

The Jurisdictional Implications of Charitable Solicitation Over the Internet*

Allan R. Stein¹

I have been asked to explore how a charitable organization's Internet activity might affect its amenability to the laws and courts of states in which it is not present. The importance of this question has been underscored by several developments in the legal landscape. The "Charleston principles," standards articulated in 1999 by a group of state attorneys general, with input from charitable organizations, suggests that a state's law should be applied in circumstances in which a charitable organization's Internet activity would subject it to the personal jurisdiction of that state's courts.² Legislation passed in both Florida³ and California⁴ might have subjected out-of-state charities to those state's regulatory standards when a charity used the Internet to solicit contributions in those states. Of particular concern was a now-repealed provision of Pinellas County, Florida,

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¹ Professor of Law, Rutgers Law School - Camden.

² Charleston Principles, Section I(D) ("state charity officials should require registration of those over whom their state courts could constitutionally assert personal jurisdiction to enforce a registration requirement").

³ See <http://www.commondreams.org/news2001/0516-12.htm>

⁴ See California Nonprofit Integrity Act of 2004, Sections 12580-12599, Cal. Govt. Code. According to the Attorney General's website FAQ, the Act applies to "all charities that solicit donations and conduct sales solicitations in California, no matter where those organizations are domiciled."

<http://ag.ca.gov/charities/faq.php#nonprofit-q1>

requiring paid registration, and the filing of disclosure documents by any charitable organization that received contributions from country residents as a result of solicitation over the Internet.⁵

I want to focus primarily here on the question of how a charitable web site might subject the charity to personal jurisdiction in states in which the web site has been accessed, and/or states from which contributions have been sent as a result of the Internet solicitation. I will limit my analysis to the problem of domestic charitable organizations subject to domestic state regulation. I will also address briefly some constitutional constraints on a state's ability to apply its regulations to out-of-state charities based on their Internet activities.

My paper will thus address both jurisdiction and choice of law. The relationship between these two concepts is complicated. In theory, the question of who can be summoned to appear in a court of law (or a regulatory proceeding) under penalty of the issuance of default judgment – personal jurisdiction – is distinct from the question of what law will govern a party's behavior in the event of litigation – choice of law. However, in practice, the two questions are closely linked.

As a matter of constitutional due process, the Supreme Court has historically subjected state courts' assertion of personal jurisdiction to more searching constitutional scrutiny than their choice of law.⁶ Thus, with rare exception,⁷ any time a state may

⁵ See <http://www.commondreams.org/news2001/0516-12.htm>

⁶ See *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981) (holding that court may constitutionally apply its own state law to case if is neither “arbitrary nor fundamentally unfair”); *Shaffer v. Heitner*, 433 U.S. 186

constitutionally assert personal jurisdiction, it may also constitutionally apply its own law to assess the rights and obligations of the litigants.⁸ (This is not to say that states always apply their own law, but that they have the constitutional power to do so). As a practical matter, this means that personal jurisdiction can effectively become the “gatekeeper” to a state’s ability to apply their law to a litigant’s conduct.

This “gatekeeping” function is particularly pronounced in “public law” litigation brought by state officials. One would not expect to see a state Attorney General enforcing state law in courts outside the state, and it is unlikely that other states would entertain such actions even if brought.⁹ States will not typically enforce the penal or revenue laws of another state.¹⁰ Thus, if litigants in public law disputes can steer clear of state courts, they can also generally steer clear of state law.

Personal Jurisdiction is also closely linked to the choice of law determination insofar as both doctrines serve to allocate state authority, and both doctrines often turn on related inquiries into the level of a party’s connection to the forum state, and the strength

(1977) (holding that contacts sufficient to support application of state law may not be sufficient to sustain personal jurisdiction).

⁷ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (court may not apply uniform interest rate to claims of class members from 50 different states).

⁸ Professor Linda Silberman, in critiquing that priority famously quipped "To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Linda J. Silberman, *Shaffer v. Heitner*, *The End of an Era*, 53 N.Y.U. L. Rev 33, 88 (1978). See also *Quill Corp. v. North Dakota*, 504 U.S. 298, 307-08 (1992) (suggesting that since defendant had sufficient contacts with the state to allow it to assert personal jurisdiction consistent with due process, the state thereby had sufficient contacts to justify application of its use tax to sales by defendant to state residents for purposes of the due process clause.)

⁹ See Restatement (Second) of Conflict of Laws §89 (1971) (“[n]o action will be entertained on a foreign penal cause of action). Cf., Restatement (First) of Conflict of Laws (1934) §611 (“[n]o action can be maintained to recover a penalty the right to which is given by the law of another State”).

¹⁰ *Id.*

of a state's regulatory interest in the underlying dispute. Accordingly, the same factors that might lead a court to conclude that it has personal jurisdiction often militate in favor of applying its law to the litigation. Indeed, the Charleston Principles make this linkage explicit: a charity is made subject to a state's charitable registration requirements in circumstances that would render the charity amenable to personal jurisdiction based on its Internet activity.

As I will develop later, although I agree that jurisdiction, like choice of law, serves to allocate sovereign authority, I believe the tight linkage articulated in the Charleston Principles is unfortunate. I think it ignores an important distinction between jurisdiction and choice of law, and it ties its choice of law determination, at least in part, to a particularly ill considered jurisdictional doctrine.

However, before I can do so, I need to discuss how courts have dealt with the jurisdictional implications of the Internet to date, and how that doctrine might apply to charitable solicitation over the Internet.

