The Rush to the Goblin Market:
The Blurring of Quill’s Two Nexus Tests

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I. INTRODUCTION

Morning and evening
Maids heard the goblins cry:
‘Come buy our orchard fruits,
Come buy, come buy . . .
Figs to fill your mouth,
Citrons from the South,
Sweet to tongue and sound to eye;
Come buy, come buy’

Like the enticing goblin cry in Christina Rossetti’s poem, some lower courts have rushed to the goblin market and bought arguments that are “sweet to tongue and sound to eye” but ultimately destructive to the clear meaning of the Supreme Court’s decision in Quill Corp. v. North Dakota.

The Quill decision placed Due Process Clause and Commerce Clause constraints on the fifty states by limiting their ability to impose sales and use tax collection requirements on out-of-state businesses that

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2. Id.
4. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.
conduct business in their states, without regard to the market share those businesses command. This was certainly good news for the out-of-state businesses but bad news for their in-state competitors, who must compete at a four to eleven percent sales tax disadvantage depending on the jurisdiction, which is the profit margin in many industries.

Prior to Quill, the Supreme Court was often unclear on the jurisprudential underpinnings of its state sales and use tax decisions. Quill was the first case in which the Court analyzed these underpinnings and clearly identified their constitutional foundations. The result was a bifurcated analysis that addresses the only two constitutional provisions implicated in state sales and use tax jurisdictional questions—the Commerce Clause and the Due Process Clause. The Court’s bifurcated analysis has created confusion, and taxpayers, administrative agencies, and state courts have struggled in applying the tests required under these two clauses.

The first step to eliminating this confusion is a subtle, yet straightforward observation: the Court in Quill merely required use of two familiar, widely-used constitutional tests—minimum contacts and physical presence—to provide what it thought would be a convenient and useful

6. Quill, 504 U.S. at 302-06. For example, Quill Corporation was “the sixth largest vendor of office supplies in [North Dakota].” Id. at 302. Its market share was ultimately irrelevant, and Quill was held to be exempt from North Dakota’s regulatory tax authority on Negative Commerce Clause grounds. Id. at 318.

7. Interestingly, the city of Arab in Cullinan County, Alabama, has the distinction of having the highest combined state and local sales tax rate in the nation at eleven percent. National Sales Taxes Reach Record Levels in 2003, BUS. WIRE, Feb. 9, 2004. Conventional wisdom when traveling through small towns is not to spend.

8. For instance, Amazon.com, a well known major e-tailer located in Seattle, WA, posts its profit margin as 7.62%. AMZN: Key Statistics for AMAZON.COM INC, http://finance.yahoo.com/q/ks?s=AMZN (last visited Feb. 13, 2005). Amazon is not required to collect sales or use taxes unless purchasers of their products live in particular states: “Items sold by Amazon.com LLC, or its subsidiaries, and shipped to destinations in the states of Kansas, North Dakota, or Washington are subject to tax.” Amazon.com Help: Ordering from Amazon.com / Sales Tax, http://www.amazon.com/exec/obidos/tg/browse/-/468512/104-5366483-6269549 (last visited Feb. 13, 2005). If Amazon was subject to sales or use tax requirements, the playing field would be leveled in states where Amazon is not currently collecting sales or use taxes.

9. See, e.g., Nat’l Bellas Hess, Inc. v. Dep’t of Revenue, 386 U.S. 753, 756 (1967) (explaining that Commerce Clause and Due Process Clause claims are similar); Scripto, Inc. v. Carson, 362 U.S. 207, 211-12 (1960) (holding independent contractors create nexus but commingling Commerce Clause and Due Process Clause tests); Miller Bros. Co. v. Maryland, 347 U.S. 340, 344 (1954) (“Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists.”).

10. Quill, 504 U.S. at 305 (“[A]lthough we have not always been precise in distinguishing between the two, the Due Process Clause and the Commerce Clause are analytically distinct.”).

11. Id.

12. See discussion infra Part II.C.
method of analyzing sales and use tax jurisdiction problems. The Due Process Clause nexus test is based on notions of fairness and relies on the "minimum contacts" test of International Shoe Co. v. Washington and its progeny. The Commerce Clause nexus test is based on the need for a free flow of goods within the national economy and relies on a bright-line physical presence test reminiscent of the Pennoyer era.

