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Treacherous Waters: Jurisdiction in E-Commerce and on the High Seas

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Online commercial transactions, more commonly referred to as e-commerce, are an established means of conducting business in the modern world. While the benefits of such novel trading are undeniable, equally novel legal challenges in this new industry have emerged. In particular, the borderless nature of e-commerce makes questions of jurisdiction—the issue of what legal authority has the ability to determine disputes—increasingly difficult.

This Article considers the nature of the preliminary legal issue of jurisdiction, and how preexisting jurisprudence, as opposed to entirely new legal principles, might be applied to e-commerce. First, the Article will consider the purpose of jurisdiction and how e-commerce differs from the more general concept of cyberspace in the jurisdiction context. Then, the Article posits that established international admiralty law could serve as a framework upon which a viable e-commerce standard might be developed. In particular, the Article argues that generally accepted international law establishing jurisdiction over vessels in international waters might be applied to e-commerce. Modifying the jurisdictional structure created by the United Nations Convention on the Law of the Sea (UNCLOS), the Article advocates the development of a similar approach to jurisdiction over disputes arising from e-commercial transactions. Finally, the Article concludes by reaffirming that problems of jurisdiction in e-commerce do not necessitate the formation of an entirely new legal framework and instead can be best resolved by adjusting existing international law to meet those challenges.

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“Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.”¹

I. INTRODUCTION

Since public use of the Internet began in the early 1990s, there has been fierce independence attached to the new and unexplored digital realm.² Indeed, as evidenced by the 1996 *Declaration of the Independence of Cyberspace* quoted above, early Internet proponents believed it marked the creation of a radically new dimension beyond the reach of traditional legal regulation and authority.³

Yet what began as an improbable manifestation of technological theory, seeming to emerge from the most fantastic science fiction, quickly became commonplace.⁴ When the final restrictions on the Internet’s ability to carry commercial traffic were removed in 1995,⁵ less than one percent of the global population had access to the new technology.⁶ Now, nearly two decades later, half of the world’s population—some three

1. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <http://www.eff.org/cyberspace-independence>.

2. Aron Mefford, *Lex Informatica: Foundations of Law on the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 211, 218 (1997).

3. *Id.* at 218-19.

4. Martin Samson, *Cyberspace-Here, There or Everywhere: A Study of Jurisdiction*, INTERNET LIBR. L. & CT. DECISIONS (1996), http://www.internetlibrary.com/publications/chtoeaso_j_art.cfm (“Cyberspace. For most, the term conjures up Captain Kirk traveling aboard the Starship Enterprise to places no man has ever gone before.”).

5. Susan R. Harris & Elise Gerich, *Retiring the NSFNET Backbone Service: Chronicling the End of an Era*, CONNEXIONS PUBLICATIONS (Apr. 1996), http://www.cbi.umn.edu/hosted/publications/Connexions/ConneXions10_1996/ConneXions10-04_Apr1996.pdf.

6. Bob Metcalfe, *Novell Targets World’s Small Computers, Plans NLM Web Server, Gets Backbone*, 17 INFO WORLD 1, 79 (1995).

billion people—have Internet access and over ninety-seven percent of Earth’s two-way telecommunications are exchanged via the Internet.⁷

Following the development of the Internet, the concept of “e-commerce” became “the new communication technology . . . the latest way of doing business.”⁸ Over time, Internet-based commercial transactions became more frequent as businesses sought to exploit the expansive opportunities made possible by the Internet’s ability to connect globally.⁹ The extensive growth of online commercial transactions in turn necessitated a concomitant growth of legal application to govern and regulate the new economic marketplace.¹⁰ While national governments quickly “rac[ed] to clear the way for a well-functioning virtual marketplace by imposing rules against potential plagues,” they simultaneously remained “anxious to reign in the Net to secure its economic benefits for their companies and to protect their citizens from harm.”¹¹

Still, the world has struggled to create a uniform body of law to govern online commercial activities.¹² This Article addresses specific issues associated with e-commerce jurisdiction and how to best regulate online commercial activity. Application of jurisdictional law is used as a “gateway” to an overall legal analysis of the issue and is essential to resolving inevitable disputes.¹³ This Article proceeds in three parts: Part I argues that traditional conceptions of jurisdiction should continue to apply to e-commerce activities despite the fact that e-commerce operates not in the terrestrial commercial world, but in cyberspace.¹⁴ Part II posits that preexisting legal structures are sufficiently capable of establishing

7. Martin Hilbert & Priscila Lopez, *The World’s Technological Capacity to Store, Communicate, and Compute Information*, AM. ASS’N ADVANCEMENT SCI. 62-63 (2011), <http://science.sciencemag.org/content/332/6025/60>.

8. Virginia La Torre Jeker et al., *E-Transaction Law and Online Dispute Resolution: A Necessity in the Middle East*, 20 ARAB L.Q. 1, 43 (2006).

9. *Id.* at 43; see also Avril D. Haines, *Why Is It So Difficult to Construct an International Legal Framework for E-commerce? The Draft Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters: A Case Study*, 3 EUR. BUS. ORG. L. REV. 157, 159-60 (2002).

10. Haines, *supra* note 9, at 158-62.

11. Mefford, *supra* note 2, at 212; see also Haines, *supra* note 9, at 159 n.6.

12. Haines, *supra* note 9, at 162.

13. See Richard Waller & Hannah Harwood, *Jurisdictional ‘Gateways,’* LAW SOC’Y GAZETTE (May 12, 2014), <http://www.lawgazette.co.uk/practice-points/jurisdictional-gateways/5041175.article>.

14. See Justice S. Muralidhar, *Jurisdictional Issues in Cyberspace*, 6 IND. J.L. & TECH. 1 (2010) (“With the internet, the question of ‘territorial’ jurisdiction gets complicated largely on account of the fact that the internet is borderless.”).

jurisdiction in an e-commerce context. Part III argues that e-commerce jurisdiction can be modeled after established admiralty law principles as applied to international waters. Finally, Part IV reaffirms the idea that preexisting law offers the best means of addressing questions associated with e-commerce jurisdiction.