Jurisdiction in the World of Bricks and Mortar

At the risk of bringing back painful memories of the first year of law school, I need to briefly review the evolution of personal jurisdiction in the 20th century. I think we will see that the problem of the Internet is simply an extension of the same central dilemma that courts have been grappling with over the last hundred years, or so: how does a doctrine built on the physical presence of a defendant in the jurisdiction contend with interstate conduct?

In *Pennoyer v. Neff*,¹¹ the Supreme Court for the first time held that a defendant could challenge a state's assertion of excessive jurisdiction on the basis that such an exercise of state power violated the defendant's right to due process under the Fourteenth Amendment.¹² The *Pennoyer* Court drew a relatively bright line to assess whether a given assertion of jurisdiction was constitutionally excessive: states generally had the authority to act coercively upon persons and things within their borders, and generally lacked the power to act coercively upon persons and things outside their borders.¹³ When a state exceeded these territorial limits, its assertion of jurisdiction over a defendant was deemed a due process violation.¹⁴

Whatever the virtues such a bright line, it proved unworkable as economic and technological developments made it increasingly common for out-of-state defendants to cause harm within the forum. The *Pennoyer* paradigm was particularly strained by the increase in interstate *corporate* activity: to the extent that *Pennoyer* looked to the physical location of the defendant's body at the time that process was served, corporations proved to be particularly problematic insofar as they have no physical "self" comparable to an individual's body.¹⁵

¹¹ 95 U.S. 714 (1877).

¹² Earlier cases conferred the right of a defendant to resist enforcement of a judgment under the Full Faith and Credit clause. *See, e.g., M'Elmoyle v. Cohen*, 13 Pet. 312 (1839). *Pennoyer* made it possible to assert a constitutional objection before judgment was rendered.

¹³ 95 U.S. at ("no State can exercise direct jurisdiction and authority over persons or property without its territory).

¹⁴ "[P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." 95 U.S. at .

¹⁵ Philip Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts; From Pennoyer to Denckla: A Review*, 25 U. Chi. L. Rev. 569, 577-86 (1958),

As a consequence, the Court eventually transformed personal jurisdiction doctrine to take into consideration a state's interest in protecting its residents from the domestic consequences of behavior of out-of-state defendants. This transformation culminated in the Court's decision in *International Shoe Co. v. Washington*,¹⁶ in which the court articulated the "minimum contacts" standard. A state may constitutionally assert jurisdiction over any defendant who has established sufficient "minimum contacts" with the state as to render the state's exercise of authority fair and reasonable.

Although the formula, as stated, begged entirely the question of how and why a contact might render jurisdiction reasonable,¹⁷ the Court provided some additional guidance in dictum. On the one hand, where a defendant has established continuous and systematic contacts with a forum, the forum state may constitutionally assert jurisdiction over that defendant for matters entirely unrelated to those contacts. (This has been subsequently called "general jurisdiction"). On the other hand, even a single, isolated contact may justify jurisdiction if the litigation arose from that contact. (This has been called "specific jurisdiction.")

This reformulated doctrine, in turn, introduced a new challenge: the search for limiting principles. If a state was permitted to assert jurisdiction based on the location of consequences, instead of the location of the defendant, what is to prevent a state from attempting to assert global jurisdiction to redress or even prevent any remote consequence

¹⁶ 326 U.S. 310 (1945).

¹⁷ See Lea Brilmayer, *How Contacts Count: Due Process Limitations of State Court Jurisdiction*, 1980 *Sup. Ct. Rev.* 77.

in the forum state? The Court's response came in *World-Wide Volkswagen v. Woodson*.¹⁸ The Court there denied to Oklahoma the authority to assert jurisdiction over the New York seller of an allegedly defective car that exploded in Oklahoma. The defect in Oklahoma's authority, the Court held, was that the defendant did not purposely direct its behavior toward Oklahoma. Mere consequences are not enough. Rather there must be some act by which the defendant "purposely avails" itself of the benefits and protections of forum state law.

The subsequent case of *Calder v. Jones*¹⁹ made clear that forum directed harm will confer jurisdiction on the forum state even if the defendant has not sought out benefits from it. Thus, the author of a defamatory magazine article about actress Shirley Jones was amenable to personal jurisdiction in Jones's home state of California notwithstanding the fact that defendant had no hand in disseminating the article in California, and received no benefit from its dissemination there. The fact that he knew he was deliberately causing injury to a California resident, in the place where she would feel the primary damage, by virtue of events alleged to have occurred in California, was sufficient.

Jurisdiction in Cyberspace

The application of these principles to Internet behavior has proved challenging. The problem is how to characterize the act of putting information on the Internet. Is it

¹⁸ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). See also, *Hanson v. Denkla*, 357 U.S. 235 (1958).

¹⁹ 465 U.S. 783 (1984).

essentially local behavior that may have predictable, but not forum-directed consequences, as in *World-Wide Volkswagen*? Or should it be seen as a deliberately global activity, which is simultaneously directed at every forum in which the message is disseminated? The latter characterization would render it subject to jurisdiction broadly; the former would not.

