



PUBLIC POLICY REPORT

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States Behaving Badly

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The United States' relatively unique form of government, in which government power is shared between the states and the national government, creates a legal environment in which businesses must deal not only with federal law, but also with the law in each state where they have customers. Although Congress has the power, under the U.S. Constitution, to regulate interstate and foreign commerce, they have not exercised this power to the extent that they could have. Relying on Congress' restraint in this area, some states, in their zeal to preserve what they see as "states rights," are acting irresponsibly. This article explores in detail some examples of that irresponsible behavior.

Unconstitutional Tax Laws and Denial of Taxpayers' Rights to Access to the Courts

One of the areas of state misbehavior that is of the most concern for electronic commerce is taxation. For decades the states have been imposing unconstitutional taxes, and tax collection duties, on sellers engaging in interstate commerce.

The Commerce Clause of the U.S. Constitution, Article I, Section 8, provides that:

"The Congress shall have Power to . . . regulate Commerce . . . among the several States. . . ."

The Supreme Court has long interpreted these words not only to grant Congress a broad affirmative power to regulate interstate commerce, but also to preclude states from discriminating against interstate commerce. This negative aspect of the Commerce Clause, often referred to as the Dormant Commerce

Clause, prohibits a State from engaging in economic protectionism.

Standards for determining the constitutionality of state and local taxes have been set by the Supreme Court, in the context of its Dormant Commerce Clause jurisprudence. To meet the constitutionality standard, a state tax on interstate businesses must pass a four-part test¹. State taxation of interstate business must:

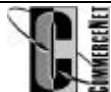
1. tax only interstate activities with a sufficient connection to the taxing state;
2. be fairly apportioned to the taxpayer's activities in the taxing state;
3. not discriminate against interstate commerce; and
4. be fairly related to the services provided by the state.

The most well known instances of imposing unconstitutional tax obligations are in the sales and use tax area. The U.S. Supreme Court has twice² told the states that, due to the overly burdensome compliance obligations which would result from dealing with the sheer quantity of different rules of the thousands of state and local taxing jurisdictions, tax collection obligations cannot be imposed on businesses which have no physical presence in their states.

One can only wonder that the U.S. Supreme Court had to make this same point twice. The reason is that the states, led by the Multistate Tax Commission (an

¹ See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

² The 1967 *National Bellas Hess* decision and the 1992 *Quill* decision. (*National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, and *Quill Corp. v. Heitkamp*, 504 U.S. 298).



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organization of state tax administrators), engage in what is commonly referred to as "tax terrorism." They claim that for this, that, or the other reason, existing legal precedents no longer apply. They then take action to revise the state standards relating to which businesses are subject to the collection obligation. Then under the new standards, which are not consistent with legal precedent, they proceed to force companies to litigate the case all the way to the Supreme Court again. Only seven years after having lost the *Quill* case, there are indications³ that the states intend to proceed in this manner once again.

Less well known, but perhaps more problematic, is the states' imposition of unconstitutional corporate franchise, income, and other business activity taxes.

Unconstitutional taxation policies by the states are aided by several factors:

- pay-to-play, or bond-to-play, rules in the states which require the taxpayer to first pay the tax and penalties and interest before challenging it, or, less commonly, to provide a bond in order to challenge the tax. Thus before taking the issue to court, a taxpayer must first pay an unconstitutional tax and if the tax was paid only upon audit, which often occurs as the state tax agencies pursue creative new theories of taxation, must also pay any accrued penalties and interest.
- a federal law that prohibits federal courts from issuing injunctions on the collection of taxes by the states.
- state legislatures that replace taxes ruled unconstitutionally discriminatory with new tax schemes that are just as unconstitutional but which must then be relitigated all the way to the U.S. Supreme Court.
- state legislatures or local governments that attempt to deny refunds of illegally collected taxes, thus requiring more litigation over refunds

- state courts, or state laws, that deny taxpayers access to the courts, one assumes in order to protect state revenues.
- state and local tax agencies that raise clearly ludicrous claims in litigation merely to stall the day when the state must refund the taxes collected.

Examples of these types of problems are abundant.