II. THE CONCEPT OF JURISDICTION

A. *Purposes of Jurisdiction*

The concept of jurisdiction is a “legal aspect of state sovereignty” that “refers to judicial, legislative, and administrative competence.”¹⁵ Jurisdiction—insofar as it permits or rejects legal authority over an incident—necessarily involves issues of sovereignty.¹⁶ The traditional understanding of jurisdiction, whereby “questions of jurisdiction [rest] on the twin towers of state sovereignty and due process,” is based upon the idea that primary jurisdictional interests of a sovereign national entity (State) involve both asserting judicial power (sovereignty) and protecting the rights of citizens (due process).¹⁷

Due process take two forms: the ability to foresee disputes and consumer protection laws.¹⁸ The first form, the ability to foresee, with reasonable clarity, where disputes related to a party’s commercial transactions may be subject to legal resolution is widely accepted as a critical component of jurisdictional law because in a commercial context, it provides a seller with the ability to predict potential risks of litigation in transactional disputes.¹⁹ The second form, consumer protection laws, allows for explicit protection of commercial buyers.²⁰ Consumer protection laws are especially important in cases involving international commercial relationships, because international laws generally require consumer contracts to be governed by the country in which the consumer has a habitual residence.²¹ Even though jurisdictional law differs across

15. Tushar Kanti Saha, *Cyberspace—Conflicting Jurisdictional Spheres of Litigating IPR Claims*, 15 J. INTELL. PROP. RTS. 364, 364 (2010).

16. *See id.* at 364; *see also* J. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 241 (1923).

17. Saha, *supra* note 15, at 365.

18. *See infra* Section III.B.

19. Katie Sutton, *E-Commerce and Jurisdictional Issues: An Overview*, 49 COMPUTERS & L. 1, 21 (2002).

20. *See* MARY KEYES, JURISDICTION IN INTERNATIONAL LITIGATION 240 (2005).

21. James J. Healy, *Consumer Protection Choice of Law: European Lessons for the United States*, 19 DUKE J. COMP. & INT’L L. 535, 547 (2009) (citing to Convention on the Law Applicable to Contractual Obligations, opened for signature June 19, 1980, 1908 O.J. (L266) 1).

various legal systems, the underlying concepts of sovereignty and due process are accepted as principal components.²²

B. Jurisdiction in Cyberspace Versus Jurisdiction in E-Commerce

Applying traditional jurisdiction law to cyberspace has been problematic since the earliest days of the Internet.²³ The primary concern associated with the Internet is its borderless nature, “as a place outside national boundaries . . . located in no particular geographic location but available to anyone, anywhere in the world, with access to the internet.”²⁴ This jurisdictional issue is highly relevant in the world of e-commerce: “in contrast to the relatively linear lines between buyers and sellers that have characterized traditional commerce, e-commerce transactions occur outside of any geographical place, in a truly ‘virtual world.’”²⁵ However, despite the fact that cyberspace poses complications severely limiting the applicability of traditional jurisdiction, the nature of commercial transactions renders such complications less consequential.²⁶ Online commercial interactions almost always involve “individuals and corporations [that] continue to exist in real space, and continue to do business from one state, while targeting other states . . . although the Internet is a new forum, parties, as always, exist in a physical space.”²⁷

Accordingly, “traditional principles of jurisdiction are adaptable to cyberspace because they consider the physical location of the parties and the conduct they direct at the forum state.”²⁸ The American Bar Association (ABA) has similarly concluded that parties to commercial

22. J. Ndumbe Anyu & Chigbo Ofong, *Teething Problems in Litigation and Regulation of E-Commerce*, 7 INT’L J. ORG. INNOVATION 47, 48 (2015) (describing the different legal principles underlying common and civil law notions of jurisdiction).

23. Denis T. Rice, *Jurisdiction in Cyberspace: Which Law and Forum Apply to Securities Transactions on the Internet*, 21 U. PA. J. INT’L L. 585, 595 (2000) (“The basic principles of jurisdiction are essentially geography-based. As a result, jurisdictional principles are difficult to apply to the Internet, which is largely a boundless medium.”); Sutton, *supra* note 19, at 22 n.17.

24. Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. TECH. L. REV. 69, 70 (1998) (citing the United States Supreme Court in *Reno v. ACLU*, 117 S. Ct. 2329, 2334-35 (1997)).

25. Rice, *supra* note 23, at 598.

26. See Haines, *supra* note 9, at 194 (“The Internet does not sit separately as a unique and distinct locale that can be regulated separately from the offline environment.”); see also Tricia Leigh Gray, *Minimum Contacts in Cyberspace: The Classic Jurisdictional Analysis in a New Setting*, 1 J. HIGH TECH. L. 85, 88 (2002), <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/GrayMinimumContacts.pdf> (“The new frontier of cyberspace has not changed the importance of location of the parties, but has expanded the geographic area throughout which these parties can readily interact.”).

27. Gray, *supra* note 26, at 86.

28. *Id.* At 85-86.

transactions ultimately exist offline and thus also advocate for an analysis for Internet jurisdiction beginning at the conventional standpoint: where the parties exist in physical space.²⁹ Cyberspace-based commerce complicates the question of “where” a transaction occurs, but by focusing instead on “who” commits the transaction, it is possible for “traditional notions of jurisdiction [to make] a relatively smooth transition into cyberspace.”³⁰

C. *The Value of International Jurisdiction Principles*

It is argued that any viable jurisdictional approach to e-commerce is rooted in international law.³¹ Since e-commerce is essentially borderless,³² “jurisdiction is *the* overriding conceptual problem for domestic and foreign courts alike . . . [and] cyberspace takes all of the traditional principles of conflicts-of-law and reduces them to absurdity.”³³ Consequently, “jurisdiction in cyberspace requires clear principles rooted in international law,” capable of respecting a variety of State laws potentially implicated in e-commerce, while simultaneously transcending any national concerns.³⁴

Additionally, an international framework should be used to address any of the aforementioned interests protected by the laws of jurisdiction³⁵ because it “would allow businesses and other Internet users to manage more accurately the risks and costs associated with litigation in foreign courts as a result of using the Internet and to enhance the confidence of consumers.”³⁶ An international solution to e-commerce jurisdiction would also balance the interests of both parties to a commercial transaction (sellers and buyers) while promoting global adoption of uniform legal

29. Am. Bar Assoc., *Achieving Legal and Business Order in Cyberspace*, 55 BUS. LAW. 1801, 1812 (2000). This report notes, while technology changes how parties communicate, it does not and can not change the fact that parties themselves exist in physical space—the key to jurisdictional analysis. Cyberspace may be a ‘place,’ but it is inhabited by bits and bytes, not by people. It may change how people understand their boundaries, and thus affect their state of mind, but in the end it is a means of communication.