Although early cases were all over the board,²⁰ the decisions eventually settled into a fairly consistent pattern.²¹ The courts have generally resisted asserting jurisdiction for claims arising out of Internet postings absent some manifestation of an intent to affect (or “target”) the forum state specifically.²² Thus, in most Internet libel cases, (particularly more recent ones) the mere posting of libelous material on a web site has not been deemed sufficient to subject the defendant to personal jurisdiction in the plaintiff’s home state.²³ The courts have required some further forum-specific factors, such as whether the libel concerned events in the forum, or was intended to greater harm in the forum than elsewhere.²⁴

²⁰ See Robert W. Hamilton & Gregory A. Castanias, *Tangled Web: Personal Jurisdiction and the Internet*, Litig., Winter 1998. Allan R. Stein, *The Unnexceptional Problem of Jurisdiction in Cyberspace*, 32 Int’l Law. 1167 (1998).

²¹ See Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 N.W. U. L. Rev. 411 (2004); Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 Vand. L. Rev. 309, 364-67 (2002); Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 Bus. Law. 601 (2003).

²² See generally Rice & Gladstone, *supra*;

²³ See, e.g., *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002); *Revell v. Lidov*, 317 F. 3d 467 (5th Cir. 2002); *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002). But see,

²⁴ See, e.g., *Bochan v. La Fontaine*, 68 F. Supp. 2d 692 ((E.D. Va. 1999) (defamation concerned plaintiff’s activities in forum state); *MCSI, Inc. V. Woods*, No. C-02-02865, 2002 WL 32059741 (N.D. Cal. Oct 7, 2002). See generally, Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in this New Frontier*, 59 Alb. L. Rev. 1083 (1996).

Similarly, in federal Lanham Act claims, defendant's unauthorized use of plaintiff's intellectual property on its website has not generally been sufficient to establish personal jurisdiction over the defendant in the trademark owner's home forum.²⁵

It is not entirely clear how much forum-directed conduct a defendant must engage in for the behavior to be considered "targeted" at the forum. One court found that a defendant had sufficiently targeted its web site to forum residents by virtue of the fact that it listed on its web site the names of large clients, who themselves did business in the forum.²⁶ Certainly, even if a defendant's initial contact with the state was by way of an untargeted Internet communication, subsequent direct dealings with forum residents will provide a sufficient nexus to support jurisdiction.²⁷ This may become a crucial issue for charities to the extent that the duty to register may be triggered by the receipt of a contribution for a forum-state resident.²⁸ At the point of receiving the check, a charity would normally have to ability to control whether or not it wanted this connection with the state. It is thus possible that courts would find sufficient purposeful availment in the act of cashing the check. As I will develop later, I think the jurisdictional significance of that contact should depend on the nature of the jurisdictional obligation triggered: While cashing an out-of-state check may be a sufficient jurisdictional basis to hold a charity

²⁵ See, e.g., *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F. 3d 446 (3d Cir. 2003); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997).

²⁶ *Sys. Designs, Inc. v. New CustomWare Co.*, 248 F. Supp. 2d 1093, 1100-03 (D. Utah 2003).

²⁷ See, e.g., *Am. Network, Inc. v. Access Am., Inc.*, 975 F. Supp. 494 (S.D.N.Y. 1997) (successful Internet solicitation and sales to six forum residents provides jurisdictional basis for suit).

²⁸ See, e.g., *Pinellas County Ordinance*, *supra* n.

accountable for defrauding the contributor, I don't think it should be an adequate basis for applying and enforcing the full range of a state's charitable regulations.

Although of limited relevance to the problem of charitable regulation (because the state's "claim" arises directly from the charity's Internet contacts), the cases have also generally resisted finding general jurisdiction for claims unconnected to defendants' Internet contacts. Two cases, however, go the other way. In *Gator.Com Corp. v. L.L. Bean*,²⁹ and *Gorman v. Ameritrade Holding Corp.*,³⁰ the Ninth and D.C. circuit courts upheld the assertion of what was arguably general jurisdiction based on defendants' Internet connections with forum state residents. These connections were deemed sufficiently "systematic and continuous" to support jurisdiction of claims unrelated to those contacts. However, the claims in *Gorman* indeed seemed related to defendant's Internet contacts with the forum,³¹ and *Gator.Com* was vacated as moot following the parties' settlement.³² Accordingly, these cases may have limited impact.

It is unfortunate that, instead of waiting for this relatively coherent pattern to emerge from the case law, the Charleston principles at least partially employ an early, and particularly ill-considered line of cases that made jurisdiction turn upon the "interactivity" of the defendant's website.³³ The court in *Zippo Manufacturing Co. v. Zippo Dot Com*³⁴

²⁹ 341 F.3d 1072 (9th Cir. 2003), *vacated as moot*, 398 F.3d 1125 (2005).

³⁰ 293 F.3d 506 (D.C. Cir. 2002).

³¹ Plaintiff's claim was for a breach of contract by defendant, who allegedly failed to place plaintiff's advertisements on defendant's web site. The claim, presumably, then included the harm to plaintiff suffered by the inability of forum state residents to see their advertisement. Thus, the claim was at least related to, if it did not directly arise out of, defendant's Internet contacts with the forum.

³² 398 F.3d 1125 (9th Cir. 2005)

³³ Charleston Principles, Section III(B)(1).

held that the jurisdictional significance of defendant's maintenance of a web site accessible in the forum depended on whether the web site was "passive" or "interactive." A passive web site – one that simply conveyed information – was deemed jurisdictionally insignificant. An "interactive" one – a category not fully defined, but included websites with the capability of consummating a sale – had great jurisdictional significance, presumptively supporting the exercise of personal jurisdiction. In the middle were "partially interactive" web sites that counted in the jurisdictional calculus, but were not themselves sufficient to support jurisdiction. Thus, under *Zippo*, a defendant who used plaintiff's trademark on an interactive web page could be sued in plaintiff's home forum for a Lanham Act violation (regardless of whether a forum resident interacted with it), but a defendant who used the mark on a passive web page could not.

