a typical mail order consumer who remains passive in a transaction and does not enter the seller's state, actively initiate contact, negotiate substantial terms of a transaction, or undertake on-going business relationships with the seller, he is not deemed subject to the jurisdiction of the seller's state in a breach of contract action. Sellers are also prohibited from bringing suits in their own states against out-of-state buyers because of a Federal Trade Commission order enjoining such suits as unfair trade practices.[88] A mail order seller may thus enforce his legal rights against a delinquent or fraudulent buyer *only* in the courts of the buyer's state. Thus it is the buyer's state that protects the revenues of the out-of-state seller.

The buyer's state also benefits the seller by assuring him an orderly market through consumer protection and usury laws on mail order transactions. Such laws create consumer confidence and eliminate unscrupulous sellers from the market. Consumer confidence is critically important to sales which cross state lines. In mail order transactions, consumers must rely heavily on state enforcement mechanisms to rectify wrongs and enforce rights.[89]

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plicit in the modern due process analysis that requires purposeful availment of the forum by the active conduct of business.

88. Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976).

89. Of course, the mail order seller does not receive all tax supported services offered by a market state. For example, the mail order seller does not have a building in the market state protected by the state police or fire department. However, the Court has never considered such facts sufficient to invalidate a general tax. In Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 203 (1905), the Court noted that the weight of a direct tax often falls unequally upon those taxed:

> This is almost unavoidable under every system of direct taxation . . . . Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit.

The Court recently reaffirmed this recognized principle that general revenue taxes (unlike user fees) can, consistent with due process, be imposed on taxpayers who enjoy no direct benefits from the taxes: "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622 (1981) (quoting Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 521-22 (1937)).

Courts and commentators have argued that the required nexus between the buyer's state and an out-of-state seller should be economically based rather than physically based.[90] Thus, they have acknowledged the significance of (1) specific government protections afforded the nonresident mail order seller by the market state, (2) the contribution of a viable local economy to sellers' profits, and (3) the importance of media and mail advertising in the creation and maintenance of a seller's market. As one leading commentator has succinctly observed: "should not the substantial exploitation of a state's market for the capture of profits, plus any governmental protection and benefits afforded the out-of-state seller, be enough for the state to demand a tithe in return, thus satisfying the requisites of the due process clause?"[91]

The concept of an economic nexus recognizes the realities of modern commercial operations. The old "doing business" test based solely on physical presence was valid when interstate business was conducted primarily face-to-face by traveling salesman.[92] Today, in contrast, interstate business is regularly conducted electronically and by mail. Interstate consumer sales occur through computer terminals located in homes and at retail outlets; consumer banking services are available at detached electronic units; credit cards are issued by mail across state lines and used for interstate retail transactions; and advertising by television and by mail is commonplace. Moreover, the concept of economic nexus provides support for equal taxation of in-state and out-of-state sellers, ending the competitive disadvantage of locally based retailers who must collect state sales taxes.

B. *Modern Taxing Jurisdiction*

Because doing business is no longer the due process test to establish jurisdiction, the theory that levels of doing business correspond to levels of due process is no longer valid. Addition-

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90. *See, e.g.*, National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 761-62 (1967) (Fortas, J., dissenting); American Refrigerator Transit Co. v. State Tax Commission, 238 Ore. 340, 395 P.2d 127 (1964); P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 39-40, 438-39, 628, 630-32 (1981).

91. P. HARTMAN, *supra* note 90, at 40.

92. *See, e.g.*, Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887); Holby, *supra* note 19; Lockhart, *The Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617 (1939).

ally, the Court has specifically equated the contacts required for judicial jurisdiction with those required for taxing jurisdiction[93]

In two important cases, lower courts have analyzed the application of modern due process tests to state taxation and regulation of foreign mail order insurers. Both cases were appealed to the Supreme Court and dismissed for lack of a substantial federal question. Such a dismissal is a determination of the case on the merits and has res judicata effect.[94] Thus, these cases arguably represent the view of the Court on the issues considered therein.