30. Gray, *supra* note 26, at 85, 88.

31. See Menthe, *supra* note 24, at 70-71; see also Sutton, *supra* note 19, at 23.

32. See Muralidhar, *supra* note 14, at 1.

33. Menthe, *supra* note 24, at 70-71.

34. *Id.* at 71; see also Note by the UNCTAD Secretariat, U.N. Conference on Trade and Development, *Cyberlaws and Regulations for Enhancing E-Commerce: Case Studies and Lessons Learned*, ¶ 25, U.N. Doc. TD/B/C.II/EM.5/2 (Jan. 14, 2015).

35. See Saha, *supra* note 15, at 372.

36. Haines, *supra* note 9, at 161.

solutions and standards.³⁷ Indeed, “given the cross-border implications of this global medium [(the Internet)], international co-operation would appear to be a necessary step in efforts to cultivate the continued development of e-commerce.”³⁸

III. THE EXISTING LEGAL FRAMEWORK OF ADMIRALTY LAW

Concerns associated with jurisdiction law in e-commerce can be best addressed by looking at existing legal structures and how those structures are applied to other “international spaces.” Most comparable to cyberspace is international law on the high seas, because of its conceptual similarity.³⁹ Further, the law can be more easily applied to cyberspace since there already exists significant, well-developed laws and globally adopted rules surrounding the law of jurisdiction in international waters.⁴⁰

International law on the high seas and cyberspace are conceptually similar. Oceans cover three-quarters of our planet; yet, most of this maritime expanse is jurisdictionally independent from traditional notions of national jurisdiction.⁴¹ The high seas are often considered “the last place on the globe that remains free from control by government.”⁴² This is significant given the vast commercial importance of water-based trade and commerce.⁴³ Similarly, cyberspace, and e-commerce transactions within that space, are not physically present within the territory of a single nation,⁴⁴ and seemingly resemble international waters in that both are accessible to all States. Thus, cyberspace and international waters share a physical similarity as well as an “international, sovereignless quality.”⁴⁵

Since the seventeenth century, the high seas have been legally considered “free” insofar as “nations [have] equal and unrestricted access to the oceans and the resources they contained.”⁴⁶ Yet, this unfettered freedom of access means that every State “regardless of whether coastal or landlocked, [has] equal rights in the resources of this area, and equal lack of territorial jurisdiction.”⁴⁷ Therefore, this theory that all States lack

37. See Menthe, *supra* note 24, at 71.

38. Haines, *supra* note 9, at 160-61.

39. See Menthe, *supra* note 24.

40. See *id.*

41. See Tina Shaughnessy & Ellen Tobin, *Flags of Inconvenience: Freedom and Insecurity on the High Seas*, 5 J. INT'L L. & POL'Y 1, 1, 5, 8 (2006).

42. *Id.* at 1.

43. *Id.*

44. Muralidhar, *supra* note 14, at 1.

45. Menthe, *supra* note 24, at 85.

46. See Shaughnessy & Tobin, *supra* note 41, at 4.

47. See *id.* at 5.

jurisdiction over the high seas⁴⁸ encouraged the establishment of a regime to develop a uniform standard for regulating international waters.⁴⁹

In 1958, the States came together under the United Nations (U.N.) to discuss possible regulations and standards to bring a degree of order to any activities occurring on international waters.⁵⁰ Over the next forty years, the U.N. would continue to meet in order to update international jurisdiction law to apply to the high seas.⁵¹ Finally, in 1994, after sixty nations ratified it, the U.N. enacted the United Nations Convention on the Law of the Sea (UNCLOS), a treaty establishing “a comprehensive legal regime for all activities in the oceans and seas.”⁵² Today, UNCLOS maintains considerable international support with over 160 nations ratifying the treaty.⁵³

UNCLOS addresses the legal status of international waters, or what it terms the “high seas,” in seventeen parts.⁵⁴ Article 87 of the treaty establishes the overarching theory that the high seas should be open to all States, stating that “[t]hese freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas.”⁵⁵ Article 89 furthers that theory by including language codifying the freedom of international waters by explicitly declaring that no State has sovereignty over the high seas.⁵⁶

UNCLOS was “entered into force based on ‘the notion that all problems of ocean space are closely related and needed to be addressed as a whole’ . . . [s]imilarly, the Internet is shared globally and the consequences of actions taken by an Internet user in one jurisdiction can be borne globally.”⁵⁷ As with the world’s oceans, e-commerce seems

48. This theory of non-jurisdiction over the high seas was often more generally referred to as simply “freedom of the seas.” *See id.* at 4.

49. *Id.* After WWII, “rapid technological developments and the increasing awareness of the finite nature of the ocean resources highlighted the need for harmonization of maritime law and an updated codification of the law of the sea.” *Id.*

50. *Id.*

51. *Id.*

52. United Nations Convention on the Law of the Sea, art. 94, Dec. 10, 1982, 1834 U.N.T.S. 396 [hereinafter UNCLOS].

53. *Id.*; *see also* Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 3.

54. UNCLOS, *supra* note 52, art. 34.

55. *Id.* art. 87.

56. *Id.* art. 89.