What on earth, you might ask, does interactivity have to do with jurisdiction? Why should a web site that displays its sales catalog but requires the buyer to call an 800 number to place his order have less jurisdictional significance than one that automates the sales process by allowing the buyer to specify his order and form of payment through the Internet? Moreover, why would anyone want to discourage a web designer from making its web site as user-friendly and interactive as possible? I, along with most commentators, saw the distinction as silly and technologically naive.³⁵

³⁴ 952 F. Supp. 1119 (W.D. Pa. 1997).

³⁵ Allan R. Stein, Personal Jurisdiction and the Internet, *supra* n. at 430-31; Michael A. Geist, Is There a There There: Toward Greater Certainty for Internet Jurisdiction, 16 Berkeley Tech. L. J. 1345, 1348-49 (2001);

Unfortunately, the “first actor” principle kicked in, and other courts, desperate to get a handle on this new and mystifying technology were delighted to have a jurisdictional metric, and they followed like lemmings.³⁶ I think courts were attracted to the notion that one could discern whether a defendant was “really present” and doing business in the forum by such an apparently clear,³⁷ mechanical test, forgetting that physical presence hadn’t been the benchmark for personal jurisdiction since *International Shoe*.³⁸

Fortunately, as courts comfort level with the technology as increased, their reliance on, albeit not their citation of, *Zippo* has faded. The overwhelming majority of cases purporting to apply *Zippo* now conclude that the web site is in the intermediate category of interactivity, requiring consideration of other jurisdictional factors.³⁹ Indeed, even in cases in which defendant has employed a highly interactive web site, the courts have focused instead on other indicia of defendant’s intent to service the forum state

³⁶ In a non-scientific survey of citations listed in Lexis, Professor Borchers reports that between 1997 and 2003, *Zippo* had been cited 570 times, or 7.04 times per month. Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 N.W. L. Rev. 473 (2004). Westlaw currently identifies 2377 “citing references.”

³⁷ The failure of the *Zippo* court to define what constitutes “interactivity” rendered the approach much more indeterminate than courts’ initially realized.

³⁸ Some of the early applications of the *Zippo* test were truly absurd. My favorite is *Hasbro Inc. v. Clue Computing*, 994 F. Supp. 34, 35 (email link on defendant’s web site renders the site sufficiently interactive to support personal jurisdiction for Lanham Act claim). *Accord*, *Blumenthal v. Drudge*, 992 F. Supp. 44, 57 (D.D.C. 1998) (email and subscription link on defendant’s web site support assertion of jurisdiction in defamation action).

³⁹ *Accord*, *Geist*, supra n. 34. *See, e.g.*, *Caterpillar, Inc. v. Miskin Scraper Works, Inc.*, 256 F. Supp. 2d 849 (C.D. Ill. 2003) (web site that promotes products, but does not provide for “direct contractual relationships” insufficiently interactive to support jurisdiction); *Brown*, 2003 WL 21496756 (interactivity of web site that allowed users to check hotel room availability, but required phone call to make reservation insufficiently interactive to sustain jurisdiction in personal injury case); *David White Instruments, LLC v. TLZ, Inc.*, No. 02C7156, 2003 WL 21148224 (N.D. Ill. May 16, 2003) (web site promoting products that infringed plaintiff’s patent not sufficiently interactive where site merely located local retailer based on consumer’s zip code).

specifically. Thus, in *Toys ‘R’ Us v. Step Two, S.A.*,⁴⁰ the court noted that although defendant employed a fully interactive web site, other factors indicated that it was not targeting customers in the forum. Other courts are now expressing skepticism that interactivity has any rational connection to jurisdiction.⁴¹

Also fortunately, the registration provision of Charleston principles actually hedges its bets on interactivity. Under Section III(B), a charity is subject to the registration requirements if it either uses an “interactive web site” to solicit contributions, *or* uses a non-interactive site but “invites further offline activity to complete a contribution, or establishes other contacts with that state, such as sending e-mail messages or other communications that promote the Web site.” In either case, the charity must have either specifically targeted contributors in the state, or have received “contributions from the state on a repeated and ongoing basis.”⁴²

It is unfortunate, then, that the Charleston Principles employ the interactivity category at all. The targeting/repeated contributions requirement does most, if not all, of the heavy lifting here. It is hard to imagine that a state would not have the authority to impose its regulatory structure on repeat, targeted solicitation, regardless of the medium employed; and absent that targeted behavior, any assertion of authority based on the use of the Internet would be constitutionally suspect. Thus, interactivity represents something

⁴⁰ 318 F.3d 446 (3d Cir. 2003). *Cf.*, *Quality Improvement Consultants, Inc. v. Williams*, No. Civ. 02-3994, 2003 WL 543393 (D. Minn. Feb. 24, 2003) (interactive web site that sold publications online does not support jurisdiction in the absence of evidence of access by Minnesota residents); *Millennium Enters., Inc. v. Millennium Music LP*, 33 F. Supp. 2d 907 (D. Or. 1999) (interactive web site does not support jurisdiction in Lanham Act case in the absence of substantial sales to forum residents).

⁴¹ *See, e.g.*, *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F.Supp.2d 1154 (W.D.Wis.,2004);

⁴² Charleston Principles, Section III(B)(1).

of a red herring that cannot help but to distract courts and regulatory agencies from the more important connections that an organization may or may not have with the state.

