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CHEAP SMOKES: STATE AND FEDERAL RESPONSES TO TOBACCO TAX EVASION OVER THE INTERNET

Christopher Banthin[†]

Cigarette smoking is the single most preventable cause of death in the United States, killing 440,000 Americans every year.¹ That is more deaths than those caused by alcohol, AIDS, car crashes, illegal drugs, murders, and suicides combined.² Millions more suffer adverse health effects from smoking and exposure to secondhand smoke.³ Few can doubt that a product responsible for so much death and disease has a profound impact on the public's health.

As anyone with an unfiltered email address knows, cigarettes are on the Internet. In 1997, an informal survey by the Center for Media and Education identified thirteen Internet cigarette vendors.⁴ Three years later, Ribisl and colleagues undertook the first comprehensive survey of the number and nature of domestic Internet cigarette vendors and identified eighty-eight vendors operating through numerous

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¹ Centers for Disease Control and Prevention, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States, 1995-1999*, 51 MORBIDITY & MORTALITY WKLY. REP. 297, 300 (2002), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5114.pdf>.

² Eric Lindblom, *Toll of Tobacco in the United States of America*, Campaign for Tobacco-Free Kids, at <http://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf> (updated Nov. 13, 2003).

³ See, e.g., Christopher Banthin & Graham Kelder, *Reducing Medicaid Costs: the Economic and Health Successes of Medicaid Comprehensive Coverage of Tobacco Cessation* (The Massachusetts Coalition for a Healthy Future), available at <http://www.tobaccofreemass.org/docs/Medicaid%20Mini-Blueprint%20Final%20Draft.pdf> (Oct. 15, 2003).

⁴ See CTR. FOR MEDIA EDUC., ALCOHOL AND TOBACCO ON THE WEB: NEW THREATS TO YOUTH (1997), available at http://www.rwjf.org/reports/grr/032436s.htm#int_top (last updated May 2001) (funded by the Robert Wood Johnson Foundation).

web sites.⁵ A follow-up study conducted in January 2002 using the same methodology located 195 vendors,⁶ a remarkable increase in light of the intervening economic recession in the United States led by the crash in online retailing.

Internet cigarette vendors represent a growing threat to the tobacco control effort, particularly with regard to tax policy. Internet cigarette vendors typically fail to charge state sales and excise taxes,⁷ which customers are otherwise required to pay when purchasing cigarettes from a vending machine, convenience or grocery store, or other traditional vendor. The price differences are substantial. For example, by purchasing their cigarettes on the Internet, smokers in New York City save up to \$30 per carton (excluding shipping costs).⁸

This article discusses the need for state and federal action if the tax policy advances in the tobacco control effort are to be preserved in light of the sale of untaxed or partially taxed cigarettes over the Internet. Part I discusses the impact of Internet cigarette vendors on public health. Part II reviews possible state approaches and justifies the importance of even labor-intensive efforts for collecting tobacco taxes on Internet sales. Part III examines advantages that proposed federal legislation provides for the collection of state tobacco taxes. Finally, the article concludes that increases in tobacco taxes continue to represent an important part of tobacco control in the Internet age, despite tobacco industry arguments to the contrary.⁹

I. RAMIFICATIONS FOR PUBLIC HEALTH POLICY

One way to predict the impact of cigarette sales over the Internet is to ask whether they might undermine one or more of the primary

⁵ See Kurt M. Ribisl et al., *Web Sites Selling Cigarettes: How Many Are There in the USA and What Are Their Sales Practices?*, 10 TOBACCO CONTROL 352, 355 (2001) (employing keywords and popular Internet search engines to find and examine on-line cigarette vendors).

⁶ Kurt M. Ribisl, *The Potential of the Internet as a Medium to Encourage and Discourage Youth Tobacco Use*, 12 TOBACCO CONTROL i48, i49 (Supp. 2003).

⁷ See *id.* at i49-i50 (describing the sales practices of Internet tobacco vendors that take advantage of tax loopholes).

⁸ The combined state and city taxes on cigarettes for New York City is \$3 per pack, making the total savings for a carton of 10 cigarette packages \$30. See Matthew C. Farrelly et al., RTI International, *State Cigarette Excise Taxes: Implications for Revenue and Tax Evasion* 2 (May 2003), at http://www.rti.org/pubs/8742_Excise_Taxes_FR_5-03.pdf (last visited Feb. 6, 2004).

⁹ See Hope Yen, *Ex-Surgeons General Seek New Cigarette Tax*, BOSTON GLOBE, Feb. 4, 2004, at A2 (recounting a Philip Morris spokesperson's comment that an increase in tobacco taxes could encourage tax evasion via Internet sales).

strategies used to achieve tobacco control goals. The tobacco control effort coalesces around a few policies, such as clean indoor air laws and litigation,¹⁰ but the effort's policy of increasing tobacco taxes to dissuade smoking is the focus of concern in dealing with Internet cigarette vendors. Most Internet cigarette vendors market huge savings compared to prices at brick and mortar vendors,¹¹ the type of savings that could only come from evading part or all of the applicable tobacco taxes. Indeed, the advertisement of tax-free cigarettes is the primary promotional tool used by Internet vendors.¹² Many of the smokers who turn to the Internet do so because of these promised savings.¹³ Thus, a primary question arises as to how Internet cigarette vendors might undermine efforts to increase tobacco taxes.

Those opposed to tobacco taxes might exaggerate the threat of Internet cigarette vendors in hopes of forestalling tobacco tax increases or even cutting taxes. The argument runs as follows: tobacco tax increases cause smokers and potential smokers to purchase cigarettes over the Internet where they are very cheap. According to the argument, the flight toward online purchasing will reduce state tax revenues (ostensibly because states cannot collect taxes on such sales) and take business away from local brick and mortar vendors, hurting small business and further lowering tobacco tax revenue.

History informs us that the success of similar arguments made in the analogous situation of cigarette smuggling have resulted in drastic setbacks for tobacco control. Smuggled cigarettes include foreign cigarettes being brought into a country without paying any of the taxes¹⁴ or related expenses in that country.¹⁵ Another form of smug-

¹⁰ See generally Dileep G. Bal et al., *The California Tobacco Control Program*, in TOBACCO AND HEALTH 341-45 (Karen Slama ed., 1995) (noting the role of legislation regarding public smoking bans and media campaigns in promulgating an anti-smoking message in California).

¹¹ See Ribisl, *supra* note 6, at i49-i50 (explaining that some Internet vendors claim to avoid paying state excise taxes on cigarettes).

¹² See U.S. GENERAL ACCOUNTING OFFICE, GAO-02-743, INTERNET CIGARETTE SALES: GIVING ATF INVESTIGATIVE AUTHORITY MAY IMPROVE REPORTING AND ENFORCEMENT 4 (2002) (noting that these websites usually indicate that the vendors do not comply with the Jenkins Act requirement of reporting interstate cigarette sales and shipments).

¹³ See, e.g., Joanna E. Cohen et al., *Tobacco Commerce on the Internet: A Threat to Comprehensive Tobacco Control*, 10 TOBACCO CONTROL 364, 364 (2001) (explaining how on-line vendors can thwart tobacco control initiatives by providing avenues for cheaper cigarettes).

¹⁴ E.g. Michelle Leverett et al., *Tobacco Use: The Impact of Prices*, 30 J.L. MED. & ETHICS 88, 92 (Supp. 2002).

¹⁵ Examples of related expenses are payments made under the Master Settlement Agreement between the States' Attorneys General and major U.S. tobacco companies. See generally NAT'L ASS'N OF ATT'YS GEN., TOBACCO MASTER

gling involves rerouting cigarettes manufactured for export back into the domestic market, thereby avoiding domestic taxes and other expenses.¹⁶ The tobacco industry uses the threat of these activities to oppose tobacco tax increases, arguing that tax increases cause more smuggling, which in turn leads to more criminal activity, less tax revenues, and more untaxed cigarettes.¹⁷

The industry argument worked in Canada with devastating effects for Canada's public health. In an initiative to combat some of the highest smoking rates in the world, Canada started raising cigarette taxes in the 1980s.¹⁸ The tax increases returned the desired effects.¹⁹ Smoking rates dropped among teens from 43% in 1981 to 23% in 1991.²⁰ Revenue from tobacco taxes also increased during this period.²¹

The tax increases, however, also triggered an increase in smuggling, which the tobacco industry used to its advantage.²² The tobacco industry launched a public relations campaign designed to reduce tobacco taxes as a means for ending smuggling.²³ In early 1994, the federal government and several provincial governments bought into

SETTLEMENT AGREEMENT 45-47 (1998), at

http://www.naag.org/upload/1032468605_cigmsa.pdf (last visited Apr. 10, 2004) (outlining payments to be made in settlement of state lawsuits).

¹⁶ See Leverett, *supra* note 14, at 92 (referring to this phenomenon as "gray market smuggling").

¹⁷ See, e.g., Luk Joossens & Martin Raw, *Cigarette Smuggling in Europe: Who Really Benefits?*, 7 TOBACCO CONTROL 66, 66-68 (1998) (explaining the industry's argument that higher taxes on cigarettes result in increased cigarette smuggling); see also Yi-Wen Tsai et al., *The Behaviour of Purchasing Smuggled Cigarettes in Taiwan*, 12 TOBACCO CONTROL 28, 28-29 (2003) (explaining tobacco companies' assertion that raising cigarette taxes leads to increased consumption of lower-priced, illegally obtained cigarettes).

¹⁸ CANADIAN CANCER SOC'Y, SURVEYING THE DAMAGE: CUT-RATE TOBACCO PRODUCTS AND PUBLIC HEALTH IN THE 1990S 24-25 (Oct. 1999), at <http://www.nsr-adnf.ca/DOCUMENTS/PDFs/oct99taxrep.pdf>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *id.*

²² See *id.* at 25-29.

²³ See *id.* Ironically, some cigarette manufacturers were later connected with the smuggling that occurred during this period. See *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001) (connecting R.J. Reynolds to smuggling activity, but dismissing case based on revenue rule barring actions to collect tax revenue of another country); see also *European Cmty. v. R.J. Nabisco, Inc.*, 355 F.3d 123, 128, 138 (2d Cir. 2004) (upholding dismissal of plaintiff's allegations of a money laundering conspiracy in connection with cigarette smuggling throughout Europe and beyond, based on foreign tax revenue rule).

the campaign and cut taxes.²⁴ Real cigarette prices were cut in half in most areas.²⁵ In Quebec, the price of cigarettes dropped from \$47 to \$23 per carton.²⁶

The result was devastating to public health. Despite the addictive properties of nicotine, smokers exhibit an inverse relationship between consumption and cigarette prices.²⁷ As the price of cigarettes rises, the quantity of cigarettes demanded falls.²⁸ On average, for every 10% increase in the cost of a pack of cigarettes, overall smoking rates will decrease 3-5%, and by 7% for smokers who are less than eighteen years of age.²⁹ So, when some provinces cut tobacco taxes thereby making cigarettes cheaper, public health authorities were correctly concerned.