57. William M. Stahl, *The Uncharted Waters of Cyberspace: Applying the Principles of International Maritime Law to the Problem of Cybersecurity*, 40 GA. J. INT’L & COMP. L. 247, 267 (2011).

rooted in a medium of *res communis*⁵⁸ insofar as cyberspace arguably is available and exists for the benefit of all people.⁵⁹ Legally, similar to how jurisdiction on the high seas is based on the nationality of the country to which a ship has been documented rather than traditional territoriality principles, e-commerce requires an acceptance that “nationality, not territoriality, is the basis for jurisdiction.”⁶⁰ Only after recognizing the legitimacy of this alternative jurisdictional foundation can the UNCLOS legal framework be adapted to apply to e-commerce.

A. *Exclusive Flag-State Jurisdiction*

Parties to commercial transactions can greatly benefit from clear and concise default rules because such rules provide certainty for both a seller and buyer regarding the jurisdiction applicable to future litigated disputes.⁶¹ Articles 90, 91, and 92 of UNCLOS establish the rules for an “exclusive flag-state jurisdiction,” which is used by States to resolve disputes between ships on the high seas.⁶² The concept of “exclusive flag-state jurisdiction” is “a cornerstone of the law of the sea.”⁶³ First, Article 90 creates an affirmative sovereign right of navigation in international waters insofar as it permits every State to “sail ships flying its flag on the high seas.”⁶⁴ Article 91 establishes the conditions for granting nationality to ships.⁶⁵ These conditions confirm that a vessel “ha[s] the nationality of the State whose flag they are entitled to fly” and require that there be “a genuine link between the State and the ship.”⁶⁶ Finally, Article 92 states that ships “shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas.”⁶⁷ In sum, “vessels

58. Or, a “common heritage of all mankind.” Menthe, *supra* note 24, at 86.

59. See Duncan B. Hollis, *NETmundial, Border in Cyberspace, and a Duty to Hack*, OPINIO JURIS (Apr. 28, 2014), <http://opiniojuris.org/2014/04/28/net-mundial-borders-cyberspace-duty-hack/> (noting that Sir Tim Berners Lee, inventor of the World Wide Web, described cyberspace as a global public good).

60. Menthe, *supra* note 24, at 83.

61. See Muralidhar, *supra* note 14, at 37-38 (citing to Wendy A. Adams, *Intellectual Property Infringement in Global Networks: The Implications of Protection Ahead of the Curve*, 10 INT’L J.L. & INFO. TECH. 71 (2002)).

62. UNCLOS, *supra* note 52.

63. See Arron N. Honniball, *The Exclusive Jurisdiction of Flag States: A Limitation on Pro-Active Port States*, 31 INT’L J. MARINE & COASTAL L. 499, 500 (2016).

64. UNCLOS, *supra* note 52, art. 90.

65. *Id.* art. 91.

66. *Id.* art. 92.

67. *Id.* Article 92 also prohibits a ship from changing “its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.”

are subject to the exclusive jurisdiction and control of the flag [S]tate”⁶⁸ and the “exclusivity ‘supersede[s] jurisdiction interests of other international actors,’ establishing the flag state as the chief basis.”⁶⁹

The notion of an exclusive flag-state jurisdiction should also be the default rule for jurisdictional issues in e-commerce. At the outset, the key issue in both the e-commerce world and international waters is that jurisdiction should be determined by nationality, not territoriality; accordingly, the concept of State registration of ships is appropriately applicable to online businesses and sellers.⁷⁰ Just as “international law, and the admiralty law of most states [requires that] every vessel engaged in international trade must register in a country and is subject to the regulatory control of the country whose flag it flies,” so too should a similar system be required for commercial businesses operating online.⁷¹ In order for an online merchant to access a cyberspace marketplace without being subject to different regulations and legal actions by *any* State, businesses would need to choose an analogous “digital flag-state” in which to register an online business.⁷² Using Articles 90 and 91 of UNCLOS as examples, every State would have the ability to register e-commerce businesses and would be responsible for setting the conditions to fly its respective digital flag.⁷³ Like the law of the high seas, there would exist a presumption that an online seller is subject to the exclusive jurisdiction of that digital flag-state.

It has been argued that “every party on the Internet should be subject to both personal and prescriptive jurisdiction in at least one state.”⁷⁴ An

68. Honniball, *supra* note 63, at 505 (citing to D. König, *Flag of Ships*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 25 (Rüdiger Wolfrum ed., 2d ed. 2009); see also Tamo Zwinge, *Duties of Flag States to Implement and Enforce International Standards and Regulations—and Measures to Counter Their Failure to Do So*, 10 J. INT’L BUS. & L. 297, 299-300 (2011).

69. Honniball, *supra* note 63, at 508 (citing to B. Simma & A.T. Müller, *Exercise and Limits of Jurisdiction*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 134, 139 (J. Crawford & M. Koskenniemi eds., 2012)).

70. See generally Menthe, *supra* note 24, at 93 (“Before there was registry at sea, there was still nationality . . . [t]he nationality of items in cyberspace could be determined by the nationality of the person or entity who put them there, or perhaps by the one who controls them.”).

71. Shaughnessy & Tobin, *supra* note 41, at 1-2.

72. There is certainly nothing novel about requiring a business to select a particular state in which to incorporate or register its presence. See WILLIAM W. BOYER, GOVERNING DELAWARE: POLICY PROBLEMS IN THE FIRST STATE 33-36 (2000) (overview of American business registration—or “incorporation”—in specific U.S. states).