13. See discussion infra Parts II.B.i, III.A.
14. Quill, 504 U.S. at 299. "Due process has not been reduced to any formula; its contents cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Whether Justice Harlan was correct in his appraisal of what due process "is," he seems to capture much of what the Supreme Court has meant (for at least forty years) when it has made reference to the concept.
15. 326 U.S. 310 (1945). Although this landmark case is mainly known today for its rejection of the Due Process Clause physical presence test and establishing the minimum contacts test, International Shoe is a state tax case where the Court rejected the taxpayer's contention that the Commerce Clause and Due Process Clause were violated.
17. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 180 (1995) (explaining Commerce Clause was created to prevent the economic Balkanization that occurred under the Articles of Confederation). Quill involves the Court's application of the Negative Commerce Clause, also referred to as the Dormant Commerce Clause. The Negative Commerce Clause is a judicially created doctrine, first mentioned by Chief Justice John Marshall in Gibbons v. Ogden, 22 U.S. 1 (1824). The framers of the Constitution and early Supreme Court decisions were heavily influenced by John Locke and Adam Smith, who both held that man's rights could be protected only if the right to property was protected. Locke declared that the "great and chief end . . . of men's uniting into Commonwealths, and putting themselves under Government is the preservation of their property." John Locke, Two Treatises Of Government 395 (Peter Laslett ed., Cambridge Univ. Press 1963) (1698) (emphasis added). Smith's contribution was the notion of the "invisible hand," meaning that traders looking to serve their own best interests in a free market would inevitably create all the material goods we would require while encouraging what Locke described as "the honest industry of all mankind." In short, the framers not only knew the importance of economic growth, but they also claimed to know how to promote it. To preserve property rights and thereby encourage honest industry and free trade, the states had to be restrained from creating obstacles to such industry and trade. The Negative Commerce Clause, then, is a protective mechanism derived from Congress's explicit power to regulate commerce "among the several States" under Article I, Section 8, Clause 3 of the Constitution. As Marshall noted in Gibbons, the power to regulate commerce, so far as it extends, is exclusively vested in Congress, and no part of it can be exercised by a state. Gibbons, 22 U.S. at 2. Although late 19th- and early 20th-century economic theories (primarily those of Marx and Keynes, respectively) shifted the focus away from a strict protection of property rights, under today's rules a state violates the Negative Commerce Clause if it either discriminates against interstate commerce or places an undue burden on it. State sales and use taxes affecting interstate commerce have undergone a similar shift and are generally more widely tolerated, although they are still subject to essentially similar constitutional tests, for example those found in Quill.

18. Professor John Swain is correct by noting that "[t]he physical presence test is a relic of a bygone era. The time is past when physical presence could be treated as a meaningful surrogate for
When both tests are satisfied, a business has "sufficient nexus" with a state to come under that state’s sales and use tax jurisdiction. The difficulty in applying Quill is not its complexity, but rather its simplicity. Its stated purpose was to bring certainty to the area of sales and use tax collection—to drain the tax jurisdiction swamp, not to make it murkier. The solution to the problem is surprisingly simple: apply the Due Process Clause and the Commerce Clause in reverse order. Currently, courts go through a quick, perfunctory Due Process Clause analysis and then move into a detailed Commerce Clause analysis. This approach invariably leads courts to consider fairness within a Commerce

the economic presence sufficient to make a seller the subject of state taxation.” John A. Swain, State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century, 38 GA. L. REV. 343, 392 (2003). Justice White notes that “[t]he illogic of retaining the physical-presence requirement in these circumstances is palpable.” Quill, 504 U.S. at 328 (White, J., concurring in part and dissenting in part).

19. See Pennoyer v. Neff, 95 U.S. 714 (1877). Prior to International Shoe, the Court required that an out-of-state defendant have physical presence in the forum jurisdiction to satisfy due process concerns.

20. See discussion infra Part II.B.ii. As explained in more detail later in this Article, "sufficient nexus" is a legal term of art that has been used by the Court interchangeably with the phrase "substantial nexus." This Article follows the Court’s example and likewise uses the two phrases synonymously. Attempts to distinguish the two phrases border on the absurd.

21. The focus of this Article is on the jurisdictional standards applicable to sales and use taxes. There is a debate raging in the scholarly literature over the proper application of Quill to other state and local taxes with one well-respected academic explaining that "Quill's holding does not apply directly to corporate income taxes [as] . . . the Court painstakingly limited its analysis throughout the opinion to sales and use taxes. . . . [P]hysical presence is not an income tax nexus requirement." John A. Swain, State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective, 45 WM. & MARY L. REV. 319, 337, 372 (2003). A number of state courts have also held that the Quill physical presence test is limited to sales and use taxation. See, e.g., Borden Chems. & Plastics, L.P. v. Zehnder, 726 N.E.2d 73, 80 (Ill. App. Ct. 2000) ("The Quill court merely carved out a narrow exception in the area of use tax collection duties."); Couch v. State Lottery Comm’n, 659 N.E.2d 1225, 1230 (Ohio 1996) ("There is no indication in Quill that the Supreme Court will extend the physical-presence requirement to cases involving taxation measured by income derived from the state."); Geoffrey, Inc. v. S.C. Tax Comm’n, 437 S.E.2d 13, 23 n.4 (S.C. 1993) (corporation without physical presence was held subject to the state corporate net income tax). In addition to courts rejecting Quill’s application to state income taxes, one court has rejected its application to the property tax. See Annox, Inc. v. Revenue Cabinet, No. K-19039 (Ky. B.T.A. Nov. 18, 2003) ("The Supreme Court expressly held that it had not applied the physical presence test to taxes other than sales and use . . . . The tax at issue here is a property tax. Therefore, Annox must have some connection, but not physical presence, with Kentucky for the public service corporation property tax to survive Annox’s Commerce Clause challenge.").