Applying the Internet Cases to Charitable Activities

From the Internet jurisdiction cases to date, we can draw the unremarkable conclusion that for claims against charities based on the defrauding of donors in the forum state, the courts of that state would have little difficulty asserting personal jurisdiction over the charity. Once the charity received payment, it presumably knew, or could have easily determined, the locus of its fraud in most cases.⁴³ Insofar as virtually all states would consider the defendant's conduct actionable, the charity would be on fair notice that receipt of a check from a state resident would subject it to judicial process there, and I suspect courts would see an appropriate proportionality between the forum-directed conduct and the litigation burden thereby incurred. So, if you can find that Nigerian prince who sent you an email promising you half of his inheritance when you gave him access to your bank account, you can probably sue him in your home forum.

⁴³ It is possible for donors to submit geographically anonymous contributions through Paypal, an Internet payment service, in which case even the perpetrator of an intentional fraud might be able to assert a lack of purposeful connection with the state. *Cf.*, *Metcalf v. Lawson*, 802 A.2d 1221, 1227 (N.H. 2002) (eBay seller not subject to jurisdiction in buyer's state given the anonymity of eBay and email; "nothing indicates . . . that the defendant . . . was aware that she was contracting with a New Hampshire resident until after the transaction was completed").

But that is neither the important nor difficult question. The more pressing question for charitable organizations is their amenability to prophylactic regulatory process. What happens when a charity receives a letter from a state attorney general informing it of its obligation to register, pay fees, and file disclosure statements with the state? In what sense do limits on the personal jurisdiction of state *courts* protect the charity from overreaching by state *officials*, and what would be the procedural posture of that challenge?

Let me first deal with the procedural posture. While the enforcement process would, no doubt, vary considerably from state to state, I can imagine several different scenarios. First, it would not be unusual for a state to confer upon the Attorney General or some other executive official coercive authority to, upon notice and hearing, order a person to do, or refrain from doing a particular act. A challenge to the official's personal jurisdiction (or more appropriately called "jurisdiction to enforce" in this context⁴⁴) could presumably be asserted directly with the official, in a declaratory judgment/injunction proceeding brought by the charity,⁴⁵ or, more likely, in a subsequent enforcement proceeding brought by the official for the charity's non-compliance with his order. The

⁴⁴ See Restatement of Foreign Relations Law of the United States (Third), Part IV, Introductory Note (1987): this Restatement deals with jurisdiction under the following headings: (a) jurisdiction to prescribe, i.e., the authority of a state to make its law applicable to persons or activities; (b) jurisdiction to adjudicate, i.e., the authority of a state to subject particular persons or things to its judicial process; and (c) jurisdiction to enforce, i.e., the authority of a state to use the resources of government to induce or compel compliance with its law.

⁴⁵ Depending on the procedural posture, such an injunction proceeding might be appropriately brought under 42 U.S.C. §1983 in state or federal court. It is also possible that the charity might be able to bring the proceeding in its home state on the theory that the official's transmission of the cease and desist order rendered the official amenable to personal jurisdiction there. See *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F.3d 1082 (9th Cir. 2000) (defendant's delivery of cease and desist letter to plaintiff subjects defendant to personal jurisdiction in plaintiff's home state).

charity would then have a double-barreled jurisdictional defense: like a New York policeman trying to secure an arrest in California, the state official has exceeded his territorial authority in issuing a directive to an out-of-state party with no constitutionally significant connections with the state; and the enforcement tribunal itself lacks personal jurisdiction. The point here is that whatever due process constraints there are on judicial power must also constrain any state official exercising the coercive power of the state.⁴⁶ Moreover, most exercises of state power are enforced, sooner or later, in courts that must themselves have personal jurisdiction over the defendant.

The harder question is the substantive one: how does the existing law on Internet jurisdiction apply to *prospective* regulatory obligations, such as attempts to force a charity to register and file disclosures with the state authorities. No one has yet been harmed by the charity's noncompliance. Rather the state is attempting to prevent future harm through its regulatory efforts.

The principle that Internet activity must be directed toward a particular forum in order to sustain jurisdiction might suggest that prospective regulatory efforts are particularly problematic. The charity has not harmed anyone, let alone, directed harmful conduct toward the forum in particular. If untargeted libel that injures the plaintiff in the

⁴⁶ There are a number of state court decisions noting the requirement that regulatory proceedings be supported by personal jurisdiction. *See, e.g.,* In Re Abandonment Of Wells Located In Illinois, 343 Ill.App.3d 303, 796 N.E.2d 623 (5th Dist. 2003); Nehls v. Quad-K. Advertising, Inc, 106 Ohio App.3d 489, 666 N.E.2d 579 (8th Dist. 1995). *See also* Federal Trade Commission v. Compagnie De Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300 (D.C. Cir. 1980) (invalidating investigatory subpoena served on party in France). This is consistent with the text of the due process clause, which constrains deprivations of liberty and property by states, not only by state courts. The constitution is agnostic about how sovereign power is allocated among different branches within a state.

forum cannot sustain jurisdiction, how could untargetted truthful speech that injures no one? Interestingly however, existing case law seems to be at tension with this conclusion (although it is a very small sample).