73. See generally UNCLOS, *supra* note 52, art. 90-91.

74. Gray, *supra* note 26, at 89. The idea of a single state where a vendor is always subject to jurisdiction mirrors the fundamental EU conception of defendant jurisdiction in their domiciled

online business registration system would accomplish this paramount goal, but it would also need to limit registration to a single State.⁷⁵ Similarly, UNCLOS expressly requires that ships must “fly the flag of a *single* nation in order to notify the international community what state has jurisdiction over them.”⁷⁶ The “single flag-state” rule would concurrently serve to protect consumers in e-commerce by ensuring that the consumer understand the laws of the jurisdiction in which a transactional dispute may arise.⁷⁷ An e-commerce “digital flag” would simply require every webpage to prominently display the globally recognized flag of the nation where it is registered. Ultimately, the clarity and legal certainty afforded by flag-state jurisdiction law has been called the “normative achievement of the law of the sea,” and the value of such unambiguous jurisdictional rules would be equally valuable in e-commerce.⁷⁸

Still, the UNCLOS flag-state jurisdiction is not without its practical limitations. For example, the issue of “open registries,” in which flag-states grant nationality to ships solely as a source of income, has become increasingly problematic.⁷⁹ These “flags of convenience” are most troublesome when states issue a corresponding flag to ships without ensuring a connection with the nation.⁸⁰ The states will issue the flags in exchange for high fees, low taxes, loose regulations, and lenient maritime inspection standards.⁸¹ Such preferential treatment and the potential of a “race to the bottom” could also arise in the context of e-commerce. Even

member state. See Julia Alpert Gladstone, *Determining Jurisdiction in Cyberspace: The “Zippo” Test or the “Effects” Test?*, INFORMING SCI. 143, 146 (2003).

75. Establishing one “country” of registration as the flag-state jurisdiction could be expanded to domestic federal nations, such as the United States, where a business could elect to be registered in multiple internal states. See, e.g., Muralidhar, *supra* note 14, at 2.

76. Shaughnessy & Tobin, *supra* note 41, at 11; see also Honniball, *supra* note 63, at 527 (while “the absence of any authority over ships sailing the high seas would lead to chaos,” the multiplicity of possible flags also requires that a ship fly the “flag of a single state” and be “subject to the jurisdiction of that State”).

77. See Gray, *supra* note 26, at 90. The American Bar Association has stressed the importance of online businesses making “good faith efforts to indicate the state in which they reside, as well as the physical targets of their website.” *Id.* An online business flag-state registration requirement would maximize these efforts by making them mandatory and ensuring that online consumers know with whom they are dealing.

78. See Honniball, *supra* note 63, at 508.

79. See Shaughnessy & Tobin, *supra* note 41, at 14-16, 17-25. In Panama, flag registry accounts for five percent of its respective national income. *Id.* at 17.

80. Although UNCLOS article 91 technically requires that flag-states register only vessels that are genuinely connected with their nation, it does not appear that this is generally enforced. See *id.* at 13 (“[T]he lack of a genuine link ‘does not justify another state in refusing to recognize the flag or interfere with the ship in question.’”).

81. See generally *id.* at 2-3, 14-25.

within the United States, companies will carefully choose a state of incorporation and a state for their headquarters in order to maximize profits, minimize costs, and take advantage of local regulatory, tax, and employment laws.⁸²

Aside from these potential limitations, UNCLOS does provide internal guidance to address issues arising out of the “primary rule” of exclusive flag-state jurisdiction.⁸³ Specifically, Article 92 serves to concurrently establish exclusive flag-state jurisdiction and expressly limit that exclusivity:

Clearly, “exclusive” certainty provides primacy, to the effect that the “exclusive” state shall have the right to apply its jurisdiction, to the detriment of any other state who might have had the right to concurrent jurisdiction [but the Article 92 exception] means that this rule of primacy operates as a rebuttable presumption . . . [t]herefore, flag state jurisdiction shall apply as a limitation on another’s jurisdiction, unless one of the “exceptional cases” applies, or the state can establish that a new exception has emerged.⁸⁴

Thus, while exclusive flag-state jurisdiction remains the default rule, it can be overturned when needed by other prevailing interests. Additionally, exceptions to exclusive flag-state jurisdiction would be needed for any viable e-commerce registration-based system. In e-commerce, as in any commercial transaction, it is imperative that both parties’ interests are appropriately balanced.⁸⁵ By creating the default rule of a digital flag-state, but also permitting that presumptive default to be overcome by the substantial interests of other legitimately implicated States, it is possible to achieve that jurisdictional balance. In the next Section, these exceptions to exclusive flag-state jurisdiction are considered.

B. Exceptions to Exclusive Flag-State Jurisdiction

The UNCLOS structure allows for mechanisms to address blatant failures arising from exclusive flag-state jurisdiction.⁸⁶ In e-commerce, there may be two primary exceptions to the concept of a presumptively exclusive digital flag-state jurisdiction. The first exception is universal jurisdiction over online conduct globally considered inherently

82. Rice, *supra* note 23, at 591. See generally Boyer, *supra* note 72, at 33-36 (discussing the various tax and policy advantages making Delaware the most popular U.S. state for business incorporation).

83. Menthe, *supra* note 24, at 83.

84. Honniball, *supra* note 63, at 519-20.

85. See *supra* Section II.A.

86. However, UNCLOS-related litigation has proved that “the burden[s] of establishing such contrary rules or exceptions [is] high.” Honniball, *supra* note 63, at 520.

unacceptable. The second exception is the protection of consumer interests through a modified “port-state” jurisdiction predicated on either systematic flag-state failures or a heightened form of a widely used minimum contacts analysis.

1. Universal Jurisdiction

The first exception to e-commerce flag-state jurisdiction centers on the idea that some acts are considered “so heinous, and so universally recognized as abhorred, that a state is entitled or even obliged to undertake legal proceedings without regard to where the crime was committed or the nationality of the perpetrators or the victims.”⁸⁷ These crimes “of such an atrocious and dangerous nature that all states have a responsibility or a legitimate interest to take action” generally include piracy, slavery, war crimes, and genocide.⁸⁸ International law deems such universally condemned acts “*hostis humani generis*—an enemy of all mankind.”⁸⁹

Article 88 of UNCLOS, which reserves the high seas for “peaceful purposes,” arguably creates universal jurisdiction.⁹⁰ Universal jurisdiction is when a State has the ability to claim jurisdiction over a type of criminal act regardless of where the act was committed, including areas in which traditional jurisdiction does not exist.⁹¹ It is often invoked after a serious crime has been committed against international law such as piracy, genocide, or any war crimes.⁹² Accordingly, universal jurisdiction is an exception to UNCLOS’s exclusive flag-state jurisdiction insofar as ships engaged in acts such as piracy are subject to the jurisdiction of any State.⁹³

Similarly, universal jurisdiction is likely to be considered an exception to a system of exclusive digital flag-state jurisdiction. Acts

87. Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 YALE J. INT’L L. 433, 438 (2012); see also *Universal Jurisdiction over War Crimes*, ICRC (Mar. 2014), <http://www.icrc.org/en/download/file/1086/universal-jurisdiction-icrc-eng.pdf>.