22. See Quill, 504 U.S. at 315–16.


24. The concept of fairness springs from International Shoe where the Court "framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Quill, 504 U.S. at 307 (citations omitted).
Clause context.\(^{25}\) Instead, courts should look first at the Commerce Clause nexus test and then at the Due Process Clause nexus test. Using this approach, courts are unlikely to import fairness considerations into the Commerce Clause analysis. As a consequence, they will apply the bright-line physical presence test mandated in *Quill* more consistently. This preserves the simplicity *Quill* purported to create without altering *Quill* in any significant way.\(^{26}\)

Part II of this Article begins with a brief introduction to sales and use taxes in the United States.\(^{27}\) Although these taxes are complementary in nature, they are treated differently for constitutional purposes.\(^{28}\) This Part then examines the Due Process Clause and Commerce Clause constraints on state taxation,\(^{29}\) which are animated by very different concerns.\(^{30}\) Next, this Part explores footnote eight in *Quill* to dispel the notion that *Quill* established a facts-and-circumstances test.\(^{31}\) The section concludes by discussing the problems lower courts have had in applying the *Quill* nexus tests. The primary problem encountered by the lower courts, exemplified by four lower court opinions,\(^{32}\) involves fact patterns near the bright-line that involve some quantum of physical presence but something less than a permanent physical presence in the taxing jurisdiction.\(^{33}\)

Part III will then look at ways of bridging the apparent *Quill* chasm. First, there is a step back to an earlier era in Due Process Clause jurisprudence with an examination of the physical presence test that existed prior to *International Shoe*.\(^{34}\) The idea is to take the lessons from that era (i.e., due process cases decided using a physical presence test) and transfer them into the Commerce Clause context. After all, it seems pointless to relitigate issues that were decided eighty years ago. Once a nexus is established, the next logical question is “When does it end?” The Article

\(^{25}\) See discussion infra Part II.C.i.

\(^{26}\) Ideally, Congress or the Supreme Court should eliminate the physical presence requirement as a relic of a bygone era. The Court abandoned the physical presence test for due process purposes in *International Shoe*, and it should have done so in *Quill*. However, until the rule is changed, the rule that does exist should be applied appropriately.

\(^{27}\) See discussion infra Part II.A.


\(^{29}\) See discussion infra Part II.B.

\(^{30}\) See supra notes 14, 17, and accompanying text.

\(^{31}\) See discussion infra Part II.B.iv.


\(^{33}\) No one would seriously contend that a corporation’s manufacturing plant, headquarters, or distribution facility is insufficient to satisfy a state’s taxation jurisdiction.

\(^{34}\) See discussion infra Part III.A.
spends some time in this Part looking at the various approaches states have taken in answering that question.35

Part III also proposes a model statute to deal with the perceived unfairness of taxing very small businesses through a minimum filing threshold.36 With the power to tax comes the responsibility to tax efficiently.37 Administrative costs are associated with having an out-of-state business comply with a state’s regulatory taxing authority, both to the business and to the state.38 A bright-line physical presence test might require very small businesses—those with $100 of sales tax liability or less a year—to file sales and use tax returns. The states would be better off creating a mechanism to exempt these small businesses because the cost of collecting this revenue might exceed the tax collected.

The conclusion of Part III discusses the ethical and professional considerations the tax profession is dealing with not only at the practical level, but more importantly at the philosophical level. At its root, the fundamental problem facing the profession today is the question whether truth is relative or universal.39 To the extent people reject objectivity, their philosophy will likely be reflected in their court submissions, which may then appear in a court opinion.