In *State of Minnesota v. Granite Gate Resorts, Inc.*⁴⁷, a Minnesota state appellate court upheld personal jurisdiction over offshore defendants about to open an Internet gambling site in an action brought by the Minnesota Attorney General to enjoin the defendant from advertising that gambling on its web site was “legal.” Defendants had not made any statements specifically about legality in Minnesota, but provided information to a Minnesota official when the official called to inquire about gambling from his home in Minnesota, and registered his name and address on defendant’s mailing list.⁴⁸

The court found that defendant’s deliberate intent to market its service generally to an American market over the Internet was sufficient “purposeful availment” to satisfy due process. To that extent, the case might appear to be repudiated by the vast weight of subsequent opinion holding that untargetted Internet contact is not a sufficient jurisdictional predicate. However, the court’s reliance upon the strong regulatory interests of the state in asserting jurisdiction may give the decision greater currency: if the Attorney General could not sue in Minnesota, it is unlikely that he would have another forum in which to enforce Minnesota law. Minnesota’s extensive regulation of gambling within the state would thereby be undermined.⁴⁹

⁴⁷ 568 N.W.2d 715 (Minn. App. 1997), *aff’d without opinion* 576 N.W. 2d 747 (1998).

⁴⁸ *Id.* at 717.

⁴⁹ *Id.* At 721.

In this sense, the *ex ante*, prophylactic nature of regulatory proceedings are jurisdictionally double-edged. On the one hand, the defendant's nexus with the state seems more attenuated because no one has been injured, and the state's regulatory interests appear undifferentiated from the regulatory interests of the multitude of places that defendant's behavior might cause injury. On the other hand, jurisdiction is essential to give effect to the state's regulatory apparatus and to prevent broad-based harm to the state's residents. Regulatory proceedings are not simply remedial; they are protective. Moreover, the procedural burden on an organization to register and file disclosure reports might appear less onerous than the burden of defending a lawsuit, and an organization could avoid litigation simply by complying with those regulatory requirements. Accordingly, the jurisdictional basis to impose a regulatory burden might arguably be lower than the jurisdictional basis necessary to assert judicial jurisdiction in remedial litigation.⁵⁰

If courts distinguish *Granite Gate* in the context of charitable regulation, and I think they might well do so, I think they might seize upon the fact that although Granite Gate had not yet initiated its gambling operations, it was already fraudulently inducing Minnesota (as well as many other state's) residents to gamble illegally over the Internet. Charities that induce people to make contributions, on the other hand, have not engaged

⁵⁰ *Cf.* *Phillips Petroleum Co. v. Shutts*, 472 U.S. at . (holding that state court could assert jurisdiction over nationwide class action notwithstanding lack of jurisdictional contacts with the entire class on the ground that absent class members could avoid the effect of a binding judgment by the simple means of opting out of the class; "Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter").

in harmful behavior per se. Thus, the state interest in *Granite Gate* was arguably more compelling.

But I think there is a deeper distinction between *Granite Gate* and charitable regulation that deals with the systemic impact of regulatory jurisdiction over charitable organizations: Overly aggressive assertions of jurisdiction in charitable regulation cases, such as the Pinellas county ordinance, may undermine the legitimate interest of both the charity and other states in the charity's conduct outside of the forum state. If a state asserted jurisdiction on the basis of out-of-state conduct not directed toward the state in particular, it would thereby burden activity that other states may have an interest in promoting. Conflicts theorists call this a "spill-over" effect:⁵¹ the inappropriate extraterritorial consequences of domestic regulation. This interference can raise serious due process as well as commerce clause problems.

Although the due process clause, to be sure, protects an individual from unfair surprise and preserves the opportunity to be heard in a non oppressively inconvenient forum – the traditional province of "procedural due process" – jurisdictional constraints enforced through the due process clause also serve to allocate governmental authority. Indeed the two process values -- sovereign allocation and unfair surprise -- are closely linked: a defendant's expectation about where he expects to be subjected to jurisdiction is informed substantially by the prevailing territorial norms. If a state is limited to asserting

⁵¹ See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199, 1200 (1998); Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 Ind. J. Global Legal Stud. 475, 487 (1998).

jurisdiction over persons purposely causing harm in the state, then any assertion of jurisdiction inconsistent with the principle will cause unfair surprise.

As the Court recognized in *Pennoyer v. Neff*, extra-territorial assertions of jurisdiction also constitute a usurpation of another state’s sovereign authority: “The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so, it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, and that no tribunal established by it can extend its process beyond that territory as to subject either persons or property to its decisions.”⁵² This theme resonates in contemporary due process cases as well. Thus, in *World-Wide Volkswagen*, the Court recognized that “even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument on interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”⁵³ Hailing an out-of-state defendant into court when it did not direct its behavior toward to forum thus deprives states of an “essential attribute[e] of sovereignty,”⁵⁴ inappropriately extending the forum state’s power to police out-of-state behavior.⁵⁵

If we look at the problem of charitable regulation from this “spill-over” perspective, Internet-based assertions of jurisdiction appear particularly problematic, and

⁵² 95 U.S. at .

⁵³ 444 U.S. at .

⁵⁴ *Id.*

⁵⁵ *Id.* at (expressing concern that local, out-of-state businesses, could be haled into a distant court because of consequences beyond their control).

far worse than *Granite Gate*. To avoid litigation in Minnesota, all the defendant in *Granite Gate* needed to do was avoid the suggestion that Internet gambling was universally legal. Indeed, had the defendant employed the old cereal box caveat of “offer void where prohibited by law,” the Minnesota Attorney General would have been hard-pressed to make the case that defendants were defrauding Minnesota residents, thereby undercutting the jurisdictional predicate.