Canadian health authorities documented smoking trends following the cuts.³⁰ For one year, researchers compared smoking rates in provinces that cut tobacco taxes with those that maintained taxes and found that the tax cuts encouraged smoking.³¹ While smoking rates in general declined, the provinces that maintained taxes enjoyed greater reductions of 29% to 24.9% in just over a year.³² In provinces that cut their tobacco taxes, smoking rates declined from 31% to 28.3% over the same time period.³³ In just one year, the difference in smoking rates between the two groups of provinces increased from 2% to

²⁴ CANADIAN CANCER SOC'Y, *supra* note 18, at 28-29.

²⁵ *Id.*

²⁶ *Id.* at 28.

²⁷ SURGEON GEN. DAVID SATCHER, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 322-37 (2000) (discussing the evidence of the relationship between price and demand for tobacco products) [hereinafter SURGEON GEN. SATCHER'S REPORT], available at http://www.cdc.gov/tobacco/sgr/sgr_2000/FullReport.pdf. The presence of an inverse relationship between smoking and the price of cigarettes, however, does not support the argument that the continuation of smoking is a matter of free choice. Nicotine addiction is determined by similar pharmacological and behavioral processes to cocaine or heroin addiction. See *id.* at 15.

²⁸ *Id.* at 322 (discussing the support behind the conclusion of an inverse relationship between the price and demand for cigarettes).

²⁹ See *id.* at 337 (extrapolating information from studies about tobacco users' behavior and economic theory to support several predictions about tobacco consumption); see also AM. MED. ASS'N, TOBACCO TAX CHALLENGE, UPDATE REPORT 2 (2003) (noting decrease in adolescent smoking rates based on price sensitivity), available at <http://www.smokelessstates.org/downloads/TaxChallenge.pdf> (last visited Mar. 24, 2004).

³⁰ Vivian H. Hamilton et al., *The Effect of Tobacco Tax Cuts on Cigarette Smoking in Canada*, 156 CAN. MED. ASS'N J. 187, 188 (1997).

³¹ See *id.* at 157.

³² *Id.* at 189.

³³ *Id.*

3.4%.³⁴ Even the number of cigarettes smoked each day per smoker declined more slowly in provinces where taxes had been cut than in those where tax rates were unchanged.³⁵ By 1998, per capita cigarette consumption in the high-tax provinces dropped by 24% compared to 1990, while low-tax provinces had a drop of only 8% over the same period.³⁶ In 1999, after tracking the impact of the tax cuts, the Canadian Cancer Society and other public health organizations concluded that the adverse effect of the tax cuts exceeded any detrimental effects to smoking rates caused by smuggling.³⁷ The tax cuts slowed quit rates among adults and increased initiation rates among new smokers.³⁸

The loss in tobacco tax revenue also far exceeded any loss in revenue from smuggling.³⁹ Since the tax rollbacks, “federal tobacco-tax revenues have been lower than in 1993-94, by an average of \$575 million” each year.⁴⁰ The Canadian provincial and federal treasuries “are \$4.8 billion poorer from reduced tobacco revenues” as a result of the 1994 tax revenue cuts, not even accounting for lost sales taxes.⁴¹ The beneficiary of the tax cuts appears to be the tobacco industry.

Similarly urged tax cuts designed to slow or stop the growth of Internet cigarette vendors would result in the same negative fiscal and public health consequences in the United States. The United States Surgeon General and the National Cancer Institute conclude tobacco taxation is one of the most effective means of reducing smoking rates.⁴² In the United States, since January 2002, twenty-nine states and the District of Columbia have increased their excise taxes on cigarettes.⁴³ Excise taxes on cigarettes reach as high as \$3 per pack in New York City.⁴⁴ Fifteen states and the District of Columbia now

³⁴ *Id.*

³⁵ *Id.* at 190.

³⁶ CANADIAN CANCER SOC’Y, *supra*, note 18, at 43.

³⁷ *See id.* at 1.

³⁸ *See* Hamilton et al., *supra*, note 30, at 190.

³⁹ CANADIAN CANCER SOC’Y, *supra*, note 18, at 43-45.

⁴⁰ *Id.* at 43.

⁴¹ *Id.*

⁴² *See* SURGEON GEN. SATCHER’S REPORT, *supra* note 27, at 337; Frank J. Chaloupka & Rosalie Liccardo Pacula, *The Impact of Price on Youth Tobacco Use*, in 14 SMOKING AND TOBACCO CONTROL MONOGRAPHS: CHANGING ADOLESCENT SMOKING PREVALENCE 193, 193-99 (Nat’l Cancer Inst. 2001) (arguing that the price increases, such as taxes, are effective in reducing the use of tobacco).

⁴³ *See* Eric Lindblom, *State Cigarette Taxes & Projected Benefits from Increasing Them*, Campaign for Tobacco-Free Kids, at <http://www.tobaccofreekids.org/research/factsheets/pdf/0148.pdf> (June 26, 2003) (showing the effective date of the last cigarette tax increase by state).

⁴⁴ Farrelly et al., *supra* note 8, at 2.

have a cigarette excise tax of \$1 or higher.⁴⁵ The reversal or freeze of tobacco tax increases would be disastrous for public health in the United States, particularly in light of the fact that nearly every state has greatly reduced spending on its tobacco control program.⁴⁶

Given the evidence that the impact of Internet cigarette vendors is not sufficient to warrant tax cuts, let alone holding off on further tobacco tax increases, the question must be asked: what is the impact on smoking rates of untaxed or partially taxed cigarettes being sold by Internet vendors? Adolescents appear particularly vulnerable. They are three times more sensitive to cigarette prices than adults.⁴⁷ Even the tobacco industry admits, through internal documents discovered in litigation, that the effects of price, which presumably includes the cost of taxes, are more pronounced among young people.⁴⁸ In one of the industry's documents, an R.J. Reynolds Tobacco Corporation's "[f]orecasting [g]roup . . . determined that younger adult smokers, particularly younger adult males smokers, tend to be very price sensitive."⁴⁹ Commenting on a 1981 government study, a Philip Morris economist stated that 20-25 year olds, and particularly males 20 to 25, are much more sensitive to price than other groups, and the effect of price on this group works mainly on the propensity to start smoking.⁵⁰

Yet, contrary to what one might expect based on their price sensitivity and their familiarity with navigating the Internet, adolescents have not patronized Internet cigarette vendors in substantial numbers

⁴⁵ *Id.* at 5.

⁴⁶ See, e.g., AM. LUNG ASS'N, STATE OF TOBACCO CONTROL: 2003 105-07 (2004) (charting individual state spending on tobacco control and prevention and comparing with recommendations for such spending by the Centers for Disease Control and Prevention), available at <http://lungaction.org/reports/appendixa03.html>; see also Cary P. Gross et al., *State Expenditures for Tobacco-Control Programs and the Tobacco Settlement*, 347 NEW ENG. J. OF MED. 1080, 1081-82 (2002) (noting that most states spent less funding for tobacco control programs than the CDC recommended).

⁴⁷ Chaloupka & Pacula, *supra* note 42, at 195 (discussing how price increases can have a greater impact on certain segments of the population, such as adolescents).

⁴⁸ See Frank Chaloupka, Mike Cummings, C. Morley and J. Horan, *Tax, price and cigarette smoking: evidence from the tobacco documents and implications for tobacco company marketing strategies*, Tobacco Control, Vol. 11, Supp. 1 pp. 62-71 (Mar. 2002) at 65-67.

⁴⁹ Letter from Gregory Novak, Director, Forecasting Group, to J.W. Johnston and H.J. Lees, Price Elasticity Among Younger Adult Smokers (Sept. 20, 1982), available at <http://www.tobaccodocuments.org/rjr/500151647-1647.html>

⁵⁰ Mem. from Myron Johnson, Philip Morris: Consumer Data/Research Dept., to Harry G. Daniel, Teenage Smoking and the Federal Excise Tax on Cigarettes (Sept. 17, 1981), <http://www.tobaccodocuments.org/landman/138281.html?printable=1>.

thus far. Recent surveys indicate that only two to three percent of adolescent smokers purchase cigarettes from Internet vendors.⁵¹ Other more traditional sources of cigarettes continue to supply adolescent smokers with the vast majority of the cigarettes they consume.⁵² According to a Centers for Disease Control (“CDC”) report in 2000, 7% of middle school-age smokers buy their cigarettes in stores, 11% steal them from family members or stores, 3% buy from vending machines, and 47% buy cigarettes or have someone buy for them.⁵³ Among high school-age smokers, 32% buy their cigarettes in stores, 3% steal them, 1% get cigarettes from vending machines, and 46% buy cigarettes or have someone buy for them.⁵⁴

Several reasons may explain why Internet cigarette vendors have been unpopular thus far among adolescents. For instance, adolescents might fear their parents or guardians will intercept home deliveries.

⁵¹ See, e.g., Jennifer B. Unger et al., *Are Adolescents Attempting to Buy Cigarettes on the Internet?*, 10 TOBACCO CONTROL 360, 361 (2001) (attempting to discover the frequency and demographics of online cigarette purchases, focusing on a sample of approximately 1700 adolescent smokers); Sara M. Abrams et al., *Internet Cigarette Purchasing Among Ninth-Grade Students in Western New York*, 36 PREVENTIVE MED. 731, 731 (2003) (summarizing a study about tobacco use and Internet purchases of cigarettes among ninth-graders); NAT’L HOUSEHOLD SURVEY ON DRUG ABUSE, THE NHSDA REPORT: HOW YOUTHS GET CIGARETTES 2 (2002) (survey in which kids ages 12 to 17, who admitted to smoking in the past, were asked how they obtained cigarettes), at <http://www.samhsa.gov/oas/2k2/YouthCigs/YouthCigs.pdf>.