Alice in Alabama

A recent U.S. Supreme Court decision⁴ involving South Central Bell has ruled Alabama's franchise tax unconstitutional. This was a partial reversal of the Alabama Supreme Court's decision, which had ruled the tax unconstitutional but unchallengeable. The case has been remanded back to that court for further consideration consistent with the U.S. Supreme Court decision. The history of that case is an example of how far the states go in their attempts to impose unconstitutional taxes that discriminate against interstate commerce. In an earlier 1989 decision⁵, the Alabama Supreme Court ruled that the franchise tax was constitutional, a case in which it now appears the Court did not have access to, or perhaps merely chose not to consider, the relevant data. The U.S. Supreme Court declined to review that case. During that earlier case South Central Bell, by agreement with the state, held its case in abeyance until the results of the first case were complete, a common practice used to prevent wasting state and business resources on simultaneous litigation over similar issues. Once the first case upheld the tax, South Central Bell went forward with its case, paying the tax in question all the while. In a most surprising 5-4 ruling, the Alabama Supreme Court conceded the unconstitutionality of the tax, as did the lower court, but also agreed with the lower court that South Central Bell had no right to litigate the case at all since the court had already decided that issue in the earlier case, a ruling that was in clear contradiction

³ See for example, the MTC's proposed nexus guidelines and also the comments expected to be included in the implementation section of the upcoming report of the NTA's Communications and Electronic Commerce Tax Project.

⁴ South Central Bell Telephone v. Alabama, U.S. Supreme Court No. 97-2045, decided March 23, 1999.

⁵ [Alabama] State Dept. of Revenue v. Reynolds Metals Company, 558 So. 2d 373 (1989).

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to a U.S. Supreme Court decision⁶ in a previous Alabama case on the very same issue.

The treatment of the out-of-state taxpayer by the Alabama court was so bizarre that the Tax Executives Institute (TEI), in its amicus brief before the U.S. Supreme Court, stated:

“Indeed, the State employed Jabberwockian logic to apply *res judicata* in a manner that makes sense only if you do not think about it. . . .

The last 15 years have seen the States propound many an original and unfounded argument to deny taxpayers relief. This Court has rightly shown patience in permitting the States time to rectify their mistakes. Some States, however, have taken advantage of the deference accorded them, either by improperly seeking to apply the Court's holdings on a prospective-only basis or by construing the States' refund statutes to render Pyrrhic the taxpayers' constitutional victory. Alabama's strained approach here -- donning judicial blinders to deny taxpayers access to a forum to press their righteous claims -- represents a new tack, but it too should fail as inconsistent with federal due process principles.

The record in this case establishes that Alabama, while recognizing the dubious vitality of its decision in *Reynolds Metals*, will cleave to it until it is directly overturned, despite the clear mandate of this Court's intervening decisions. . . .

In this case, the Supreme Court of Alabama embraced a bogus theory of *res judicata* to deny taxpayers a refund of illegally extracted monies. If Alabama's judicial alchemy succeeds, state courts will become Wonderland, a place where the rules no longer matter. If taxpayers win by the rules, the States -- like the Queen of Hearts in her game of croquet -- will consider themselves free to change them.”

Among the more bizarre legal theories by the state was the claim by Alabama that South Central Bell, in spite of different facts, different tax years, and intervening relevant U.S. Supreme Court decisions, could not litigate the case at all. The state claimed that South Central Bell was legally bound by the previous case involving a different taxpayer since South Central Bell knew about the case and had one of the same lawyers as the taxpayer in the previous case. Imagine a legal system in which using a lawyer with experience in similar cases was grounds for having your case thrown out of court. No wonder TEI felt justified in citing Lewis Carroll as an authority on the logic used by the Alabama Supreme Court.

Alabama also claimed that the 11th Amendment of the U.S. Constitution should be interpreted to prohibit the U.S. Supreme Court from ruling on tax cases appealed from the state's Supreme Court. This argument, along with the lack of any argument that the tax in question was constitutional, was extremely overreaching. Alabama wanted to not only behave very badly, but also to leave the taxpayer with absolutely no recourse. Fortunately the Supreme Court, in its May 1999 *South Central Bell v. Alabama* decision, soundly rejected that argument.

What is nearly as bizarre as what Alabama did claim in the case before the U.S. Supreme Court, is what they did not claim. They made no arguments that the tax was indeed constitutional under current standards, but instead argued that the Court should simply abandon its longstanding Commerce Clause jurisprudence.