In contrast, to avoid being subjected to the regulatory regime of a law like the Pinellas county ordinance, a charitable organization would have had to alter its conduct universally: use of a web page to solicit contributions might subject the organization to the regulatory claims of multiple states. Unlike the situation of the defrauding charity,⁵⁶ a legitimate charity would not be on notice that the receipt of a contribution from a forum resident would thereby trigger extensive registration and reporting obligations *without investing heavily in monitoring the charitable regulations, and the jurisdictional predicates thereto, of all fifty states.*⁵⁷ Rather than incur this expense, a charity might well forgo all Internet activity, including in states where it had a legitimate right to solicit. Insofar as the charity would have a perfectly legitimate right to use the Internet to solicit contributions in many states, assertions of jurisdiction under the ordinance would unconstitutionally leverage a state’s interest in regulating domestic consequences into a power to regulate extraterritorial behavior with a tenuous connection to the forum state.

⁵⁶ See *supra* p .

⁵⁷ *Cf.*, Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. Pa. L. Rev. 311, 386 (2002) (arguing that Internet actors should be protected from assertions of jurisdiction which they can avoid only by incurring the substantial transaction costs).

This ,I would argue, is at the core of the due process concern articulated by *World-Wide Volkswagen*.⁵⁸

This kind of excessive leverage is also the explicit concern of the Court’s dormant commerce clause jurisprudence. Even though a state may have a legitimate interest in regulating domestic activity, it may not impose excessive burdens on out-of-state behavior to advance its domestic objectives.⁵⁹ “Excessiveness” under this principle is measured by the proportionality of means and ends; the burden on extraterritorial behavior must be proportionate to the state’s regulatory interest, and the state must use a regulatory mechanism that narrowly advances its domestic purpose without unnecessarily affecting extraterritorial conduct.⁶⁰ The Court has clearly indicated that the non-profit nature of the regulated activity does not insulate a regulation from commerce clause scrutiny.⁶¹

Under this principle, a number of courts have used the Commerce Clause to invalidate state laws that attempt to regulate “indecent communications” over the

⁵⁸ See Allan R. Stein, *Regulatory Precision*, *supra* n. . . Others assert that federalism is not an important element of the court’s contemporary due process doctrine. See, e.g., Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 Minn. L. Rev. 75, 80-81 (1984); Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 *Notre Dame L. Rev.* 699, 721-24 (1983); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 Or. L. Rev. 485, 504-05 (1984).

⁵⁹ As Professor Regan has pointed out, such a constraint on the assertion of extraterritorial authority seems implicit in our constitutional scheme, and not simply a matter of interfering with commerce. Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1884-85 (1987). Accord, Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction*, 24 Va. Tax. Rev. 109, 126-28 (2004).

⁶⁰*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970);

⁶¹*Camps Newfound/Owantonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

Internet.⁶² Thus, in *American Libraries Ass'n v. Pataki*,⁶³ the court struck down on Commerce Clause grounds a New York statute criminalizing the digital transmission of sexually-oriented materials deemed harmful to minors. The court reasoned that "balanced against the limited local benefits resulting from the Act is an extreme burden on interstate commerce" due to the inability of persons transmitting information on the Internet to control the geographic reach of the transmission.

Although the courts at one time used the Commerce Clause as a constraint on assertions of excessive state jurisdiction,⁶⁴ due process eventually became the central constitutional mechanism to constrain judicial overreaching.⁶⁵ The commerce clause, at least recently, has been reserved for scrutiny of substantive legislation.

Although I see the Court's personal jurisdiction jurisprudence as informed by a similar desire to police regulatory poaching by states, there is an significant distinction between jurisdiction and choice of law that has important implications for the problem of charitable regulation: A defendant can normally accommodate its amenability to multiple courts far more easily than it can accommodate its amenability to multiple substantive rules. If a state forbids the corporate takeover of any company in which its residents own stock,⁶⁶ or requires trucks driven through its state to be equipped with unusual mud

⁶² E.g., *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Am. Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002); *Psinet Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

⁶³ 969 F. Supp. 160 (S.D.N.Y. 1997).

⁶⁴ See *Davis v. Farmers Co-Operative Equity Co.*, 262 U.S. 312 (1923).

⁶⁵ See *Int'l Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511, 517 (1934).

⁶⁶ *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

flaps,⁶⁷ or forbids the dissemination of sexually explicit material over computers used in the state,⁶⁸ a person subject to those rules must conform its conduct generally to those rules or, at the least, absorb prohibitive costs to engage in different out-of-state conduct. In other words, the extraterritorial “spill over” effect of substantive legislation applicable to interstate conduct can be enormous.

Personal jurisdictions, in contrast, *normally* imposes a less onerous burden. The marginal cost of litigating in one state rather than another does not significantly increase the cost of litigation (compared to the overall cost of litigation), and litigation in one state is typically in lieu of litigation elsewhere. Just because a defendant is amenable to jurisdiction in multiple places does not mean that he must absorb the cost of litigating in *all* of those places. It is thus not surprising that courts have historically been more concerned about the burdens on interstate commerce imposed by substantive regulation than by personal jurisdiction.