In the first case, *Ministers Life & Casualty Union v. Haase*,[95] a mail order insurance company challenged a Wisconsin statute that regulated and taxed all unlicensed foreign insurers doing business in Wisconsin either by mail or otherwise. The company claimed that Wisconsin did not have jurisdiction to tax or regulate its mail order business. The Wisconsin Supreme Court considered this issue under the doing business test and disagreed. That court expressly held that Wisconsin could constitutionally tax and regulate mail order insurers. The company had no office, salesmen, or agents in Wisconsin, and all insurance contracts with Wisconsin residents were accepted outside the state. However, the court found that through advertisements in the national media and direct mail solicitations in Wisconsin, the company had "realistically entered the state looking for and obtaining business."[96] The court held that it was not essential for an insurance policy to be issued in Wisconsin for exploitation of the consumer market. In "common parlance" and "in any enlightened sense," the company was doing business in Wisconsin.

In the second case, *People v. United National Life Insurance Co.*,[97] the California Supreme Court upheld a state statute requiring all foreign insurers to procure a certificate of authority from the California Insurance Commissioner before engaging in business. According to the levels of "doing business" theory, this requirement would have been judged by the strictest standard. However, the court used a transacting business standard and

93. *See supra* notes 63, 70 and accompanying text.

94. Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 247 (1959); Hicks v. Miranda, 422 U.S. 332 (1975); Note, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488, 489 (1949).

95. 30 Wis. 2d 339, 141 N.W.2d 287, *appeal dismissed*, 385 U.S. 205 (1966).

96. *Id.* at 359, 141 N.W.2d at 295.

97. 66 Cal. 2d 577, 427 P.2d 199, 58 Cal. Rptr. 599 (1967), *appeal dismissed*, 389 U.S. 330 (1967).

found that: "realistically viewed the insurer through the instrumentality of the mail is for all practical purposes soliciting insurance here as manifestly as if it were to carry on such solicitation through representatives physically present within this state."[98] By mailing materials and insurance policy forms into California and issuing contracts of insurance covering California residents, the mail order insurers had created sufficient contacts with California to merit taxing jurisdiction.

In each of these cases, the courts emphasized that the mail order insurers had voluntarily and purposefully chosen to conduct business activities in the taxing/regulating state. Each court also noted that the states had an interest in the businesses because they were potential forums for litigation in connection with the insurance policies, and could be asked to provide assistance to residents eligible to receive financial benefits from the policies. The insurer may also enter the state to investigate claims and litigate disputes although none of the insurers had so done. Thus, the standards applied by these courts for taxing jurisdiction—purposeful contacts between the insurer and the state, the state's interest in the transaction, and the potential benefits and protections the state might offer to both parties to the contract—were identical to the Supreme Court standards for judicial jurisdiction.

C. *The Relationship Between the Due Process Clause and the Commerce Clause*

In *Complete Auto Transit, Inc. v. Brady*,[99] the Court overruled decades of precedent by holding that the commerce clause does not preclude state taxation of interstate commerce. Under *Complete Auto Transit*, a state sales tax on interstate commerce is valid if it satisfies a four-prong test:

> [1] [T]he tax is applied to an activity with a substantial nexus with the taxing State,
>
> [2] [The tax] is fairly apportioned,
>
> [3] [The tax] does not discriminate against interstate commerce, and
>
> [4] [The tax] . . . is fairly related to the services provided by the State.[100]

98. *Id.* at 593, 427 P.2d at 209, 58 Cal. Rptr. at 609.
99. 430 U.S. 274 (1977).
100. *Id.* at 279.

The first and fourth prongs of this test are closely related to due process requirements. For example, in recent cases the Court has equated due process nexus requirements with the first prong of the *Complete Auto Transit* test.[101] The relationship created between a market state and a nonresident mail order seller who purposefully avails himself of the privileges, opportunities, and benefits of the market state through continuous and regular solicitation satisfies the minimum contacts requirement of the due process clause. The same relationship satisfies the commerce clause nexus requirement.