The story does not end here. Obviously, Alabama will have to revise its tax laws. But recent reports indicate that Alabama's position⁷ is that no refunds are due for taxes collected under their unconstitutional tax law, nor, it is rumored, will Alabama even allow taxpayers credits for the unconstitutional taxes against future taxes. Instead Alabama now simply claims that it can rely on an earlier Alabama Supreme Court decision in *Reynolds*

⁶ Richards v. Jefferson County, 517 U.S. 793 (1996).

⁷ Alabama Ponders Future of Its Franchise Tax, Tax Analysts Document Number: Doc 1999-15418, April 28, 1999 and Alabama Franchise Tax Reform Legislation In the Works, Tax Analysts Document Number: Doc 1999-16388, May 5, 1999.



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*Metals*⁸. Again, Alabama is proceeding to simply ignore a previous U.S. Supreme Court case⁹ - this one on the requirement for states that do not allow taxpayers “a meaningful opportunity to withhold payment and to obtain a pre-deprivation¹⁰ determination of the tax assessment’s validity” to instead provide post-deprivation remedies for any unlawful tax collection. Those remedies may be either refunds to taxpayers overpaying, retroactively taxing those taxpayers who had underpaid, or a combination of both. In that case the court rejected the argument that the state could rely on a “presumptively valid statute” as Alabama is now attempting to do. To rule otherwise would clearly have totally eviscerated any requirement to impose only constitutional taxes, for if unconstrained the states could simply continuously replace one unconstitutional tax with another with no fear of having to provide any refunds whatsoever.

Given Alabama’s position on its obligation to provide refunds, it is obvious that this battle is far from over. Alabama has managed, by its outrageous behavior in refusing to recognize the unconstitutionality of its tax for nearly a decade¹¹, to put itself in an extremely bad position. Details of the case indicate that out-of-state corporations have been paying five times as much taxes as in-state corporations. In the roughly 10 years since the case started being litigated, 92% of the franchise tax, which makes up 14% of the general fund, has been illegally collected. If that had to all be refunded in one year it would more than totally wipe out the entire state general fund, which is the funding source for most state services except education. Many taxpayers have been paying under protest for up to 10 years, and most taxpayers have been for the past five years. Alabama state tax authority Bruce P. Ely states that refunds owed could amount to as much as \$500-\$600 million, which is approximately 75% of the state’s yearly general fund expenditures.

It is hard to imagine how the state will rectify the situation - especially when rectifying the situation involves compensating 17,000 out-of-state corporations at the expense of 57,000 in-state corporations. It is unlikely, and justifiably so, that the U.S. Supreme Court will allow the state to decline to either make refunds or, alternately, to allow credits for previously paid taxes against future taxes. But the enormity of the inequity means that in-state corporations, those whose officers and employees actually vote in the state, are going to have to make up the difference - *i.e.*, they will have to carry the burden of making up for at least a decade of paying very low taxes at the expense of out-of-state corporations, while at the same time out-of-state corporations will have to be credited for past taxes. As part of their efforts to rectify the situation, the legislature has passed a bill to submit to the voters a referendum to repeal the parts of the constitution that impose the unconstitutional tax. How likely is it that state taxpayers will vote to get rid of a provision of their state constitution that imposes higher taxes on out of state corporations than in-state corporations? Failure of the referendum could leave Alabama with no option but to simply not enforce their corporate franchise tax.

And the sad saga of Alabama is likely to repeat itself. An Alabama Court of Appeals has just ruled¹² that a law applying Alabama’s use tax retroactively is constitutional - once again based on ignoring certain facts. As the Alabama Court of Appeals states in the decision, the use tax being collected was ruled invalid in 1986, by both an administrative law judge and a trial court, due to a loophole caused by inappropriate wording in the law. The state tax agency did not even appeal the ruling, nor did it ask the legislature to revise the law to eliminate the loophole. The Appeals Court also noted that the tax was ruled invalid by an administrative law judge again in 1993 and yet again in 1997. Not until the 1997 ruling generated national media attention, making taxpayers aware of it, did the legislature see fit to close the loophole legislatively. Then they closed it retroactively! If the ruling that the retroactive application is constitutional is


⁸ Reynolds Metals Co. v. Sizemore, 496 U.S. 912 (1990).

⁹ McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990).

¹⁰ *i.e.*, pre-payment.