⁵² Internet vendors, however, may actually supply more of the tobacco products consumed by children than these surveys imply. Because the minimum online order is typically one or more cartons, “minors need to [buy] with less frequency to obtain the same number of cigarettes as they would obtain from other commercial sources.” *Santa Fe Natural Tobacco Co. Inc. v. Spitzer*, 2001 WL 636441, at *18 n.28 (S.D.N.Y. June 8, 2001) (noting defendants argument that studies underestimated the volume of cigarettes purchased by minors through direct vendors due to minimum purchase requirements), *rev’d sub nom.* *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003). These children may be distributing cigarettes to friends and other peers. Approximately 21% to 46% of high school students and 22% to 47% of middle school students who smoke report they get cigarettes from members of a peer group. See Centers for Disease Control and Prevention, *Youth Surveillance United States 2000*, 50 MORBIDITY AND MORTALITY WKLY. REP. 21, 21 fig.9 (Supp. SS-4 2001) [hereinafter *Youth Surveillance United States 2000*] (studying use by high school and middle school children throughout the United States by examining students in all fifty states and the District of Columbia). Indeed, youth are particularly sensitive to cigarette prices and sometimes sell cigarettes to peers to off-set increases in tobacco products. See Emma Croghan et al., *The Importance of Social Sources of Cigarettes to School Students*, 12 TOBACCO CONTROL 67, 72 (2003) (discussing the ways in which teenage students in the United Kingdom obtain and exchange cigarettes). No published research answers whether this alternative theory is accurate.

⁵³ See *Youth Surveillance United States 2000*, *supra* note 52, at 21 fig.9.

⁵⁴ *Id.*

Hence, they may prefer to attempt to buy from a convenience store or the like where their parents are unlikely to be alerted. Indeed, even in communities where only a few vendors sell to minors, adolescents commonly know which stores and clerks will sell to them.⁵⁵ In addition, the typical minimum order requirement of most Internet cigarette vendors of two cartons per order or higher⁵⁶ and the need to use credit cards to pay may also dissuade adolescents.⁵⁷ These intrinsic barriers could account for why adolescent smokers have not turned to internet cigarette vendors in significant numbers.

The potential exists that increasingly untaxed or partially taxed cigarettes offered by Internet vendors may attract adolescents. A 2003 study published in *JAMA* showed that minors purchasing cigarettes from internet cigarette vendors are successful 89% of the time when using money orders and 94% of the time when using credit cards.⁵⁸ Almost all of the packages ordered as part of the study were

⁵⁵ See Joseph R. DiFranza & Mardia Coleman, *Sources of Tobacco for Youths in Communities with Strong Enforcement of Youth Access Laws*, 10 TOBACCO CONTROL 323, 327 (2001) (explaining that familiarity with the clerk helps minors purchase cigarettes illegally).

⁵⁶ See Ribisl et al., *supra* note 5, at 356.

⁵⁷ Although requiring a credit card may discourage some adolescents, credit cards are ineffective for age verification purposes. A warning to online vendors by one of the largest credit card companies states:

All Visa accepting merchants have a responsibility to adhere to all federal and state laws. As it relates to accepting Visa products, merchants must ensure they only accept our products for legal transactions. Merchants that sell age-restricted products (such as alcohol, tobacco) must have business processes and controls in place to ensure all laws governing such transactions are honored. Merchants should be aware that possession of a Visa card or submission of a Visa account information does not signify that the cardholder is of legal [sic] to purchase age restricted products. The issuance of Visa cards is not restricted to individuals above 18 years of age.

VISA, ACCEPT VISA: MERCHANT RESPONSIBILITY, at

http://www.usa.visa.com/business/merchants/get_account_responsibilities.html (last visited Apr. 11, 2004). Children also may turn to online payment companies, such as PayPal.com, which allows users to deposit funds into an account and then transfer funds to pay for online purchases. See PAYPAL, WELCOME, at <http://www.paypal.com> (last visited Apr. 11, 2004). PayPal.com states on its website that Internet cigarette vendors may use PayPal.com. PAYPAL, SHOPS: FOOD & DRINK: TOBACCO & CIGARS, at http://www.paypal.com/cgi-bin/webscr?cmd=_shop-cat-ext&loc=60450 (last visited Apr. 11, 2004). A search of the online vendors using PayPal.com returns numerous cigarette vendors. See *id.* (where a search for "Winston" in the "search shops" box results in a display list of cigarette vendors).

⁵⁸ See Kurt M. Ribisl et al., *Internet Sales of Cigarettes to Minors*, 290 JAMA 1356, 1357 (2003). The study recruited four adolescents to test Internet cigarette vendors' compliance with state minimum age sales laws, which make it illegal to sell cigarettes to people under the age of eighteen. The study had youth operatives buy cigarettes using credit cards and money orders. The credit cards used in the survey were predominately reloadable Visa cards marketed to teenagers. The youth

simply left at the front doors of the purchasers.⁵⁹ The youth recruited for the study encountered ineffective or no age verification protocols at all.⁶⁰ Perhaps mindful of the effect on smoking rates among adolescents,⁶¹ as well as adult smokers, and to protect the revenue streams created by tobacco taxes, states have begun to respond.

II. STATE RESPONSES

Every state has excise taxes on cigarettes.⁶² The tax is imposed on a purchaser who purchases cigarettes within the taxing state for personal consumption.⁶³ The purchaser is in principle ultimately liable for payment of the tax, but wholesalers normally collect the money.⁶⁴ States typically require a wholesaler or other pre-retail distributor to collect the tax by adding it into the wholesale price of the cigarettes and then remitting it to the state.⁶⁵ States generally require that a stamp be applied to each package of cigarettes to evidence payment of the tax.⁶⁶

operatives obtained the money orders at a local post office or grocery store. Only 1% of the packages clearly indicated they contained tobacco products. Some of the complimentary items included in the packages were packages of cigarettes, pens, ashtrays, and lighters displaying the vendors' logos. One vendor sent six free cartons of cigarettes several weeks after the original purchase with no explanation or requests for payment. *Id.* at 1356-58.

⁵⁹ *See id.* at 1358.

⁶⁰ *See id.* at 1357-58. Of the nine vendors (out of fifty-five total) whose websites instructed customers to fax or mail in a copy of their photo ID, only four refused to sell because the identification was never sent. *See id.* Adolescents received 5% of the deliveries and parents received 9% of the deliveries, with only one requiring an adult's signature. *See id.* at 1358.

⁶¹ *See, e.g.,* Lori Enos, *Shakeout Can't Put Out Web Tobacco Sales*, E-COMMERCE TIMES, Feb. 23, 2001 (noting that attorneys general in Michigan, Texas, Maryland, and other states have sued internet tobacco vendors for failing to verify purchasers' ages), at <http://www.ecommercetimes.com/perl/story/7625.html>; *see also* Michigan Attorney General Granholm Announces Charges Filed for the Illegal Sale of Tobacco Products to Minors over the Internet, PR NEWswire, Sept. 20, 2000, available at LEXIS, News & Business, News, Wire Service Stories. Out of the numerous vendors caught by the Washington Attorney General, only one asked the child operative her age. *See* In Re Ziggy's Tobacco & Novelty, No. 14.8 (Order of Wash. State Liquor Control Board) (Dec. 21, 1999) in TOBACCO PRODUCTS LIABILITY REPORTER 2.492 (2000), available at http://www.atg.wa.gov/releases/rel_bidis_122199.html (last visited Apr. 4, 2004).

⁶² *See* Farrelly et al., *supra*, note 8, at 5.

⁶³ *See e.g.,* MASS. GEN. LAWS ch. 62C, § 16; MASS. GEN. LAWS ch. 64C, § 6 (2000).

⁶⁴ *See* MASS. GEN. LAWS ch. 64C, § 6 (2000).

⁶⁵ *See id.*

⁶⁶ *See* MASS. GEN. LAWS ch. 62C § 16(d) (2000).

When vendors outside of a state's borders sell products within the state, the state may nevertheless capture revenue from the sale by imposing a compensating tax known as a use tax.⁶⁷ A use tax is a tax on the use, storage, or consumption of tangible personal property within the state.⁶⁸ The use tax on cigarettes equals the sales tax and tobacco excise taxes.⁶⁹

States rely upon use taxes to circumvent their constitutional "lack [of] power to tax a sale consummated beyond [their] borders."⁷⁰ Use taxes, however, generally face significant enforcement problems. States are unaware of the vast majority of sales originating from out-of-state vendors because, typically, neither the vendor nor the buyer reports the sale.⁷¹ In addition, there are legal barriers to enforcement. The Supreme Court limits the circumstances under which states can require out-of-state vendors to assist in collection of use taxes.⁷² In the absence of assistance from either a vendor or third party, such as a credit card company or a common carrier,⁷³ states in general must rely on citizens to volunteer the information about out-of-state purchases, no doubt a rare occurrence.⁷⁴

A. *Quill Corp. v. North Dakota*

The Commerce Clause gives Congress the authority to regulate businesses operating in more than one state.⁷⁵ As this power resides

⁶⁷ PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 10.8, at 617-18 (1981).

⁶⁸ *Id.* § 10.1, at 578.

⁶⁹ See MASS. GEN. LAWS ch. 64C § 6 (2000).

⁷⁰ HARTMAN, *supra* note 67, § 10.8, at 618.

⁷¹ States can track and easily collect taxes on some out-of-states sales without assistance from vendors. For example, sales to business consumers are less likely to go unnoticed by states because businesses must file monthly or quarterly tax returns and subject to relatively frequent audits by state revenue officials in comparison to individuals. Cars sales are also easily tracked by states because the owner registers the car with the state where he or she resides.

⁷² See discussion *infra* Part II.A.

⁷³ See, e.g., Bruce Mohl, *UPS Eyed as Source for Names: Firm May Have Given Customer Data to State in Cigarette Tax Probe*, BOSTON GLOBE, October 22, 2003, at D1 (suggesting that state revenue officials convinced UPS to turn over names and addresses of Massachusetts customers to whom they delivered cigarettes).