In *Commonwealth Edison Co. v. Montana*[102] the Court equated the fourth prong of the *Complete Auto Transit* test with the due process requirement that a rational relationship exist between revenue claimed by the state and intrastate values of the enterprise.[103] The taxpayer contended that Montana's coal severance tax was excessive and therefore not fairly related to services provided by the taxing state. The Court applied the due process clause and asserted that "there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity be reasonably related to the value of the services provided to the activity."[104] The Court rejected arguments that the fourth prong of the commerce clause test necessitated a different rule because "there is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce."[105]

The second and third prongs of the *Complete Auto Transit* commerce clause test have no parallel in the due process clause test. However, the second and third prongs of the *Complete*

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101. In Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980), the Court began by analyzing due process concerns. Having found those concerns lacking in merit, the Court turned its attention to "additional considerations" posed by the commerce clause. These "additional considerations" involved only the second and third prongs of the *Complete Auto Transit* test. Likewise, in Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980), the Court discussed the nexus requirement of the due process clause and then summarily dismissed the taxpayer's commerce clause argument by noting that: "It has already been demonstrated that the necessary nexus is present . . . ." *Id.* at 228.

102. 453 U.S. 609 (1981).

103. *See supra* note 18.

104. *Commonwealth Edison*, 453 U.S. at 622.

105. *Id.* at 623.

Auto Transit test can be satisfied by a carefully drawn state statute.[106]

Bellas Hess forcefully argued the issue of administrative burden in its brief before the Supreme Court although that requirement was not included in the four-prong test. Full treatment of this commerce clause issue is outside this article's scope, but it should be noted that the same electronic revolution enabling businesses to operate across state lines without physical contact has enabled them to comply with different state laws with greater ease.[107]

IV. THE USE TAX

In Section III it was shown that the due process clause does not preclude a state from exercising either judicial or taxing jurisdiction over an out-of-state mail order insurer. This due process analysis applies to all mail order businesses.[108] It has been shown that regular and continuous solicitation in the market state by a mail order business satisfies the minimum contacts test: the business has purposefully availed itself of benefits and protections in the market state.

A. *The Apportionment Issue*

At least one court, the Wisconsin Supreme Court, has raised a separate due process impediment to state taxation of insurance premiums. In *National Liberty Life Insurance Co. v. State*,[109] the court invalidated an insurance premium tax levied on a mail order insurer because the tax was unapportioned.[110] Because use taxes are also unapportioned, this discussion of due process considerations under *Bellas Hess* would not be complete without analyzing the apportionment issue.

The question of apportionment always arises in an interstate transaction since the activities producing the revenue to be

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106. *See* McCray, *supra* note 13.

107. For example, Vertex Systems, Inc. provides subscribers with current information on sales tax rates in every state and political subdivision. The service is provided by publication and by magnetic tape; the latter can be used automatically to apply correct tax to each sales invoice.

108. *See* State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451 (1962).

109. 62 Wis. 2d 347, 215 N.W.2d 26, *cert. denied*, 421 U.S. 946 (1974).

110. The California Supreme Court reached the opposite conclusion in Illinois Commercial Men's Ass'n v. State Bd. of Equalization, 34 Cal. 3d 839, 671 P.2d 349, 196 Cal. Rptr. 198 (1983).

taxed occur in more than one state. For example, the activities which lead to the writing of an insurance policy—market research, mortality and accident studies—take place at the insurer's home office. Similarly, with a use tax some activities that generate gross receipts (acceptance of the sales agreement and shipment of the goods) take place outside the market state while other activities (solicitation, delivery, and use) take place within the market state. However, the Supreme Court has never held that a gross premium tax or use tax violates due process for lack of apportionment. Indeed, the Court has consistently upheld unapportioned taxes.