It is for precisely this reason that the Charleston principle’s adoption of a judicial jurisdictional benchmark to test whether a state’s substantive law should apply to charitable solicitation is troubling. Just because it might be fair to make a defendant appear in a particular court tells us little about the potential hardship of applying that state’s law to defendant’s primary conduct. The level of hardship on an interstate actor will vary with the type of regulation; disclosure requirements are less onerous than “structural” requirements, such as the requirement that the charity have a certain number

⁶⁷ *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

⁶⁸ *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

of “outsiders” on its audit committee.⁶⁹ But all of those regulatory burdens are different from burden of being subjected to personal jurisdiction.

But more importantly, the fact the courts have not, at least recently, thought about personal jurisdiction in *ex post*, remedial litigation as implicating commerce clause concerns, does not mean that they will not see *ex ante*, regulatory proceedings as creating greater interstate burdens. Unlike *ex post*, remedial litigation, which will typically be brought in only one forum at a time, the kind of prospective regulatory proceedings that charitable organizations will face is by its nature duplicative. Litigation or other regulatory proceeding initiated by the New York attorney general in New York is not in lieu of regulatory obligations in Florida. Indeed, I would be surprised if there were not a snow ball effect as state regulators seeks to demonstrate that they are as vigilant as the next guy. Thus, the interstate burden of regulatory process is cumulative. The cost of Internet solicitation under the Pinellas county ordinance was not the simply regulatory costs imposed by a single state, but rather the cumulative expense of dealing with the numerous states that might seek to impose these costs on the basis of the same Internet communication. This, I think, raises particular Commerce Clause problems.

In this regard, the Court’s jurisdiction to tax cases are instructive. The Court has long held that the Commerce Clause requires that a state must have a “substantial nexus” with an activity before imposing a tax on that activity.⁷⁰ That principle would seem to support the notion that a state may not impose a substantial administrative obligation

⁶⁹ See Cal. Statute..

⁷⁰ Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

without having a comparable connection with the regulated party. But more specifically, in *Quill Corp. v. North Dakota*,⁷¹ the Supreme Court held that North Dakota could not force a mail order office supply company to collect and forward to the state use tax on goods shipped to North Dakota residents.

While holding that defendant had sufficient contacts with North Dakota to justify imposition of the tax collection duty as a matter of due process, the statute nonetheless violated the commerce clause by the excessive burden thereby imposed upon defendant's interstate business. Of particular interest was the Court's focus on the cumulative impact on mail-order businesses of allowing the imposition of such an administrative burden:

a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection duty. What is more significant, similar obligations might be imposed by the Nation's 6,000- plus taxing jurisdictions. See *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 759-760, 87 S.Ct. 1389, 1393, 18 L.Ed.2d 505 (1967) (noting that the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could

⁷¹ 504 U.S. 298 (1992).

entangle [a mail-order house] in a virtual welter of complicated obligations")
(footnotes omitted)⁷²

The parallel to charitable regulation is striking. While a state may have the right to impose administrative obligations on a charity that has a substantial connection with the state, if it did so on the basis of more tenuous connections, charitable organizations would be subjected to a crippling multitude of regulatory proceedings and obligations from numerous states, making interstate charitable solicitation too expensive for all but the most well-endowed organizations. Accordingly, *Quill* appears to be persuasive authority for challenging both the substantive regulations, as well as the enforcement authority of jurisdictions that have connection only to the charity's untargeted Internet activities.

I should note that this branch of dormant commerce clause doctrine in general may lose some of its bite as several justices have suggested that Congress may be in a better position than the courts to identify and police inappropriate non-discriminatory burdens on commerce imposed by state law.⁷³ And *Quill* in particular has been the subject of harsh criticism from commentators who have noted its reliance on the somewhat archaic and irrational distinction between businesses physically present in the jurisdiction and those doing business in the state through the mails.⁷⁴

⁷² 504 U.S. at 313 n.6.

⁷³ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J. concurring in part); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S.564, 618 (1997) (Thomas, J. , dissenting, joined by Rehnquist, J.).

⁷⁴ See, e.g., John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 Wm. & Mary L. Rev. 319, 335 (2003) ("Physical presence marks how one does business in a state, not how much"); Joondeph, *supra* n. 59, 24 Va. Tax Rev. at 134.

Note, however, that a charitable organization's nexus with the state by virtue of Internet solicitation may far more attenuated than the defendant's connection with North Dakota in *Quill*, and the administrative burden on the charity may be more onerous and disproportionate to its level of connection with the regulating state. In *Quill*, the business would incur a duty to collect and forward the tax only to the extent that it had made sales to state residents. An isolated sale would thus impose a relatively modest administrative burden.⁷⁵ In contrast, if a state were to require registration, payment of a fee, and filing of disclosure documents whenever a charity solicited over the Internet, or when a small number of contributions were made, the administrative burden on the charity might far exceed the value of its activity in the state. Accordingly, the charity would be discouraged from engaging in untargeted Internet solicitation to avoid incurring such a burden.

In conclusion, I am therefore reasonably confident that charitable solicitation over the Internet cannot constitutionally provide a jurisdictional basis for either the application of state registration and other regulatory laws, or the assertion of personal jurisdiction to enforce those laws against organizations that have not engaged in some significant "forum-specific" conduct. Such assertions of regulatory authority should be vulnerable to both due process and commerce clause challenges.

⁷⁵ Accord Jooneph, *supra* at 137-38 (questioning empirical basis for *Quill's* assumption that mail-order businesses would be overwhelmed by the tax-forwarding obligation imposed there). As Professor Jooneph notes, perhaps the biggest burden would be identifying the duty in the first place. *Id.* The actual administrative compliance cost would be relatively modest.