⁷⁴ See HARTMAN, *supra* note 67, § 10.8, at 618-19 (noting the administrative difficulty of collecting use taxes from individual purchasers). Under the Streamline Sales Tax Project, state delegates are developing an interstate compact to simplify and modernize sales and use tax administration. STREAMLINED SALES TAX SYSTEM FOR THE 21ST CENTURY, at <http://www.geocities.com/streamlined2000> (Nov. 12, 2002). Participating states will have access to use tax information and receive assistance in collection and remittance of use taxes. *Id.*

⁷⁵ See U.S. CONST. art. I, § 8, cl. 3.

in the hands of federal lawmakers, the Commerce Clause also limits the manner in which states may regulate interstate business.⁷⁶ States may not “unjustifiably . . . discriminate against or burden the interstate flow of articles of commerce.”⁷⁷ This limitation, known as the dormant Commerce Clause, applies even in the absence of relevant federal law.⁷⁸

The contemporary framework for analyzing the impact of the Dormant Commerce Clause on state and local taxes was established by *Complete Auto Transit, Inc. v. Brady*.⁷⁹ There, the taxpayer argued the imposition of Mississippi’s gross receipts tax on his business of transporting motor vehicles within Mississippi unconstitutionally burdened interstate commerce.⁸⁰ The Court upheld the tax and in the process articulated a four-prong test designed to determine whether application of a use tax comports with the dormant Commerce Clause.⁸¹ The tests asks whether 1) the tax is applied to an activity having a substantial nexus with the taxing state, 2) the tax is fairly apportioned, 3) the tax does not discriminate against interstate commerce, and whether 4) the tax is fairly related to the services provided by the state.⁸²

Numerous cases have turned on the “substantial nexus” requirement, including the 1992 Supreme Court case *Quill Corp. v. North Dakota*.⁸³ In *Quill*, North Dakota attempted to require an out-of-state mail order business to collect and remit use taxes on all of its sales into the state.⁸⁴ The plaintiff company was the sixth largest supplier of office equipment with about \$1 million in annual sales in North Dakota, but its contacts with North Dakota were limited to catalogues,

⁷⁶ See *S. Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) (explaining that the Commerce Clause has been interpreted as a “limitation on the power of the States to enact laws imposing substantial burdens on such commerce”).

⁷⁷ *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98 (1994) (declaring Oregon’s surcharge on in-state disposal of waste generated in other states facially invalid under this negative aspect of the Commerce Clause).

⁷⁸ *Cf. id.* at 98-99 (explaining the original intent of the Commerce Clause was to ensure that the nation, and not individual states, remained the primary economic unit and therefore retained the requisite authority to regulate commerce).

⁷⁹ 430 U.S. 274, 289 (1977) (denying the notion that taxes imposed on the privilege of doing interstate business are *per se* unconstitutional), *overruling* *Spector Motor Service, Inc. v. O’Connor*, 340 U.S. 602 (1951).

⁸⁰ *Id.* at 275-77.

⁸¹ *Id.* at 279.

⁸² *Id.*

⁸³ See 504 U.S. 298, 309-13 (holding that North Dakota’s taxation of *Quill* Corporation violated the Commerce Clause because the corporation did not have a substantial nexus with the state).

⁸⁴ See *id.*

flyers, advertisements, and telephone calls.⁸⁵ The Court reaffirmed that the dormant Commerce Clause did not allow the states to require an out-of-state company whose only connection to the taxing jurisdiction was shipping goods to customers and minimal advertising to collect taxes.⁸⁶

Internet vendors in general assume that *Quill* delineates their tax exposure, an assumption of which they are well suited to take advantage.⁸⁷ Internet-based business models “allow[] organizations a wide variety of choices as to where to locate, what employees to hire, and how to buy and sell goods and services.”⁸⁸ As long as Internet vendors avoid creating a “substantial nexus” with their customers’ states, then they may sell retail goods without having to assist states in collecting sales and use taxes under *Quill*.⁸⁹ The business strategy accurately presumes that most online purchasers will decide not to notify the state and remit the applicable taxes or that they will simply not think about the tax implications.⁹⁰ The net effect is that Internet vendors can offer cheaper products at retail.

B. The Jenkins Act

Internet cigarette vendors, however, are prohibited from taking full advantage of this business strategy. *Quill* affirmed the “substantial nexus” requirement, in part, on the basis that Congress was free to establish an alternate requirement.⁹¹ The *Quill* Court was attempting to avoid upsetting the reliance of out-of-state vendors on the “substantial nexus” requirement—particularly by creating a situation where states could hold companies liable for several years of back taxes, which they had never attempted to collect from their customers—while leaving room for prospective-only changes by Congress.⁹² In 1992 when *Quill* was decided, such congressional action had already

⁸⁵ *Id.* at 302 (adding that none of *Quill* corporation’s employees worked in North Dakota and all of the deliveries were made by mail or common carrier).

⁸⁶ *See id.* at 301-02, 314 (upholding *National Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753 (1967), which held that there is no substantial nexus when a vendor’s only contact with a state is through the mail).

⁸⁷ *See* MICHAEL L. RUSTAD & CYRUS DAFTARY, *E-BUSINESS LEGAL HANDBOOK* § 6.07(D)(2) (2003).

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *Id.* at § 6.07(D)(1).

⁹¹ *See* 504 U.S. at 318 (stating that Congress has the power to decide when states may require interstate mail-order retailers to collect use taxes).

⁹² *See id.* at 315-17 (noting that the bright-line rule granting tax exemption to vendors whose only contacts with a state are through the mail has engendered reliance of the mail-order industry and encouraged growth).

occurred with regard to out-of-state cigarette vendors via Congress' 1949 passage of the Jenkins Act.⁹³

The Jenkins Act requires any person or business that ships cigarettes to a state imposing a tax on tobacco products to disclose to state tax officials the name and address of the shipper and the person to whom cigarettes are shipped.⁹⁴ The disclosure also must include the brand names and quantities.⁹⁵ States are expected to use this information to obtain use taxes from the person who is ultimately liable for tobacco taxes, the smoker. Accordingly, while states may not require Internet cigarette vendors to collect and remit taxes under *Quill*, the Jenkins Act prohibits Internet cigarette vendors from offering their customers anonymity with regard to use taxes that many other Internet vendors provide.

The Jenkins Act was enacted in response to tobacco tax evasion by mail order cigarette houses located in tobacco-growing states and other states with very low tobacco taxes or none at all.⁹⁶ Throughout the 1940s, state tobacco tax revenues climbed significantly for the first time in history.⁹⁷ From 1939 to 1949, eighteen states started taxing cigarettes.⁹⁸ By 1949, thirty-nine states taxed cigarettes. During this same period, cigarette tax revenues at the state level jumped from \$56,140,000 to \$381,040,000.⁹⁹ The surreptitious movement of cigarettes from state to state suddenly became a very lucrative business, abetted by the astounding increase in the popularity of smoking during the same time period.¹⁰⁰ The potential tax revenue loss from mail order houses was in the millions.¹⁰¹ The Jenkins Act was intended to stop the loss in state tax revenue caused by the evasion of state tobacco taxes, to protect vendors who correctly charged their customers

⁹³ Pub. L. No. 363, 63 Stat. 884 (1949) (codified as amended at 15 U.S.C. §§ 375-378 (2000)).

⁹⁴ 15 U.S.C. § 376 (2000).

⁹⁵ *Id.* § 376(a)(1).

⁹⁶ See 81 CONG. REC. 6346, 6346-47 (1949) (explaining that the purpose of the bill is to assist the States in collecting both sales and use taxes on cigarettes).

⁹⁷ See THE TOBACCO INSTITUTE, THE TAX BURDEN ON TOBACCO: HISTORICAL COMPILATION 1992 1 (1993).

⁹⁸ See *id.* at 7 (showing that by the end of 1939, 21 states were taxing cigarettes and by 1949, 39 states were taxing cigarettes).

⁹⁹ *Id.* at 8.

¹⁰⁰ See RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 112-40 (1996) (discussing how the World War II years saw a dramatic increase in American smoking habits).

¹⁰¹ See 81 CONG. REC. 6346, 6348-51 (1949) (noting loss estimates ranging from \$3 million to \$50 million dollars annually from evasion of State sales taxes).

state tobacco taxes, and to halt the use of the United States mail to evade state tobacco taxes.¹⁰²

The manner in which local vendors sold cigarettes soon overshadowed and even diminished the problems associated with mail order cigarettes. Before the Jenkins Act, vendors sold cigarettes in hopes of selling other merchandise, nearly all of which had a higher markup.¹⁰³ But, cigarette manufacturers knew that “if dealers . . . gave adequate display space to cigarettes, gross profits on their sale were very high relative to the capital invested in their inventory, thanks to the product’s remarkably high turnover rate and frequent, reliable deliveries by wholesalers To impress more firmly on vendors the virtues of this dream product, Reynolds [Tobacco Company] now [in the late 1940s] systematically upgraded its field forces” with better wages, travel allowances, long-term arrangements, training, and more.¹⁰⁴ Similar campaigns were either in place or soon started by other manufacturers.¹⁰⁵

In addition to increasing cigarette sales by local vendors, cigarette manufacturers quickly recognized another important advantage to courting local vendors. The tobacco control movement was starting during this time period as the damaging effects of smoking came to light.¹⁰⁶ Cigarette manufacturers needed local allies to oppose burgeoning tobacco control efforts. Manufacturers helped fund retail associations for lobbying purposes and poured promotional dollars and advertisement materials into local cigarette retailing.¹⁰⁷ As of 2001, the portion of the cigarette industry promotional budget that goes to local retailers reached \$9.5 billion, which represents approximately 85% of the industry’s entire promotional budget.¹⁰⁸ As attention focused on local cigarette vendors and mail order houses, the relevance of the Jenkins Act ebbed.

¹⁰² S. REP. NO. 84-1147, at 1 (1955).

¹⁰³ See KLUGER, *supra* note 100, at 122 (claiming that in the early stages of selling cigarettes, vendors would use cigarettes to lure people into their stores to buy other merchandise).

¹⁰⁴ *Id.* at 122, 123.

¹⁰⁵ See *id.* at 127 (discussing Philip Morris’s efforts to repair and stabilize their sales by offering better pay and benefits to attract better salesmen).

¹⁰⁶ See *id.* at 132-36. Led by some pioneering studies by Ernst Wynder and Richard Doll published in the 1950s, the medical profession realized through the emerging science of epidemiology that smoking was associated with lung cancer. *Id.* at 134-36.

¹⁰⁷ See generally Michael S. Givel & Stanton A. Glantz, *Tobacco Lobby Political Influence on US State Legislatures in the 1990s*, 10 TOBACCO CONTROL 124 (2001).

¹⁰⁸ FED. TRADE COMM’N, CIGARETTE REPORT FOR 2001 (2003), at <http://www.ftc.gov/os/2003/06/2001cigreport.pdf>.