In *Equitable Life Assurance Society v. Pennsylvania,*[111] the Court explicitly held that the market state could constitutionally levy an unapportioned gross premium tax on an out-of-state insurer that employed salesmen to solicit in the state. Foreign insurers that employ salesmen to solicit in the market state, but do not have an in-state office, perform mortality and accident studies outside the market state. Thus, the only distinction between a foreign insurer that solicits through salesmen and one that solicits through the United States mail is the physical presence of an insurer's agents, and that distinction no longer has any constitutional significance.

The Court has also upheld unapportioned use taxes in numerous decisions.[112] In these decisions, the seller was physically present in the market state (through salesmen, independent contractors, or a leased or owned office); however, that fact lacks constitutional significance. If an unapportioned use tax is unassailable under a presence standard for due process, it should also be unassailable under the new due process standard of regular and continuous solicitation. In both situations the activities generating gross receipts occur in more than one state. Moreover, according to the Court, the vice of a tax on gross receipts of a foreign corporation doing interstate business—the risk of multiple taxation—is not present when only use tax collection duty is involved.[113]

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111. 238 U.S. 143 (1915).

112. National Geographic Soc'y v. Bd. of Equalization, 430 U.S. 551 (1977); Scripto, Inc. v. Carson, 362 U.S. 207 (1960); General Trading Co. v. State Tax Comm'r, 322 U.S. 335 (1944); Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); Henneford v. Silas Mason Co., Inc., 300 U.S. 577 (1937); Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934).

113. National Geographic Soc'y v. Bd. of Equalization, 430 U.S. 551 (1977).

The Supreme Court has also upheld unapportioned gross receipts taxes in contexts unrelated to the use tax. For example, in *Standard Pressed Steel Co. v. Department of Revenue,*[114] the Court upheld a Washington state tax on gross receipts from sales in Washington by a foreign manufacturer whose plant was outside that state. Although the goods sold in Washington were manufactured entirely outside the state, the Court rejected the company's claim that the tax did not bear a reasonable relation to protections and benefits conferred by Washington. The Court reached the same conclusion in *General Motors v. Washington.*[115] Thus, the apportionment issue does not raise a due process impediment to state use taxes measured by gross receipts from interstate sales.[116]

B. The Collection Duty

This article has assumed that an out-of-state seller is the taxpayer for purposes of showing tbat the due process clause does not prohibit the market state from taxing an out-of-state mail order business. However, one need not make this assumption. The Supreme Court has consistently distinguished the collector of a use tax from the payer of a use tax. The use tax is levied not on the out-of-state seller but on the in-state buyer, even though most states hold the seller liable for the tax if he does not collect it. According to the Court, the out-of-state business is not the taxpayer because it becomes liable for the tax only by failing or refusing to collect the tax from a resident consumer.[117] Thus, the burden of the tax is entirely within the control of the seller.

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114. 419 U.S. 560 (1975).

115. 377 U.S. 436 (1964).

116. An unapportioned excise tax does have commerce clause implications. For a discussion of those issues, see McCray, *supra* note 13.

117. National Geographic Soc'y v. Bd. of Equalization, 430 U.S. 551 (1977); Scripto, Inc. v. Carson, 362 U.S. 207 (1960); General Trading Co. v. State Tax Comm'r, 322 U.S. 335 (1944); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934). In *National Geographic,* the Court suggests a constitutional distinction between a use tax collection duty and imposition of a tax. For example, in rejecting the taxpayer's argument that the due process clause requires a *transactional* nexus or connection between mail order sales of a seller and the seller's activity in the taxing state, the Court noted that: "However fatal to a direct tax a 'showing that particular transactions are dissociated from the local business' . . . such dissociation does not bar the imposition of the use-tax collection duty." *National Geographic Soc'y,* 430 U.S. at 560.