¹¹ It should be noted that the most significant evidence of the enormously discriminatory nature of the tax was provided by the Alabama Department of Revenue itself early in the litigation.

¹² Monroe v. Valhalla Cemetery Co., et al.; Alabama Court of Civil Appeals # 2980012 (May 14, 1999).

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successfully appealed, Alabama could be in for yet another loss of tax revenue.

Alice in California, Georgia, Florida, Washington, and Other States

Alabama is no isolated example. A multitude of unconstitutional taxes, or illegally enforced taxes, exists in other states. For example:

- ◆ California at the current time has somewhat reasonable income, sales, and use tax laws, due in part to the California Constitution¹³ which only requires tax laws to be enforced by the tax agencies if they have NOT been overturned as unconstitutional by a state appeals court. Other states collect taxes until ruled on by their state supreme court or the U.S. Supreme Court. However, like the states which collect taxes contrary to federal law, local tax agencies collect taxes which are contrary to state or federal law and refuse to refund taxes ruled illegal. California examples include:
 - Currently in California local assessors are litigating a case with far-reaching consequences for software companies. The case concerns the application of property tax to software. While the legislature, and the tax agency that oversees the local assessors, have repeatedly re-iterated that the tax in question applies only to a very limited type of software, the local tax assessors have continually refused to understand the law or the interpreting regulations, and are insisting on applying the tax far beyond what can legally be imposed. Even after repeated clarifications of the tax law and regulations, they insist on assessing the tax illegally. The county assessors are currently suing the state tax agency over the agency's most recent attempt at clarifying the law, which the counties are refusing to apply as clearly intended.
 - The City and County of San Francisco, in response to a Court of Appeals decision¹⁴

¹³ California Constitution, Article III, Section 3.5.

¹⁴ General Motors v. City and County of San Francisco, 60 Cal App 4th 448 (1999).

overruling on constitutional grounds a city tax on out-of-city businesses, passed an ordinance requiring that all claims for tax refunds must be filed within 90 days of payment of the tax. Of course, since it takes several months if not years, for a court to rule a tax unconstitutional, the effect of such an ordinance is to completely deny refunds to all but the taxpayer originally challenging the tax. This is of course unconstitutional, both because it denies meaningful backward looking relief as required under *McKesson*¹⁵, and because, as applied retroactively, it is an unconstitutional "bait and switch" tactic which the U.S. Supreme Court ruled impermissible in *Reich*¹⁶ and *Newsweek*¹⁷. Furthermore, San Francisco, joined by several other cities and the League of California Cities, is asking that the ruling be depublished so that taxpayers in other cities with similar taxes will not find out about the ruling, thereby allowing other cities to continue to collect their unconstitutional taxes. To the best of my knowledge, the tax ordinance in question was originally circulated by the League of California Cities as a model for the cities to adopt. Surely a more responsible action for the League to now take would be to encourage cities to amend the tax to cure the unconstitutionality, rather than to try to keep secret the court ruling that the tax is unconstitutional.

- ◆ Both Georgia¹⁸ and Florida¹⁹ have attempted to deprive taxpayers of refunds by passing laws providing for credits of previously paid taxes which have been ruled unconstitutional, when the law prior to the ruling clearly called for refunds of unconstitutional taxes. The U.S. Supreme Court ruled this behavior

¹⁵ *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

¹⁶ *Reich v. Collins*, 513 U.S. 106 (1994).

¹⁷ *Newsweek v. Florida Dep't of Rev.*, 118 S. Ct. 904 (1998).

¹⁸ *Reich v. Collins*, 513 U.S. 106 (1994).

¹⁹ *Newsweek v. Florida Dep't of Rev.*, 118 S. Ct. 904 (1998).



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impermissible, characterizing it as a “bait and switch” tactic.