The Internet revived interest in mail order cigarettes and reestablished the relevance of the Jenkins Act. Shipping untaxed or partially taxed cigarettes across state borders returns to the consumer a gross savings up to \$20.50 per carton in some states.¹⁰⁹ Additionally, advertising and taking orders online is much cheaper and quicker than traditional mail order sales. In 2001, it was estimated that states would be losing up to \$1.4 billion annually to Internet cigarette vendors by 2005 from uncollected states tobacco taxes.¹¹⁰

As part of its August 2002 report on internet sales of cigarettes, the United States General Accounting Office (“GAO”) contacted ten states with the highest tobacco taxes to determine whether they had undertaken efforts to enforce the Jenkins Act.¹¹¹ Of the nine states who provided information, seven reported to the GAO that starting in 1997 they “had made some effort to promote Jenkins Act compliance by Internet cigarette vendors.”¹¹² This included contacting or sending letters requesting compliance with the Jenkins Act from those internet cigarette vendors suspected of selling within the states.¹¹³ These states reported that most vendors failed to respond or responded by stating the Jenkins Act was no longer good law.¹¹⁴ Indeed, over half of the 147 websites surveyed by the GAO indicated they do not comply with the Jenkins Act.¹¹⁵ When cigarette vendors turned over customer lists to states, the customers ultimately remitted the applicable tobacco taxes to the states.¹¹⁶

The states studied by the GAO also responded that they are “limited in what they can accomplish on their own to address this situation and successfully promote Jenkins Act compliance by Internet cigarette vendors.”¹¹⁷ The report found that “all of the officials pointed out that their states lack the legal authority necessary to enforce the [Jenkins] [A]ct and penalize the vendors who violate it, particularly with ven-

¹⁰⁹ See e.g., N.J. STAT. ANN. § 54:40A-8 (West 2004) (showing that the tax in New Jersey is \$0.1025 for each cigarette, totaling \$2.05 per pack).

¹¹⁰ See Robert Rubin, Chris Charron, & Moira Dorsey, *Online Tobacco Sales Grow, States Lose*, (Forrester Research, Inc.), Apr. 27, 2001, *excerpts available at* <http://www.forrester.com/ER/Research/Brief/Excerpt/0,1317,12253,00.html>.

¹¹¹ GAO, INTERNET CIGARETTE SALES: GIVING ATF INVESTIGATIVE AUTHORITY MAY IMPROVE REPORTING AND ENFORCEMENT, Report No. GAO-02-743, 2 n.3. (August 2002). Eleven states were initially contacted—the ten with the highest excise taxes and one additional state that seemed to be promoting the Jenkins act. Of these eleven, only nine provided information for the study. *Id.*

¹¹² *Id.* at 3.

¹¹³ *Id.*

¹¹⁴ *Id.* at 3-4.

¹¹⁵ *Id.*

¹¹⁶ See *id.* at 11-12.

¹¹⁷ *Id.* at 15.

dors residing in other states.”¹¹⁸ The enforcement provision only states “[w]hoever violates any provision of this chapter shall be guilty of a misdemeanor and shall be fined not more than \$1,000, or imprisoned not more than 6 months, or both.”¹¹⁹ Additionally, federal courts have jurisdiction to prevent and restrain violations.¹²⁰ The GAO report indicated that no federal agency had assisted states in Jenkins Act enforcement beyond turning over some potential violators’ names to the states.¹²¹

Despite the states’ reported feeling of powerlessness, the absence of statutory language does not necessarily foreclose the possibility of state enforcement. States might be able to proceed under an implied right of action. The Supreme Court in the 1975 case *Cort v. Ash*¹²² “attempted to harmonize and rationalize the law in this [implied right of action] area by formulating a four-part test for determining whether private remedies were available for violations of statutes not expressly providing them.”¹²³ The test instructs courts to consider four factors:

- 1) “[I]s the plaintiff one of the class for whose *especial* benefit the statute was enacted”;
- 2) “[I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one”;
- 3) “[I]s it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff”;
- and
- 4) “[I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?”¹²⁴

Although courts are moving away from the *Cort* factors (in favor of relying exclusively on congressional intent),¹²⁵ they have not fully rejected them. For the implied cause of action analysis of the Jenkins Act, the *Cort* factors provide an important context that would other-

¹¹⁸ *Id.* at 15.

¹¹⁹ 15 U.S.C. § 377 (2000).

¹²⁰ *Id.* § 378.

¹²¹ See GAO, *supra* note 111, at 3, 7-11 (discussing how only the ATF has even investigated Jenkins Act violations and that the ATF has consistently failed to prosecute offenses that they did find).

¹²² 422 U.S. 66 (1975).

¹²³ PAUL M. BATOR ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 945-46 (3d ed. 1998).

¹²⁴ *Cort*, 422 U.S. at 78.

¹²⁵ See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (stating that the *Cort* factors are just “guides” to determining the court’s “focal point”: congressional intent).

wise be missed by simply asking whether congressional intent existed. The Jenkins Act was passed in an era when courts commonly implied rights of action, and before the Supreme Court announced its reluctance to recognize them.¹²⁶ Legislative drafting and congressional debate of the Jenkins Act occurred when explicit statements about enforcement were not necessary for enforcement. Indeed, the factors discussed in *Cort* provide an appropriate framework for interpreting who may enforce the Jenkins Act.

Application of all of the *Cort* factors to the Jenkins Act leans in favor of an implied right of action for state enforcement.¹²⁷ With respect to the first *Cort* factor, the text and the legislative history of the Act leave little room for doubt that state tax enforcement officials fall within this class. Indeed, states are the class. The information required to be disclosed under the Act, including the name of the vendor, all of its places of business, customer lists, brands and quantities of cigarettes shipped, are all reported solely to state officials.¹²⁸ The vendors are not required by the Act to report this or other information to any other individual or governmental body.¹²⁹ The legislative history of the Act suggests the same conclusion. During the 1949 congressional committee hearings and floor debate, numerous state tax officials testified in support of the bill or submitted written testimony.¹³⁰ The central theme of their support and that of congressional supporters was that the states needed help in collecting lost tax revenue from mail order cigarette sales.¹³¹

Application of the second *Cort* factor also supports the finding of implied authority for state enforcement of the Jenkins Act. Although legislators opposed to enactment in 1949 decried the added federal budgetary expenses needed to cover the cost of federal enforcement,¹³² a 1953 amendment recognized that state tax officials had an implied right of action.¹³³ The amendment changed the reporting re-

¹²⁶ See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) ("In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts [such as *Cort v. Ash*] and that it expected its enactment to be interpreted in conformity with them." *Id.* at 699.).

¹²⁷ It should be noted that the parties in *Cort* were both private parties and so the factors outlined in that case may not equally apply to a case where one of the parties is the government.

¹²⁸ 15 U.S.C. § 376 (2000).

¹²⁹ *Id.*

¹³⁰ For examples of oral and written testimony, see 81 CONG. REC. 6346, 6354, 6357 (1949).

¹³¹ *Id.* at 6348, 6360.

¹³² *Id.* at 6349, 6352, 6355, 6359.

¹³³ Technical Changes Act of 1953, ch. 512, 67 Stat. 617 (1953) (codified as

quirement so that the reports would be “filed with” state tax officials, rather than “forward[ed] to” them.¹³⁴ The amendment had the purpose of assuring, in the event of an offense committed under this Act, that the venue of the action would be in the district in which the state tobacco administrator is located.¹³⁵ The change makes no difference to federal enforcement agents who can just as easily enforce the law where the seller is located as where its customers are located. It does, however, make a world of difference for state officials who are simply unable to prosecute cases in other states. After the 1953 amendment, a seller should not be able to escape prosecution by arguing improper jurisdiction. Viewed in this context, the 1953 amendment has meaning and supports the notion that Congress intended state tax officials to have an implied cause of action.

The third *Cort* factor supports the presence of at least one implied cause of action available to state tax officials, that is, enjoining sellers from violating the Act. The Act provides for this remedy (but does not state who enforces it). It states, “[t]he United States district courts shall have jurisdiction to prevent and restrain violations of this chapter.”¹³⁶ States suing for this remedy would further the Act’s intended goals.

Lastly, the fourth *Cort* factor, which asks “is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law,” addresses federalism.¹³⁷ The fourth seeks to limit federal law from impinging on the scope of state law and the accountability state lawmakers have to their constituents in this capacity. In the typical case, federalism concerns counsel against an implied right of action. For example, a federal district court dismissed an implied right of action under the Federal Aviation Act to compel the defendant to cut down trees where a state common law nuisance claim could have provided the same relief.¹³⁸ An implied cause of action under the Federal Aviation Act would have supplanted the state’s authority to define policy through its common law on nuisance.

amended at 15 U.S.C. § 376(a)(1) (2000)) (requiring that reports be “filed with” state tax officials instead of forwarding them to state tax officials).

¹³⁴ See S. REP. NO. 84-1147, at 2-4 (1955).

¹³⁵ See *id.* at 1.

¹³⁶ 15 U.S.C. § 378 (2000).

¹³⁷ *Cort v. Ash*, 422 U.S. 66, 78 (1975).

¹³⁸ *County of Westchester v. Town of Greenwich Connecticut*, 745 F. Supp. 951 (S.D.N.Y. 1990) (dismissing the implied right of action on grounds independent from the consideration of the nuisance claim). The Commission of Transportation of Connecticut was also named as a defendant. *Id.*

In this case, federalism weighs in favor of an implied right of state action for two reasons. First, state enforcement of the Jenkins Act empowers the states since it would be giving them new authority.¹³⁹ Second, there is no state law to displace. While the enforcement of state tobacco excise taxes in general is relegated to state law, the dormant Commerce Clause denies states the ability to compel the assistance of Internet cigarette vendors. Indeed, *Quill* makes it clear that the dormant Commerce Clause prohibits states from asserting tax jurisdiction over out-of-state sellers that have no presence in the state, unless Congress legislates otherwise.¹⁴⁰ This is exactly what has happened under the Jenkins Act. Congress used its power under the Commerce Clause to authorize states to collect needed information about interstate cigarettes sales, and thus, remove possible dormant Commerce Clause checks on such states efforts. As a result, the Jenkins Act does not displace state remedies. To the contrary, it evidences Congress' intent to provide states with a remedy that they could not develop on their own.

The State of Washington, which participated in the GAO report, recently explored Jenkins Act enforcement using an implied cause of action approach. Washington successfully forced one of the most ubiquitous Internet cigarette vendors, www.dirtcheapcig.com, to provide customer information to tax authorities in the State.¹⁴¹ The com-

¹³⁹ Courts may be more willing to find implied causes of action by states than private litigants in response to the so-called "new federalism," illustrated in *New York v. United States*, 505 U.S. 144 (1992). The Supreme Court has a renewed notion of state sovereignty, and implying causes of action for states appears to comport with this continuing effort.

¹⁴⁰ See *supra* Part II.A.