88. Yana Shy Kraytman, *Universal Jurisdiction—Historical Roots and Modern Implications*, 2 BRUSSELS J. INT’L STUD. 94, 95, 97-116 (2005); Bennett, *supra* note 87, at 452 n.132.

89. Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy* 251 (Northwestern School of Law, Working Paper No. 38, 2010).

90. UNCLOS, *supra* note 52.

91. *Universal Jurisdiction*, INT’L JUST. RESOURCE CTR., <http://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (last visited Jan. 30, 2019).

92. See Kontorovich & Art, *supra* note 89, at 252-54. UNCLOS article 105 expressly grants all states jurisdiction over acts of piracy on the high seas. *Id.*; see also Stahl, *supra* note 57, at 267-68. See generally INT’L JUST. RESOURCE CTR., <http://ijrcenter.org> (last visited Jan. 30, 2019).

93. See Kontorovich & Art, *supra* note 89, at 251-52 (stating that states are often unwilling to expend the judicial resources to legally prosecute pirates they capture on the high seas).

globally recognized as warranting universal jurisdiction should be equally applicable to an online environment. Accordingly, e-commerce transactions involving things such as weapons trading, human trafficking, or terrorism would equally be subject to universal jurisdiction.⁹⁴

2. Modified Port-State Jurisdiction

The second exception is a modified port-state jurisdiction. A “port-state” is a state in which vessels from all around the world may dock and make use of that nation’s harbors, piers, and dockyards.⁹⁵ A port-state has an inherent interest in ships utilizing their facilities and hence are generally considered to retain concomitant jurisdictional rights over those vessels.⁹⁶ It seems the ultimate interest of a port-state is reduced to two critical areas: (a) prevention of flagrant and consistent failure of flag-states to provide legitimate registry requirements and (b) protection of their citizens’ fundamental consumer rights.

a. Systematic Flag-State Failure

Under Article 94 of UNCLOS, a flag-state has an affirmative duty to exercise effective jurisdiction and control over ships bearing its national flag.⁹⁷ This means that a flag-state must both maintain registration requirements and undertake reasonable investigation of any vessels reported as problematic.⁹⁸ If a flag-state fails to assert jurisdiction over individual ships committing clear infractions, such as failing to uphold basic safety or maintenance requirements, other States are generally granted jurisdiction to ensure such compliance.⁹⁹ However, when there is a “systematic failure”¹⁰⁰ of a flag-state to control its vessels, Article 228 of UNCLOS expressly mandates that port-states may assume jurisdiction over all ships flying a particular flag, regardless of the presumption of exclusive flag-state jurisdiction.¹⁰¹ Additionally, such systematic

94. Some have already argued that Cybercrime, as “an international problem with international consequences . . . demands its recognition as a category of offenses that are universally condemned.” Stahl, *supra* note 57, at 270.

95. Zwinge, *supra* note 68, at 312.

96. *Id.* at 312-13.

97. UNCLOS, *supra* note 52.

98. *Id.*

99. See Zwinge, *supra* note 68, at 300, 317.

100. *Id.* at 317.

101. *Id.* at 300 (“It seems to be apparent that if the flag State has exclusive jurisdiction over its vessels, it must also exercise its jurisdiction in order to enforce the international binding rules it is subject to [UNCLOS] Article 228 (1) expresses that if the flag State ‘has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in

violations could event warrant action against the offending flag-state.¹⁰² The “ultimate form” of such sanctions would be to simply refuse recognition of a non-controlling flag-state’s flags; accordingly, all vessels flying that flag would be subject to the jurisdiction of any State.¹⁰³ While such sanctions may prove difficult to enforce, recent case law has evidenced courts’ willingness to hold flag-states responsible for blatant maritime safety violations.¹⁰⁴

The problem of flag-states failing to appropriately assert jurisdiction and enforce reasonable registration requirements could easily arise in e-commerce. The ability to combat systematic failure of flag-states to adhere to acceptable online registration standards and to enforce clear violations of established e-commerce regulations would remain equally important. This goal could be achieved through a mechanism similar to Article 228, in which online businesses flying a digital flag of a non-controlling flag-state would become subject to the jurisdiction of any State in which they sought to have a commercial presence.¹⁰⁵ In fact, in the e-commerce arena, the possibility of losing recognition of a flag-state banner would be perhaps even more devastating because without a legitimate flag-state, an online business would subject itself to regulation, litigation, and restriction in any State where it sought to do business. As a result, a business’s online sales activity may be potentially beset by numerous national legal requirements and would have no jurisdictional recourse when called into the courts of those nations to answer for any alleged violations of that State’s particular laws. By allowing for explicit nonrecognition of exclusive flag-state jurisdiction, such a mechanism would ultimately regulate e-commerce flag-state registries while concurrently enforcing compliance with such systems.

respect of violations committed by its vessels,’ the port or coastal State does not have to suspend its own proceedings against the vessel.”).

102. *Id.* at 317.

103. *See id.* at 318; *see also* R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 257 (3d ed. 1999); J. Ashley Roach, *Alternatives for Achieving Flag State Implementation and Quality Shipping*, in MRYON H. NORDQUIST & JOHN NORTON MOORE, *CURRENT MARITIME ISSUES AND THE INTERNATIONAL MARITIME ORGANIZATION* (1999).