◆ In an April 1999 decision, which a noted tax practitioner has called the disgrace of the century²⁰, the Supreme Court of Washington has ruled that the legislature’s tax credit scheme can be applied retroactively and that such retroactive application provides a sufficient remedy for a tax ruled unconstitutional by the U.S. Supreme Court, in spite of:

- a provision in the tax credit act that expressly states an effective date that is subsequent to the period for which the taxpayer is asking for a refund.
- an existing state law that requires over-collected taxes to be refunded (not credited against future taxes)
- the above mentioned two recent U.S. Supreme Court rulings in Georgia and Florida cases which clearly rule that bait and switch tactics, *i.e.*, passing laws that retroactively alter refund laws, are not permissible
- the fact that the credits are, according to the dissenting judges, impossible to prove in practice for interstate businesses and therefore the resulting tax scheme is itself unconstitutional. Indeed, the dissenting judges state:

However the tax credit scheme at issue here incorporates on its face exactly that discriminatory mechanism which the Supreme Court condemned in the very opinion which struck down the unconstitutional tax which this credit scheme was supposedly enacted to cure: it leaves interstate taxpayers to "the shifting incidence of the varying tax laws of the various states at a particular moment.”

◆ The list of cases in the last 15 years in which the states have propounded creative and unfounded

arguments to deny taxpayers relief from illegally collected taxes is quite extensive and includes, in addition to the others mentioned above:

- *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) (West Virginia's business and occupation tax)
 - *Bacchus Imports, Ltd., v. Dias*, 468 U.S. 263 (1984) (Hawaii's exemption of local products from the liquor excise tax)
 - *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (Alabama's tax on foreign insurers)
 - *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) (Pennsylvania's highway use tax)
 - *Fulton Corp. v. Faulkner*, 516 U.S.325 (1996) (North Carolina intangibles tax on fair market value of stock)
 - *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (retroactivity of decision overturning Florida statute exempting local products from liquor excise tax)
 - *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (retroactivity of a case striking down a Georgia statute)
 - *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (retroactivity of a Supreme Court case)
 - *Dryden v. Madison Co.*, 118 S. Ct. 1162 (1998) (remanded in light of the Newsweek case).
- ◆ State tax laws that take into account taxes paid to another state on income from doing business in that state only if the taxpayer would be required to pay the tax under the rules of the home state - rather than under the rules of the state actually requiring payment of the tax. Since state income taxes are generally considered unconstitutional if they result in multiple taxation of the same income, which this rule definitely does, then this scheme is unconstitutional.
- ◆ Additional state tax laws that tax practitioners have characterized as unconstitutional include

²⁰ As reported in Pomp and Frankel Go Head-To-Head On Current Audit Issues At Georgetown SALT Institute, State Tax Notes, May 24, 1999.

several features of corporate income tax including a mechanism (single-factor apportionment) commonly used by states to apportion taxpayer income amongst the states for tax purposes.

While perhaps the most problematic, taxes are not the only area in which states are behaving badly. They are also attempting to stretch the bounds of the 11th Amendment far beyond its intended purpose.

11th Amendment to the U.S. Constitution

The 11th Amendment to the U.S. Constitution states that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State" and thus provides that neither the citizens of one state, nor the subjects of any foreign country, can bring suit in federal court against the government of another state except by that state's consent.

The Courts have interpreted the 11th Amendment to bar all suits in federal court against a state except in three situations: (1) if there is consent by the state; (2) if there is congressional abrogation of the immunity; and (3) if the suit is against a state official in an official capacity for prospective injunctive relief.²¹

However, the U.S. Supreme Court has also held that a suit is not "commenced or prosecuted" against a state by the appeal of a case that was instituted by the state itself against a defendant who claims rights under the Constitution, laws, or treaties of the United States. This permits a person to sue a state in a federal court by appealing a state court decision.

In its 1996 *Seminole* decision²² the U.S. Supreme Court ruled that a state was not subject to suit under the provisions of the federal Indian Gaming Regulatory Act, because none of the above-listed requisite criteria for an exception to 11th Amendment immunity had been met.

States have been using that decision as an excuse to claim 11th Amendment immunity in situations where the applicability of the decision is not only extremely implausible, but downright unconscionable.

11th Amendment Challenges to Applicability of Copyright, Trademark, and Patent Laws to the States and to Federal Courts Ability to Rule on State Tax Case Appeals

In addition to the tax case claim referenced above, states are challenging whether federal intellectual property laws apply to them. Currently, two states²³ are challenging whether they are subject to U.S. copyright, trademark, and patent laws, using the *Seminole* case for justification, in spite of the fact that Congress in recent amendments to the federal patent and copyright laws explicitly abrogated states' immunity under the 11th Amendment. The states are claiming that Congress did not abrogate states' immunity in the right way. The implications for electronic commerce, which relies heavily on intellectual property protections, could be significant.