¹⁴¹ See *State of Washington v. www.dirtcheapcig.com, Inc.*, 260 F.Supp. 2d. 1048, 1052 (W.D. Wash. 2003) (finding that the state had an implied right of action against the Internet cigarette seller). *Dirtcheapcig.com* has been the subject of numerous state enforcement efforts. In 2001, when the Massachusetts Department of Revenue asked it to release a list of its customers, *Dirtcheapcig.com* refused and stated "[w]e are the last refuge of the persecuted smoker." See Bruce Mohl, *Cigarette Shoppers Turn to the Internet*, BOSTON GLOBE, Feb. 16, 2001 at A1. A year earlier, *Dirtcheapcig.com* sold to minors in the compliance checks run by the Department of Consumer Affairs of New York City a few months after the Attorney General of Michigan brought criminal charges against it for the same conduct. See John Radziejewski & Kevin Ortiz, *Department of Consumer Affairs Cracks Down on Mail-order & Internet Tobacco Dealers who Sell Cigarettes to Minors*, New York City Dept. of Consumer Affairs, Spring 2001, available at <http://www.nyc.gov/html/dca/html/cigsminors.html> (visited at Sept. 21, 2001). The California Attorney General is currently suing *dirtcheapcig.com*. See Press Release, Office of the Attorney General, State of California, Attorney General Lockyer Files Lawsuits Against Five Retailers for Internet Sales to Minors: Companies Also Evading Reporting Requirements, Depriving State of Excise Taxes (April 1, 2003), at <http://caag.state.ca.us/newsalerts/2003/03-039.htm>.

pany advertised cigarette sales in Washington through the Internet and newspapers, took orders via the phone and the internet, shipped cigarettes into the state, but failed either to register with the state as a cigarette vendor or to report individual cigarette sales to the state.¹⁴²

Although the case was settled before trial, the court had a chance to rule on the Defendant's Motion to Dismiss, in which Dirtcheap argued that the State of Washington had neither an explicit nor implied right to sue under the Jenkins Act.¹⁴³ The court disagreed, finding that because Congress clearly intended to help states in passing the Jenkins Act, states have an implied right to enforce the Jenkins Act in court.¹⁴⁴

States have enacted laws to help carry out their implied authority provided by the Jenkins Act. For example, in September 2002, California enacted complementary legislation allowing state officials to recover attorneys' fees in Jenkins Act enforcement cases.¹⁴⁵ The legislation also requires Internet cigarette vendors to display a warning on packages of cigarettes notifying the customer that he or she is responsible for unpaid state tobacco taxes and that the seller has notified state officials about the sale.¹⁴⁶ The legislation leverages these and other reporting requirements to encourage Internet cigarette vendors to simply collect and remit taxes before the sale.

C. Banning Direct-to-Consumer Cigarette Deliveries

Tobacco taxes constitute only one aspect of state regulation of cigarette distribution. States also license retailers,¹⁴⁷ specify age verification procedures and age warnings,¹⁴⁸ require minimum pricing,¹⁴⁹ prohibit self-service displays,¹⁵⁰ prohibit vending machines,¹⁵¹ prohibit cigarette giveaways,¹⁵² and require retailer training.¹⁵³ Rather

¹⁴² *Dirtcheap*, 260 F. Supp. 2d at 51-52.

¹⁴³ *Id.* at 1050, 1053. *Dirtcheap* also argued that the court lacked personal jurisdiction over it because it was operated out of Kentucky. *See id.* at 1052.

¹⁴⁴ *See id.* at 1055.

¹⁴⁵ CAL. CIV. PROC. CODE § 1021.10 (West Supp. 2002) (permitting the award of attorney's fees for successful claims to enforce the Jenkins Act); CAL. REV. & TAX CODE § 30101.7 (West Supp. 2003) (establishing collection of cigarette sale taxes and penalties for violations of the Jenkins Act).

¹⁴⁶ CAL. CIV. PROC. CODE § 30101.7.

¹⁴⁷ *E.g.*, MASS. GEN. LAWS ANN. ch. 62C, § 67 (West 2002); MASS. GEN. LAWS ANN. ch. 64C, § 2 (West 2000).

¹⁴⁸ *E.g.*, MASS. GEN. LAWS ANN. ch. 270, § 6 (West 2000); MASS. REGS. CODE tit. 940, §§ 21.04(2)(b); 22.06(2)(b) (2000).

¹⁴⁹ *E.g.*, MASS. REGS. CODE tit. 830, § 64C.14.1 (2004).

¹⁵⁰ *E.g.*, MASS. CODE REG. tit. 940, §§ 21.04(2)(c), 22.06(2)(c) (2003).

¹⁵¹ *Id.* §§ 21.04(4)(b), 22.06(4)(b).

¹⁵² *Id.* §§ 21.04(1)(a), 22.06(1)(a).

than trudge through the legal and practical uncertainties of achieving regulatory parity between the internet and traditional cigarette vendors, states could simply ban direct-to-consumer cigarette deliveries.¹⁵⁴

On August 16, 2003, New York became the first state to ban direct-to-consumer cigarette deliveries.¹⁵⁵ Legislators felt “the shipment of cigarettes sold via the internet or by telephone or by mail order to residents of [New York] pos[ed] a serious threat to public health, safety, and welfare, to the funding of health care . . . and to the economy of the state.”¹⁵⁶ The Second Circuit Court of Appeals upheld New York’s ban. The other circuits have not yet addressed the question. Alaska is the only other state thus far to ban direct-to-consumer cigarette deliveries.¹⁵⁷

Courts typically apply a two-step analysis to determine if such laws violate the dormant Commerce Clause.¹⁵⁸ First, courts initially ask whether the state law is “basically an [economic] protectionist measure, or . . . [whether it] fairly [can] be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.”¹⁵⁹ If elements of economic protectionism are found, then courts strictly scrutinize the law,¹⁶⁰ which usually leads to its *per se* invalidation.¹⁶¹

Following the 1970 U.S. Supreme Court’s holding in *Pike v. Bruce Church, Inc.*, courts apply a lesser standard of review when a

¹⁵³ *Id.* §§ 21.04(3)(b), 22.06(3)(b).

¹⁵⁴ Many states have adopted similar bans for Internet alcohol sales. See Eric L. Martin, Note, *A Toast to the Dignity of States: What Eleventh Amendment Jurisprudence Portends for Direct Shipment of Wine*, 31 HOFSTRA L. REV. 1303, 1307 (2003) (noting that many states ban Internet sales of wine).

¹⁵⁵ See N.Y. PUB. HEALTH LAW § 1399-ll (2002) (banning direct to consumer delivery of cigarettes and bidis).

¹⁵⁶ *Brown & Williamson Tobacco Corp v. Pataki*, 320 F.3d 200, 204 (2d Cir. 2003).

¹⁵⁷ See ALASKA STAT. § 43-50-105 (West Supp. 2003) (banning direct to consumer sale of cigarettes).

¹⁵⁸ See *City of Phila. v. New Jersey*, 437 U.S. 617, 623-24 (1978).

¹⁵⁹ *Id.* at 624. The U.S. Supreme Court has identified protectionist measures as laws that “discriminat[e] against articles of commerce coming from outside the State” which are no different from articles in-state except for their origin. *Id.* at 626-27. There is a narrow exception to the *per se* rule. The U.S. Supreme Court has allowed protectionist laws to stand based on the “noxious” character of an article in commerce. See *id.* at 628-29. The court stated that quarantine laws that are directed against interstate commerce, like with containing diseased livestock, were “noxious” because its “very movement risked contagion and other evils.” *Id.* at 629.

¹⁶⁰ See *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979) (noting that the “strictest scrutiny” shall apply to review of discriminatory state laws).

¹⁶¹ *E.g.*, *City of Phila.*, 437 U.S. at 623-24 (claiming that state legislation which amounts to mere economic protection is *per se* invalid).

state law “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental”¹⁶² State laws that do so “will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹⁶³ The intensity of the burden that will be allowed depends on “the nature of the local interest involved.”¹⁶⁴ Preservation of public health, safety and welfare weigh strongly in favor of states.¹⁶⁵

State regulation of Internet sales and communication initially spurred renewed judicial use of another dormant Commerce Clause analysis, the “extraterritoriality” analysis, which blocks states regulation of commercial activity that takes place wholly outside of the state.¹⁶⁶ The extraterritoriality analysis appears well suited for the super-geographical nature of typical websites.¹⁶⁷ For example, a New York law banning digitized web site content was struck down under the dormant Commerce Clause because the law would have regulated not only the content viewed by Internet users in New York, but also the same content viewed by Internet users in other states.¹⁶⁸

¹⁶² 397 U.S. 137, 142 (1970) (rejecting a state order that imposed restrictions on a fruit producer’s interstate commerce). The Supreme Court has chosen not to draw a clear distinction between when this test and the first Commerce Clause test apply. *See Brown-Forman Distillers Corp. v. N.Y. Liquor Auth.*, 476 U.S. 573, 578-79 (1986) (discussing when a lesser standard of review is appropriate when evaluating a statute under the Commerce Clause).

¹⁶³ *Pike*, 397 U.S. at 142.

¹⁶⁴ *Id.*

¹⁶⁵ *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (asserting that issues of local concern over health or safety are generally interpreted to give states a higher level of commerce control).

¹⁶⁶ *See, e.g., Healy v. The Beer Inst.*, 491 U.S. 324, 342-43 (1989). *See generally* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 817-18 (2001) (discussing courts approaches to Internet regulation using the dormant Commerce Clause).

¹⁶⁷ *See PSINet v. Chapman*, 108 F. Supp. 2d 611, 626-27 (W.D. Va. 2000) (finding that because there is no way to limit access to online materials by geographic location, a California website owner would have to alter his commercial materials in all states in order to comply with a Virginia law); *see also ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (finding no guarantee that an Internet communication from one New Mexican intended for another New Mexican “will not travel through other states en route”); *see also Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 751 (E.D. Mich. 1999) (finding that because the Internet lacks geographical boundaries, “a publisher of a web page cannot limit the viewing of his site to everyone in the country except for those in [a particular state]”).

¹⁶⁸ *See Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 183-84 (S.D.N.Y. 1997) (holding that a New York statute regulating content available to minors would violate the dormant Commerce Clause because such a statute would regulate content viewed by citizens outside of New York state).