104. *See* Zwinge, *supra* note 68, at 321-22. In the 2010 *Total* case, a French court held shipping titan Total SA, whose substandard vessel caused a massive oil leak, liable for negligence. *Id.* at 322. However, the court also held the ship’s classification society—the flag-state body responsible for certifying maritime safety compliance—liable for improperly authorizing a substandard ship and imposed a significant €375,000 fine. *Id.*

105. UNCLOS, *supra* note 52.

b. Advanced Minimum Contacts

Consumer protection interests involved in e-commerce are far greater than those relating to maritime trade on the high seas. Although both may be considered international spaces, e-commerce involves more direct, individual consumer involvement.¹⁰⁶ The ability of e-commercial vendors to specifically target individuals through unique, personalized marketing further supports the need for stronger protection of the average online consumer.¹⁰⁷ However, consumer protection is a national, rather than an international concern; therefore, any e-commerce consumer protection regime must move beyond the foundational framework of UNCLOS in order to fully account for inherently differing national interests.¹⁰⁸

In order to allow States to balance the internationality of e-commerce with the obvious impact on a nation's domestic citizens, another exception to the presumptively exclusive digital flag-state jurisdiction is a more advanced minimum contacts analysis. The idea of subjecting a defendant to jurisdiction in places where they have personal or business contacts is nothing new.¹⁰⁹ The United States Supreme Court first used the concept of "advanced minimum contacts" in 1945 as an extension of traditional territoriality-based jurisdiction, where a nonresident's purposeful availment of opportunities within the State is viewed as amenability to that State's jurisdiction in exchange for the protection of its laws.¹¹⁰ Subsequent U.S. case law involving Internet-based commercial disputes developed and modified the minimum contacts test.¹¹¹ First, in 1999, a Pennsylvania district court held that the minimum contacts test could be used to acquire jurisdiction over online website companies.¹¹² The court advocated the use of a "sliding-scale test" based on the "nature and quality of the commercial activity that an entity conducts over the Internet,"¹¹³ whereby the "more the defendant directs its attention to the forum state,

106. See Rania Nemat, *Taking a Look at Different Types of E-Commerce*, 1 WORLD APPLIED PROGRAMMING J. 100, 101-04 (2011).

107. *Id.* at 101. *But see* Rice, *supra* note 23, at 586, 599, 604-07 ("[T]he Internet alters the balance of power between buyer and seller. It arms buyers with masses of information and new analytical tools . . .").

108. Muralidhar, *supra* note 14, at 40.

109. See Saha, *supra* note 15, at 365-66.

110. See Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1501-02, 1512-13 (2006); *see also* Int'l Shoe v. Washington, 326 U.S. 310 (1945).

111. See *infra* note 114-120 and accompanying text.

112. *Zippo Mfg. v. Zippo dot Com, Inc.*, 952 F. Supp. 1119, 1124-27 (W.D. Pa. 1999).

113. *Id.* at 1124.

the more minimum contacts [are] established.”¹¹⁴ While this sliding scale test was not without issue, it would remain the predominant jurisdictional analysis for online commercial disputes in the United States until the early 2000s.¹¹⁵ In response to criticism that the sliding scale test was “ineffective in lending legal certainty in the face of ever-changing technology,” United States courts shifted online jurisdictional analysis to an “effects test,” which focuses on the “intentional targeting” of consumers by Internet businesses.¹¹⁶ The effects test is an extension of a much earlier holding by the Supreme Court in *Calder v. Jones*. In this case, the Court looked at the concept of “purposeful availment” and found that “the minimum contacts test is satisfied if a defendant aims a foreign act at the forum state, and the act has effect there.”¹¹⁷ In later case law, the Court defined the term “purposeful availment” to mean a defendant must have “engaged in ‘significant activities’ within a State, or has created ‘continuing obligations’ between himself and residents of the forum.”¹¹⁸ Today, U.S. courts use a combination of both the sliding-scales test and the effects test to determine the jurisdiction of online defendants.¹¹⁹

The difficulty in creating a uniform consumer protection law is compounded by the worldwide reach of e-commerce and the “differing policy priorities of countries [that] defy the formulation of a uniform set of laws or codes to regulate [commercial] activity on the internet.”¹²⁰ Yet, the minimum contacts approach to online commercial jurisdiction has shown great promise as a general legal principle that may be globally embraced.¹²¹ Already there are developments in legislation and courts in

114. Gray, *supra* note 26, at 93; see also Jeremiah Chin, *Where Is Waldo.com? Problems of Personal Jurisdiction in Cyberspace*, CYBERBEAR TRACKS BLOG (Dec. 4, 2013), <http://cyberbeartracks.wordpress.com/2013/12/04/where-is-waldo-com-problems-of-personal-jurisdiction-in-cyberspace/>.

115. See Gray, *supra* note 26, at 95-6 (criticizing the 2000 case *Tech Heads Inc*, where an Oregon district court found minimum contacts jurisdiction over an online company whose presence in the forum state was almost entirely passive); Muralidhar, *supra* note 14, at 5 (in 2008 the Ninth Circuit in *Boschetto* rejected the *Zippo* sliding scale test while nonetheless embracing the general idea of Internet jurisdiction based on minimum contacts).

116. Muralidhar, *supra* note 14, at 15.

117. Gray, *supra* note 26, at 97 (citing to *Calder v. Jones*, 465 U.S. 783, 785 (1984)).

118. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985).

119. See Gladstone, *supra* note 74, at 143 (“[C]ourts are not embracing the effects test as a panacea to the dilemma of determining jurisdiction, but rather a combination of both the *Zippo* and the effects test is being employed.”); see also Muralidhar, *supra* note 14, at 18-19.