The distinction hinted at in the above-quoted language may in fact be one of seman-

When the seller is merely collecting the tax for the state, the question becomes one of regulatory jurisdiction. That is, may a state, consistent with the due process clause, require an out-of-state mail order seller to collect the state's use tax?

The leading case in the regulatory jurisdiction category is *Travelers Health Association v. Virginia.*[118] At issue was a Virginia Blue Sky law which required persons selling or offering securities in Virginia to furnish the state with information on their financial condition, to consent to service of process, and to obtain a permit.[119]

Travelers Association was a Nebraska domiciliary that conducted a mail order insurance business from its home office in Omaha. The Association solicited members from all states including Virginia. Virginia brought an action against Travelers enjoining it from offering or selling certificates of insurance to Virginia residents until it had complied with Virginia Blue Sky laws. Travelers challenged Virginia's authority on the grounds that its insurance contracts were executed and performed outside Virginia and that it had no agents or offices within Virginia; hence, it was not doing business in that state.

In rejecting Travelers' argument, the Supreme Court also rejected the "doing business" standard and applied instead the minimum contacts test. According to the Court, Traveler's contacts with Virginia were not isolated but were systematic; its certificates of insurance were widely delivered in Virginia.[120] Thus, Virginia jurisdiction over Travelers did not violate the due process clause.

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ties. In Miller Bros. Co. v. Maryland, 347 U.S. 340 (1953), the Court framed the due process test loosely in the alternative: due process requires "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." *Id.* at 344-45. With a use tax, the minimal connection between a taxing state and the transaction taxed is *always present* since by definition the "use" taxed must occur within the state. Thus, if the due process clause is viewed as requiring *any* connection at all between seller and taxing state, the Court must, in use tax cases, focus on the word "person" rather than on the word "transaction." If such a distinction exists, it has a parallel in the judicial jurisdiction cases. *See supra* notes 72, 78 & 86.

118. 339 U.S. 643 (1950).

119. These statutory requirements were conditions precedent to conducting business in Virginia; therefore, the case could fit within the qualification category. *See supra* note 19 and accompanying text. However, the decision is frequently citad as one interpreting due process implications of state regulatory jurisdiction, and so it is included in that category. It is irrelevant whether the case is analyzed as a fourth level (qualification) decision or as a second level decision since, in either event, the Court's holding supports state assertion of collection duty jurisdiction over an out-of-state mail order seller.

120. *Travelers Health Ass'n,* 339 U.S. at 648.

State regulation of interest rates charged by a seller on credit sales is closely related to state regulation of interstate sales by imposing a use tax collection duty on an out-of state mail order seller. The Supreme Court has not ruled on this exercise of a state's regulatory jurisdiction.[121] However, four circuit courts have held that a market state can subject an out-of-state mail order seller to its usury laws.[122] All four cases involved Aldens, an Illinois corporation that solicited orders in fifty states solely by mailing catalogs and flyers from its headquarters in Chicago. Four of these market states—Pennsylvania, Wisconsin, Oklahoma, and Iowa—sought to apply their usury laws to the interstate sale. Each circuit court reached the same conclusion: state interest in the cost of credit for goods sold to its residents was sufficient to overcome due process objections.

The *Travelers* decision, like the *Aldens* decisions, supports the proposition that the due process clause does not require physical presence for the assertion of state jurisdiction. A state may extend its regulatory jurisdiction, including its use tax collection duty, over an out-of-state mail order seller. This legitimate interest in collecting nondiscriminatory use taxes was recognized by the Court in the 1937 case of *Henneford v. Silas Mason Co.*[123] The Court noted with approval that the purpose of the use tax was to help local retail sellers compete with out-of-state retail sellers not subject to sales tax, and to prevent a drain upon the revenues of a state by removing the tax advantage of buyers placing orders with businesses located in other states.