Recent scholarship and courts prefer the *Pike* balancing test, pointing out that states' interests should be factored into their decision-making.¹⁶⁹ Such was the case in the Second Circuit opinion on New York's ban.¹⁷⁰ The court found that New York demonstrated a legitimate governmental interest in stopping sales of cigarettes to minors and in stopping the sale of untaxed or minimally taxed cigarettes.¹⁷¹ New York convinced the court that the burden on out-of-state sellers was not excessive in relation to these benefits.¹⁷²

The court ultimately considered Internet cigarette vendors to be a type of distribution, as opposed to a group of competing out-of-state vendors.¹⁷³ Such interpretation joins numerous cases upholding state authority to regulate the cigarette distribution.¹⁷⁴ Given the recognized authority of states in this area and the governmental interests in reducing the adverse health effects of smoking, other federal circuits that address this issue may well conclude that bans on direct-to-consumer cigarette deliveries are allowed under the dormant Commerce Clause.

D. State Level Recommendations

Debate about the pros and cons of state taxation on interstate sales surges with the pace of commercial activity on the Internet. One position in this debate advocates doing away with or significantly limits sale and use taxes on retail sales over the Internet.¹⁷⁵ The Internet economy, it is thought, would grow much more quickly without the imposition of state taxation than otherwise.¹⁷⁶ Under this reasoning, even if the Internet economy displaced part of the economic produc-

¹⁶⁹ See, e.g., *State v. Heckel*, 24 P.3d 404, 409 (Wash. 2001) (applying the *Pike* test and considering local interests).

¹⁷⁰ See *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2nd Cir. 2003) (applying the *Pike* test).

¹⁷¹ See *id.* at 217 (noting that this result was reached because the effects of New York's ban on interstate commerce were *de minimis*).

¹⁷² *Id.*

¹⁷³ See *id.* at 212-14 (citing *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978)).

¹⁷⁴ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (providing that while state bans on tobacco advertising violated the First Amendment, state bans on these sales themselves are valid); see also *Austin v. Tennessee*, 179 U.S. 343, 361-62 (1900) (noting states may ban the manufacture and sale of cigarettes within their boundaries).

¹⁷⁵ See generally ALAN E. WISEMAN, FEDERAL TRADE COMMISSION, ECONOMIC ISSUES: ECONOMIC PERSPECTIVES ON THE INTERNET 71 (July 2000) (presenting theoretical arguments for and against taxing electronic commercial transactions), at <http://www.ftc.gov/be/hilites/economicissues.pdf> (last visited Feb. 11, 2004).

¹⁷⁶ See *id.*

tivity derived from brick and mortar economies, the benefits of the new Internet economy would filter back down through income taxation on the entrepreneurial members of the online community.

This position draws support from the amount of work involved with collecting sale and use taxes on interstate sales. Collection efforts are labor intensive.¹⁷⁷ The Internet has magnified the workload of state revenue departments.¹⁷⁸ Attempts to collect the compensating use taxes for general sales taxes have achieved modest success in terms of revenue generated at best when compared to collection efforts involving income taxes, gasoline taxes, and taxes on other wholly in-state activities.¹⁷⁹ Costs associated with collection efforts have approached and even surpassed the amount of revenue raised.¹⁸⁰

The position supporting the elimination or limitation of sales and use taxes, however, ignores one of the most important policy rationales for taxation: encouraging good behavior and discouraging bad behavior. The taxation of tobacco products quintessentially exemplifies this rationale. Shortly after the United States Surgeon General released his groundbreaking report in 1964 that linked smoking to cancer,¹⁸¹ state cigarette excise taxes increased dramatically.¹⁸² State and federal tax increases on tobacco products during the intervening years reduced smoking rates and may have saved millions of lives.¹⁸³

¹⁷⁷ See Hal R. Varian, *Taxation of Electronic Commerce* (April 2000) (stating, "there is no easy way to enforce the collection of use taxes, since states do not have tax jurisdiction over out-of-state-companies, and thus cannot require them to collect use taxes at the point of sale."), *at* <http://www.sims.berkeley.edu/~hal/Papers/etax.html>; *but see* discussion *infra* Part IV (noting that collection of tobacco taxes from consumers can raise revenues).

¹⁷⁸ See Varian, *supra* note 177; ROBERT J. CLINE & THOMAS S. NEUBIG, THE SKY IS NOT FALLING: WHY STATE AND LOCAL REVENUES WERE NOT SIGNIFICANTLY IMPACTED BY THE INTERNET IN 1998 1 (noting use tax collection is a longstanding problem in the area of mail order catalogues), *available at* <http://www.ecommercecommission.org/document/Ernst&Young1.pdf> (June 18, 1999).

¹⁷⁹ See *State and Local Taxation of Out-of-State Mail Order Sales*, Advisory Committee on Intergovernmental Relations, A-105 at 2-8 (April 1986) (discussing the difficulty of enforcement with mail orders).

¹⁸⁰ See *id.*

¹⁸¹ See SURGEON GENERAL LUTHER TERRY, U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 155-81 (1964).

¹⁸² Farrelly et al., *supra* note 8, at 2.

¹⁸³ Kenneth J. Meier & Michael J. Licari, *The Effect of Cigarette Taxes on Cigarette Consumption 1955 Through 1994*, 87 AM. J. PUB. HEALTH 1126 (1997). The Surgeon General and the National Institute believe tobacco taxation is one of the most effective means for reducing smoking rates. See SURGEON GEN. SATCHER'S REPORT, *supra* note 27, at 337 (discussing the effective reduction in smoking anti-

Thus, debate about the efficacy of collecting excise taxes for Internet cigarette sales should take into consideration the public health and fiscal impact of smoking. Smoking causes approximately \$157 billion in annual health-related economic losses, much of which is paid for by state Medicaid programs.¹⁸⁴ For example, in Massachusetts, from 1991 to 1998, smoking-related asthma cost \$10 million annually.¹⁸⁵ Tobacco-related birthing complications cost as much as \$2 billion annually in this country.¹⁸⁶ Medicaid pays for well over half of such neonatal expenses.¹⁸⁷ The CDC estimates that “[f]or each of the approximately 22 billion packs sold in the U.S. in 1999, \$3.45 was spent on medical care attributable to smoking, and \$3.73 in productivity losses were incurred, for a total cost of \$7.18 per pack.”¹⁸⁸

While the extra burden involved in collecting tobacco taxes on cigarette sales over the Internet is labor intensive, the countervailing benefits are substantial. Even if the cost of collection exceeds the revenue raised, states will enjoy countervailing savings on smoking-related health care expenditures. Furthermore, collecting tobacco taxes from the consumer may do more to dissuade smoking than adding in taxes at the retail level. The thought of getting special attention from state revenue officials in the form of a Jenkins Act letter may steer smokers back to brick and mortar vendors and discourage potential smokers from starting. Such letters might also alert parents that their children are purchasing cigarettes.

The debate about taxation on Internet commerce is an important and necessary one if society is to realize the full potential of the Internet, but legitimizing untaxed or partially taxed cigarette sales over the Internet or cutting tobacco taxes would reverse a long-lasting and highly effective public health initiative. Such a reversal would cause a public health tragedy on parallel with what Canada experienced after cutting its tobacco taxes. Collection under the Jenkins Act or by some other means, while labor intensive and difficult, keeps smoking rates low and saves state revenue generated from tobacco taxes and reve-

pated in a system of tobacco taxation); Chaloupka & Liccardo Pacula, *supra* note 42, at 193-99.

¹⁸⁴ J.L. Fellows et al., *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs - United States, 1995-1999*, 51 MORBIDITY & MORTALITY WEEKLY REP., April 12, 2002 (discussing the detrimental effects of smoking on quality of life which generates health costs that must be absorbed by federal programs).

¹⁸⁵ See Banthin & Kelder, *supra* note 3, at 6.

¹⁸⁶ See *id.* at 7.

¹⁸⁷ See *id.*

¹⁸⁸ Centers for Disease Control and Prevention, *supra* note 1, at 302 (concluding that the costs to society justify increased funding for interventions).

nues spent on smoking related expenditures. The approach of banning all direct-to-consumer cigarette deliveries affords the same protection with easier enforcement.

III. FEDERAL RESPONSE

Although state efforts to collect the tobacco taxes from customers of Internet cigarette vendors are productive,¹⁸⁹ it is labor intensive relative to tobacco tax collection from in-state vendors. The obvious preference would be for Internet cigarette vendors to collect and remit taxes before shipping cigarettes or to use a wholesaler licensed within the state. Under *Quill*, such an approach to Internet cigarette vendors would violate the Commerce Clause.

Quill makes clear that Congress could authorize states to require out-of-state sellers to collect use taxes. Congress may act on this invitation with regard to all out-of-state vendors of cigarettes, including those on the Internet. On December 9, 2003, the Senate unanimously passed Senate Bill 1177 entitled the "Prevent All Cigarette Trafficking Act."¹⁹⁰ Complementary legislation, House Resolution 2824, is being debated in the House.¹⁹¹

In addition to clarifying that states have the authority to compel production of Jenkins Act information from Internet cigarette vendors, both legislative proposals would require tobacco taxes be paid before cigarettes are shipped to customers.¹⁹² Senate Bill 1177 states:

With respect to delivery sales into a specific state and place, each delivery seller shall comply with ... all State, local, Tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if such delivery sales occurred entirely within the specific state and place, including laws imposing ... payment obligations or *legal requirements relating*

¹⁸⁹ See discussion *infra* Part IV; see also discussion *supra* Parts I, II.C (relating to public health and public health funding benefits).

¹⁹⁰ S. 1177, 108th Cong. (2003) (enacted).

¹⁹¹ See Internet Tobacco Sales Enforcement Act, H.R. 2824, 108th Cong. § 2 (2003) (setting out requirements for compliance with laws, recordkeeping, and reporting for the interstate sale or distribution of cigarettes and smokeless tobacco); see also 150 CONG. REC. D35 (daily ed. Jan. 28, 2004) (amended and passed by Committee on the Judiciary).

¹⁹² See S. 1177 § 2(e), 5 (b); H.R. 2824 §§ 2-5 (requiring the payment of taxes prior to delivery as well as the filing of information on each sale of cigarettes or smokeless tobacco with the state tobacco tax administrator, and imposing civil and criminal penalties for violation); see also discussion *supra* Part II.B.

*to the sale, distribution, or delivery of cigarettes and smokeless tobacco . . .*¹⁹³

This language and similar language in House Resolution 2824¹⁹⁴ will effectively fold the Internet cigarette vendors into state regulatory schemes for cigarette distribution. Just like traditional brick and mortar cigarette vendors, under the proposed legislation internet cigarette vendors will be forced either to collect tobacco taxes at the point of sale or to obtain their cigarettes from wholesalers who are authorized to affix appropriate state tax stamps to cigarette packages.