120. Muralidhar, *supra* note 14, at 40.

121. See Sutton, *supra* note 19, at 21-24; Bharat Saraf & Ashraf U. Sarah Kazi, *United States’ and Australian Principles on Internet Jurisdiction: A Case for Australia to Consider United States’ Hegemony on Jurisdiction*, 26 INT’L REV. L. COMPUTERS & TECH. 1, 49-58 (2012); see also Muralidhar, *supra* note 14, at 22-31.

different nations have adopted versions of the test to address the issue of an online entity's jurisdiction.¹²² For example, in assessing e-commerce jurisdiction, Canada "requires a 'real and substantial connection,'"¹²³ whereas the United Kingdom and the Netherlands consider whether online activities have been "directed at" their consumers.¹²⁴ Likewise, courts in Belgium, Germany, Hong Kong, and Australia all address whether Internet materials or services are "directed at" their residents.¹²⁵ While many of these tests relate specifically to online securities transactions, they still demonstrate a willingness to incorporate the minimum contacts principle into domestic jurisprudence.¹²⁶ In the end, it appears that many States embrace the idea that "the litmus test for determining whether assertion of jurisdiction is appropriate involves analyzing whether jurisdiction is reasonable under the circumstances."¹²⁷

In e-commerce, a heightened form of the minimum contacts test could operate as another exception to a presumptively exclusive digital flag-state jurisdiction. The requirements for the test would be heightened insofar as there would need to be an even greater showing of contacts between a non-flag-state seeking to assert jurisdiction and the party over whom jurisdiction is sought. First, "the burden will clearly be on the prosecuting state to prove that an item in cyberspace was targeted to that state, giving that state a special interest above others" and justifying a departure from exclusive flag-state jurisdiction.¹²⁸ Second, the required contacts should be greater than the current "minimum" standard established in the United States, with an increased focus on the specific, active, and purposeful availment of that State by the online entity in question.

By allowing domestic courts to invoke jurisdiction over e-commerce disputes when a heightened form of the minimum contacts test is satisfied,

122. See Rice, *supra* note 23, at 626-44; see also Muralidhar, *supra* note 14, at 22-31.

123. Rice, *supra* note 23, at 626 (citing to *Morguard Inv. Ltd. v. De Savoye*, [1990] S.C.R. [1077] 9854-56).

124. Rice, *supra* note 23, at 632-33, 636 (citing to Britain's Financial Services Act, 1986, c.60, pt. I, c.V, § 56(i) (Eng.) and the Dutch STE Policy Document 99-0003, June 18, 1999).

125. Rice, *supra* note 23, at 637, 638, 640-41, 643-44 (citing to Belgium's *CFB, Financial Services Via the Internet: Prudential Requirements*, Circular D1 2000/2 (May 5, 2000); see also Germany's *BAWe, Announcement of the [BAWe] Relating to the Act on the Prospectus for Securities Offered for Sale (Prospectus Act) of 13 December 1990*; Hong Kong's *SFC, Guidance Note on Internet Regulation* § 7.4; and Australia's *ASIC Policy Statements*, PS, 141, 141.13).

126. *Id.*

127. Muralidhar, *supra* note 14, at 5 (citing to Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 *BERKELEY TECH. L.J.* 1345, 1356 (2001)).

128. Menthe, *supra* note 24, at 97.

States would be able to protect their consumers online while also forcing litigants to respect the presumption of exclusive flag-state jurisdiction. Furthermore, while the potential for inconsistent or abusive national court rulings remains,¹²⁹ this exception would also provide another source of predictability for online businesses by indicating where their Internet activities that may subject them to legal jurisdiction.¹³⁰

IV. CONCLUSION

In addressing jurisdictional concerns in e-commerce disputes, “courts around the world face the difficult question of deciding whether to develop a new body of jurisprudence to deal with a novel legal problem, or to identify analogous legal precedents that best fit the facts at par.”¹³¹ It has become fashionable to advocate the need for wholly innovative solutions to the legal questions of e-commerce jurisdiction,¹³² yet, this Article argues for a more sensible approach in which e-commerce is based on a system similar to the preestablished international law framework used in determining jurisdiction over ships on the high seas.¹³³

The UNCLOS framework for jurisdiction on the high seas is predicated on the fundamental principle of exclusive flag-state jurisdiction; ships in international waters are presumptively subject to the sole jurisdiction of the nation whose flag it is authorized to fly.¹³⁴ Jurisdiction in e-commerce disputes should be based on a similar structure whereby all online sellers register in a digital flag-state and are presumptively subject to the jurisdiction of that State. Yet, there is a simultaneous need for exceptions to this default jurisdiction in order to

129. See, e.g., Gladstone, *supra* note 74, at 153-56. In the 2001 *Yahoo! Inc.* case, a French court assumed jurisdiction over U.S.-based Yahoo.com, ordered them to restrict French user access to Nazi memorabilia auctions held on their English language website, and instituted a steep fine for each day of noncompliance. *Id.* at 154. Yahoo appealed to a California district court, which took minimum contacts jurisdiction and ruled the French court order violated Yahoo’s First Amendment rights under the U.S. Constitution. *Id.* at 155. As this case indicates, any system of Internet jurisdiction will likely involve some instances of inconsistency.

130. See Muralidhar, *supra* note 14, at 21.

131. Saha, *supra* note 15, at 365.

132. See, e.g., Joel R. Reidenberg, *Lex Informatica: The Founding of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1997); see also Mefford, *supra* note 2.

133. This is not to underscore the undeniable fact that creating an international e-commerce framework modeled on UNCLOS would be greatly challenging. See *supra* notes 51-53 and accompanying text (discussing the arduous, lengthy process of developing UNCLOS as an international instrument). Nonetheless, as this Article presupposes that such an international framework will inevitably become necessary for e-commerce, its focus is instead on the application of existing jurisdictional rules to that eventual international e-commerce instrument.

134. See *supra* Section III.A.

protect the equally important interests of Internet consumers and the international community. These exceptions include universal jurisdiction, in instances of blatantly unacceptable conduct, and modified port-state jurisdiction when flag-states either systematically fail their obligations or “minimum” contacts with a State are so prevalent as to warrant litigation in that forum.

Typically, “debates about Internet jurisdictional approaches have focused on whether to take a ‘country of origin’ or a ‘country of destination’ approach.”¹³⁵ E-commerce jurisdiction based on the UNCLOS template of presumptively exclusive flag-state jurisdiction, tempered by the aforementioned exceptions, incorporates both of these approaches and appropriately balances the commercial legal interests of online merchants, consumers, and States alike. Ultimately, such a system of e-commerce jurisdiction may “[turn] cyberspace from a place of infinitely competing jurisdictions into a place where normal jurisdictional analysis can continue.”¹³⁶

135. Haines, *supra* note 9, at 173.

136. Menthe, *supra* note 24, at 94.