What are the states thinking of in these lawsuits? Do they really think that they should be able to take advantage of the U.S. copyright and patent laws to protect their own intellectual property, while denying everyone else's copyright and patent rights? This would seem exceedingly greedy, especially as the state's use of copyrights and patents generally does not take place in the context of carrying out their government functions, but rather in the context of business activities carried out by government entities, *i.e.*, patent licensing and publishing, especially by state universities. Both publishing and patent rights are granted by the Constitution and governed by federal statutes - should states be able to engage in those business activities, yet be immune from the statutory restrictions imposed in those areas on private entities? Should they be able to claim all the benefits while denying all the obligations? That is completely illogical. Furthermore, there is grave risk that if the states actually win these cases, Congress will then be compelled to remedy the

²¹ See: *Poarch Band of Creek Indians v. State of Alabama*, 784 F.Supp. 1549, 1551-52 (S.D. Ala. 1992) (Poarch II).

²² *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

²³ *College Savings Bank v. Florida Prepaid and Chavez v. Arte Publico Press* [University of Houston, Texas] Fifth Circuit Court of Appeals, No. 93-2881, on remand from the U.S. Supreme Court.



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situation - which they might do by denying the benefits of the copyright and patent laws to the states. Such an act would have major implications for university finances.

Or are the states merely taking advantage of their ability to litigate endlessly in order to delay as long as possible their having to pay statutory damages for copyright and patent infringement?

Whatever the states' reasons, this is abominable behavior on the part of the states. One can hardly imagine that authors will continue to be willing to have university presses publish their writings if the university can violate their copyright at will. The Supreme Court will shortly issue a decision on the 11th Amendment issue in the *College Savings Bank* patent case, and the outcome of the *Chavez* copyright suit is expected to be dependent on that case. It will be extremely interesting to see, if the state of Florida loses the patent case, as is likely, whether the state of Texas will nonetheless pursue the copyright case further by attempting to distinguish it in some way.

Laws and Regulations that Discriminate Against Interstate Commerce

Although tax laws may be the most financially burdensome state laws to discriminate against interstate commerce, they are not the only laws to do so. Among the others are:

- ◆ laws that regulate the distribution of alcoholic beverages in a state. Some states prohibit the direct shipping of alcohol to consumers altogether. Others require such shipments to be routed through local distributors.
- ◆ laws that prohibit manufacturers of certain products (such as cars) from selling direct to consumers if they have dealers in the state.
- ◆ state regulatory agencies that regulate utilities, insurance providers, and other businesses differently in each state. It is time, in the nationwide markets whose development is accelerated by e-commerce, for uniform and centralized regulation of those types of businesses.
- ◆ In general, state consumer laws that impose different requirements in every state - thus

requiring e-commerce businesses to treat different customers differently.

Implications for Electronic Commerce

Obviously state laws, be they tax laws or other laws, that discriminate against interstate commerce will have a negative effect on the ability of electronic commerce businesses to access nationwide markets. The U.S. needs to create a single-market environment in which companies can thrive - but can that be done in the context of our unique form of government? This question, along with specific recommendations, is addressed in the June 1999 CommerceNet Public Policy Report article *Federalism: Should Congress Take a More Active Role in Restraining the States from Interfering in Interstate Commerce?*

Government Power and Government Responsibility

Congress has shown enormous respect to the states by severely limiting its use of powers under the Commerce Clause of the U.S. Constitution. Rather than acting to constantly push the boundaries of states rights to the point of, and beyond, abuse, the states should be exercising better judgement and behaving in a more responsible manner. To do otherwise merely invites Congress to intrude into areas that the states would prefer to control themselves. With statehood come the responsibility to refrain from abusing sovereign powers, whether by refusing to recognize federally granted intellectual property rights of private parties, by imposing discriminatory taxes, or by abusive acts in other areas that affect interstate commerce. The growth of electronic commerce, necessitating as it does a more nationwide, indeed more global, marketplace will put enormous pressure on badly behaving states. It is time for them to grow up and drop policies that discriminate against interstate commerce. Failing that, it is time for Congress to step in²⁴.

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²⁴ See the June 1999 CommerceNet Public Policy Report article *Federalism: Should Congress Take a More Active Role in Restraining the States from Interfering in Interstate Commerce?*