Folding Internet cigarette vendors into the states' regulatory scheme for cigarette distribution will also immunize state tobacco tax collection efforts from a host of legal challenges. For example, dormant Commerce Clause challenges, such as the challenge to New York's ban noted earlier,¹⁹⁵ would become more difficult to win. The proposed legislation implicitly authorizes states to adopt New York style bans on direct-to-consumer cigarette deliveries. States that were dissuaded from following New York's lead for fear of being challenged under the dormant Commerce Clause may enact similar legislation, under the proposed legislation. To date, only Alaska has followed New York's lead.¹⁹⁶ A similar ban was proposed in at least one other state.¹⁹⁷

State laws targeting Internet cigarette vendors would also enjoy protection from legal challenges based on the Federal Aviation Administration Authorization Act.¹⁹⁸ Several states require Internet cigarette vendors to use only delivery services that check identification to ensure recipients are eighteen years of age or older, the legal minimum sales age in every state.¹⁹⁹ In October 2003, a group of New

¹⁹³ S. 1177 § 2(c) (emphasis added).

¹⁹⁴ Compare to H.R. 2824 §2, which mandates:

[e]ach person who engages in an interstate sale of cigarettes or smokeless tobacco or in an interstate distribution of cigarettes or smokeless tobacco shall comply with all the excise, sales, and use tax laws applicable . . . in the State and place in which the cigarettes or smokeless tobacco are delivered as though the person were physically located in that State or place. *Id.*

¹⁹⁵ See discussion *infra* Part II.B.

¹⁹⁶ See ALASKA STAT. § 43-50-105 (West Supp. 2003).

¹⁹⁷ E.g., 2003 CONN. ACTS 03-271 (Spec. Sess.) (banning shipment of cigarettes into Connecticut except when sent to licensed sellers).

¹⁹⁸ See 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(2000) (limiting state's ability to regulate property transported by motor vehicles).

¹⁹⁹ E.g., IND. CODE ANN. § 24-3-5-5 (West Supp. 2003); ME. REV. STAT. ANN. tit. 22 § 1555-C (West Supp. 2003-2004); R.I. GEN. LAWS § 11-9-13.11(2002); TEX. HEALTH & SAFETY CODE ANN. § 161.455 (Vernon Supp. 2004); VA. CODE ANN. § 18.2-246.10 (Michie Supp. 2004); WASH. REV. CODE ANN. § 70.155.105 (West Supp. 2004); and W. VA. CODE ANN. § 16-9E-4 (Michie Supp. 2003).

England-based transportation associations challenged Maine's newly enacted delivery requirement.²⁰⁰ The plaintiffs sought "a declaration that [the delivery requirements] are preempted by federal law under the FAAA Supremacy Clause—because those provisions purport to regulate which 'Delivery Services' can be utilized for shipping a Delivery Sale of Tobacco Products to a person in Maine, and what data Delivery Services must collect from shippers of such packages."²⁰¹ The trial court denied the plaintiff's motion for summary judgment,²⁰² but similar challenges in other states are possible. The proposed federal legislation would end such lawsuits.

Lastly, the proposed legislation would prohibit common carriers and the U.S. postal service from accepting deliveries from those vendors known to ship untaxed or partially taxed cigarettes.²⁰³ Under the proposed legislation, states may compile lists of these violators for use by common carriers and the U.S. postal service.²⁰⁴ Neither common carriers nor the U.S. postal service would be allowed to deliver packages from listed Internet cigarette vendors unless a good faith effort is made to ascertain that the package is free of tobacco products.²⁰⁵

The common carrier requirements of the proposed legislation are particularly important for addressing cigarette sales from Native American reservations and foreign Internet cigarette vendors. Numerous Internet cigarette vendors are based in Europe and other foreign lands.²⁰⁶ Over one half of the Internet cigarette vendors based in

²⁰⁰ See Complaint, New Hampshire Motor Transport Assoc. et al. v. Rowe, (U.S. Dist. Ct. Me. 2003) (No. 1:03cv178DBH). The plaintiffs are also challenging another of Maine's newly enacted responses to Internet cigarette vendors, 22 MSRA § 1555-D (2003), which prohibits common carriers from delivering tobacco products into Maine from certain unlicensed tobacco vendors identified by Maine. The preemption language in the FAAAS says "a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service" of any motor or air carrier. 49 U.S.C. §§ 14501(c) (1), 41713(b)(4)(A).

²⁰¹ See *id.*

²⁰² See Mem. Decision of Pl.'s Mot. for Summ. J., New Hampshire Motor Transport Assoc. et al. v. Rowe, (U.S. Dist. Ct. Me. 2004) (No. 1:03cv178DBH).

²⁰³ S. 1177, § 2(c); Internet Tobacco Sales Enforcement Act, H.R. 2824, 108th Cong. § 2(a)(3) (2003) (permitting states to limit delivery of products to only those from vendors who are in compliance with the law).

²⁰⁴ S. 1177 § 2(c).

²⁰⁵ The Senate version requires warning labels on packages, which are required to state: "CIGARETTES / SMOKELESS TOBACCO: FEDERAL LAW REQUIRES THE PAYMENT OF ALL APPLICABLE EXCISE TAXES, AND COMPLIANCE WITH APPLICABLE LICENSING AND TAX-STAMPING OBLIGATIONS." S. 1177, § 2 (c). Packages without this notice would be considered non deliverable for all common carriers and the United States Postal Service, if they know or should know that the package contains tobacco. *Id.*

²⁰⁶ See JUDITH MACKAY & MICHAEL ERIKSEN, *The Tobacco Atlas* 60 (Paulo

the United States operate from Native American lands.²⁰⁷ States encounter numerous difficulties when attempting to collect tobacco taxes from these groups. For example, states have the legal right to require vendors on Native American lands to collect sales and excise taxes for cigarettes sold to non-tribal members and keep records about each sale, but because of the tribal sovereign immunity, states are barred from prosecuting the vendor.²⁰⁸

The common carrier requirements of the proposed legislation allow states to prosecute Native American-based Internet cigarette vendors, albeit indirectly, while at the same time, allowing Native American tribes to maintain sovereign immunity.²⁰⁹ Similarly, the common carrier provisions allow states to avoid confronting the legal and practical complexities of suing foreign internet cigarette vendors. These benefits, along with clarification of Jenkins Act enforcement, make the proposed federal legislation important for future tobacco control efforts in the United States.

IV. CONCLUSION

Increases in state and federal tobacco taxes should continue as an important part of tobacco control in the Internet era. Massachusetts is the most recent state to initiate a lawsuit under the Jenkins Act to compel the release of customer information so that tobacco taxes may be collected from smokers.²¹⁰ The Internet cigarette vendors, not the customer, pose the greatest hurdle in this process, according to a

Jeremy & Candida Lacey eds., 2002).

²⁰⁷ See Ribisl et al., *supra* note 5.

²⁰⁸ See *Okl. Tax Comm'n v. Citizens Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 507 (1991). States can go after the wholesalers that provide cigarettes to vendors located on Native American lands. States typically allow wholesalers to sell both untaxed and taxed packages of cigarettes to vendors based on Native American lands. The untaxed cigarettes are for tribal members and the taxed cigarettes are for non-tribal members. However, it is difficult to ensure the accuracy of such estimates. The vendors may overestimate the percentage of sales to tribal members. Suits are barred against tribes under the doctrine of sovereign immunity absent a clear waiver by the tribe or Congress. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Neither the legislative history nor actual text of the Jenkins Act explicitly mentions sales originating from Native American lands. See 15 U.S.C. §§ 375-78 (2000).

²⁰⁹ See S. 1177 § 2(c). Senate Bill 1177 exempts Native American-based Internet cigarette vendors from direct enforcement by states to preserve the sovereign immunity of Native American tribes. *Id.* § 2(d). House Resolution 2824 does not explicitly address Native American sovereign immunity, but does define commerce between a State and any Indian lands as "interstate commerce" for purposes of the law. Internet Tobacco Sales Enforcement Act, H.R. 2824, 108th Cong. § 7 (2003).

²¹⁰ See Bruce Mohl, *Internet Cigarette Retailers Targeted State to Sue for List of Tax-Evading Clients*, BOSTON GLOBE, Feb. 17, 2004, at C1.

spokesman for the Department of Revenue in Massachusetts who commented on the lawsuit.²¹¹ The spokesman stated "the numbers suggest it is worth [Massachusetts'] time to do so [because] in the last six months of 2003, the department sent bills to nearly 1,200 people, and collected \$162,374 in outstanding taxes from names they were able to get through other methods."²¹² Once online purchasers understand that the discounts offered by Internet cigarette vendors are largely illusory, there is a high likelihood that they will return to purchasing from local vendors to avoid the hassle of paying tobacco taxes directly to the state in a separate transaction after the purchase.²¹³ Similar efforts should be pursued in other states. Early efforts by a few states shows that Jenkins Act enforcement can help preserve the public health and fiscal benefits of tobacco taxation.²¹⁴ Additionally, these efforts would be greatly aided by the common carrier provisions and other requirements proposed in Senate Bill 1177 and House Resolution 2824.²¹⁵

The manner in which the Internet will affect public health policy remains largely unknown. States traditionally retain authority to regulate for the protection of public health and safety.²¹⁶ In the case of tobacco control, many states have established sound policies to reduce tobacco use.²¹⁷ Juxtaposed to these aggressive (and mostly successful) state tobacco control policies, the federal government has established very few policies to reduce tobacco use. In fact, some of the policies established by federal government preempt more effective state requirements.²¹⁸

Nevertheless, the super-geographical nature of the Internet will wed some aspects of state public health policy with policies established at the federal government, whether this interaction involves direct federal oversight or the dormant Commerce Clause or some other legal doctrine that defines the respective spheres of authority in our federalism. In the case of tobacco taxes, the state-federal relationship thus far has been beneficial for public health. The Jenkins Act

²¹¹ See Peter Reuell, *Net Cigarette Sales a Drag for the State*, DAILY NEWS TRIB. (Waltham), Feb. 18, 2004, at A1.

²¹² *Id.*

²¹³ See discussion *supra* Part II.C.

²¹⁴ See discussion *supra* Part II.B.; see also Reuell, *supra*, note 211.

²¹⁵ See discussion *supra* Part III.

²¹⁶ See *Kassel*, 450 U.S. at 670.

²¹⁷ See Graham Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63-98 (1997).

²¹⁸ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (finding Massachusetts marketing restrictions on tobacco products preempted by the Federal Cigarette Labeling and Advertising Act).

has provided states with authority to collect tobacco taxes, and states would probably welcome passage of Senate Bill 1177 and House Resolution 2824, at least in their present form.