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121. The Court has, however, ruled on the commerce clause implications. In State *ex rel.* Meierhenry v. Spiegel, Inc., 277 N.W.2d 298 (S.D.), *appeal dismissed*, 444 U.S. 804 (1979), the South Dakota Supreme Court upheld the right of that state to enjoin an Illinois mail order seller from violating South Dakota's consumer protection (usury) laws by charging an interest rate permissible in Illinois, but exceeding South Dakota's ceiling. That court held that South Dakota's law applied to the interstate sale (invalidating the contractual term which stated that Illinois law would govern) because that atate had a strong public policy interest in regulating interest rates. Spiegel was a classic mail order seller whose only contacts with South Dakota were by United States mail. The company's appeal to the United States Supreme Court was dismissed by that Court "for want of a substantial federal question." 444 U.S. at 804.

122. Aldens, Inc. v. Miller, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); Aldens, Inc. v. Ryan, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978); Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977); Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

123. 300 U.S. 577 (1937).

V. Conclusion

The due process clause does not preclude the forum state from asserting *in personam* jurisdiction over an out-of-state mail order seller. Nor does it prohibit the market state from requiring a mail order seller to collect a use tax. In both cases, the mail order seller must have a constitutionally sufficient relationship to the state asserting jurisdiction. Such a relationship does not require that the seller be physically present in the state. Indeed, according to modern due process analysis, presence is neither necessary nor sufficient to support jurisdiction.

An out-of-state business regularly and continuously soliciting and receiving income from sales in a state solely by mailing catalogs or by advertising has sufficient contacts with that state to support judicial, regulatory, and taxing jurisdiction. A nonresident mail order business continuously soliciting in a state has purposefully availed itself of the benefits and protections of conducting business in that state—including access to its courts and to an orderly market. Moreover, the market state has a strong and legally recognizable interest in equalizing competition between intrastate and interstate retailers.

The Supreme Court has struck down state imposition of a use tax collection duty on an out-of-state seller on only two occasions. First, in *Miller Brothers Co. v. Maryland*,[124] the out-of-state company did not advertise in Maryland and had only an irregular and sporadic presence there through its delivery trucks. The Court held that these contacts were constitutionally insufficient to support imposition of Maryland's use tax collection duty. That decision is still valid today. The company did not purposefully avail itself of the privilege of engaging in business in Maryland since it did not solicit sales.[125]

Second, the Court disallowed imposition of a use tax collection duty in *Bellas Hess*. To the extent that *Bellas Hess* was decided on due process grounds, the decision is no longer valid

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124. 347 U.S. 340 (1954).

125. According to the majority opinion, the Miller Brothers Company did no advertising in Maryland and made only irregular and sporadic deliveries there. The Court found "no invasion or exploitation of the consumer market in Maryland." *Id.* at 347. The dissent disagreed with the Court's characterization of the facts. According to the dissent, the seller *regularly* made local deliveries of goods into Maryland in its own delivery trucks. The argument here that *Miller Bros.* is still valid is based solely upon the facts as set forth in the majority opinion. For a view that the *Miller Bros.* Court reached the wrong conclusion, see P. Hartman, *supra* note 90, at 623-26.

since Bellas Hess regularly and continuously solicited and received income from sales in Illinois. Therefore, under modern due process analysis, it should have been held subject to Illinois jurisdiction.

The constitutional sanctions against state taxation of mail order sales are based primarily on commerce clause considerations with due process undertones. This article has shown that any due process obstacles to such taxation can be overcome by a carefully drawn state statute creating a limited class of out-of-state vendors that must collect and remit the state's use tax.

The statute should be drafted so as to bring only interstate traders that have purposefully availed themselves of benefits and protections of the state's market on a regular and continuous basis into the class of vendors under state jurisdiction. For an out-of-state mail order vendor that has no physical presence in the market state, the due process test may be executed by considering both the volume of solicitation in a state and the amount of revenue generated as a result of solicitation; a statutory threshold should be included. States should take the first step now to equalize the tax burden on in-state and out-of-state sales by enacting such legislation.