This Article hopes to make a contribution by helping states strengthen their sales tax base and assisting taxpayers in understanding their legal obligations. Whether state revenues are up or down,40 it cannot

35. See discussion infra Part III.B.
36. I have placed the threshold at $100 in tax liability, though this number is purely arbitrary on my part. A state may believe that it can collect less than $100 in tax efficiently, or it may believe that a larger amount is more appropriate.
   The most desirable way of increasing the revenue is to cut off the worse than useless extravagances, to abolish the idle ministries, to avoid wars and long travels, which are very like wars [in their bad effects], to suppress graft among the office holders, and to be interested in the proper administration of the kingdom rather than in the extension of its boundaries.
Id.
38. Administrative costs include the cost of hiring employees to process tax returns, maintaining space to store tax returns, and hiring computer personnel for electronic filing of tax returns.
39. See discussion infra Part III.D.
   Continuing the pattern states have become too familiar with since the bull market ended, revenue collections in fiscal 2003 continued to dwindle. Following a booming economy that generated exceptional state tax receipts—particularly from personal income taxes that included record capital gains, options, and bonuses—and then a dramatic fall, recovery shuffled to take hold. Two years of economic doldrums have resulted in an uncertain revenue outlook, as sales, personal income, and corporate income tax collections all missed their projected marks in fiscal 2003. For fiscal 2004, thirty-six states enacted tax
be emphasized enough that "taxes are the life-blood of government, and their prompt and certain availability an imperious need."\(^41\) A bright-line test, admittedly an artificial construct, has the primary advantage of providing notice to those that cross the line that they must collect the tax. Taxation is not just another area of government regulation: in the words of Justice Oliver Wendell Holmes, Jr., "[t]axes are what we pay for civilized society."\(^42\)

II. UNDERSTANDING SALES AND USE TAXES, THE QUILL NEXUS STANDARDS, AND THEIR APPLICATION

The primary focus of this Article is the application of the Due Process and Commerce Clauses to sales and use taxes, but a discussion of these constitutional constraints without some context might be confusing. Thus, a short history and basic understanding of how these taxes work are necessary.

and fee increases totaling a net $9.6 billion, in concert with another round of massive budget cuts, the use of reserve funds, and the implementation of an extensive array of other budget-balancing strategies. States also enacted $3 billion of revenue measures that enhance general fund revenue but do not affect taxpayer liability, such as deferrals of tax phase-outs, tax amnesty programs, and accelerated remittance of sales taxes by vendors. Id. (citation omitted). However, state fiscal conditions fluctuate and a fiscal crisis can be followed by a year of plenty. This Article's argument is based not on financial necessity, but on notions of responsible federalism. Only when states control their tax base can they implement sound fiscal policies.


42. Compania General de Tabacos v. Collector of Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). Taxes buy society many things, including a functioning legal system. We often take for granted the notion of a legal system, but what happens when that legal system is not in place? In People v. Williams, 1 Idaho 85 (1866), the Territorial Supreme Court of Idaho dealt with that question. Williams was arrested and charged with the crime of highway robbery for an act he committed in September 1863. Id. In March of 1863, Congress had created the Territory of Idaho "by cutting off certain territory from the already organized territories of Washington, Dakota, Nebraska, and Utah." Id. at 86. Unfortunately, Congress did not create a criminal code for the new territory and the new territorial legislature had not yet met by the date of Williams' act. Id. The court held that because no criminal law existed in September 1863, Williams could not be held criminally liable for any crime. Id.

It is taxes that pay the salaries of the legislators who make the laws, the police officers who enforce the laws, and the judges who administer the laws. Both in-state residents and out-of-state companies that would do business in the state benefit from a fully functioning state government, funded by tax dollars. It is hard to imagine any out-of-state business willing to do business in a jurisdiction where its employees could be killed with impunity and its goods stolen without recourse, or at least it is hard to imagine such a situation with goods and services being priced at peace time market rates. Presumably there are some willing to take on higher risks for much higher profits.
A. Sales and Use Taxes

Apples and quinces,
Lemons and oranges,
Plump unpecked cherries,
Melons and raspberries,
Bloom-down-cheeked peaches,
Swart-headed mulberries,
Wild free-born cranberries,
Crab-apples, dewberries,
Pine-apples, blackberries,
Apricots, strawberries;—
All ripe together

Most Americans live in states with a sales tax, but few understand how this pervasive tax operates. The sales tax is a tax on commerce with all purchases of tangible personal property, including wild free-born cranberries, subject to it unless specifically excluded by statute. It is a tax on consumption charged to consumers in the jurisdiction in which

43. Rossetti, supra note 1, at 284.
44. Hellerstein & Hellerstein, supra note 28, § 12.04(1) (“Sales taxes in most states are designed to tax all retail sales of tangible personal property, unless explicitly exempted . . .”).
45. It is probably more accurate to say that a sales tax is “primarily” a tax on consumption. Consumption is defined as “[t]he act of destroying a thing by using it; the use of a thing in a way that thereby exhausts it.” Black’s Law Dictionary 336 (8th ed. 2004). The following is an intellectually simple example of consumption: a Californian visits Washington, D.C. and purchases a hot dog and drink for lunch. Both items are completely consumed in the District of Columbia. However, that same tourist purchases a replica of the United States Capitol dome in a snow globe. That item is left in its box and is not opened by the tourist until he is back home in California, where it spends the next fifty years on a shelf. The item cannot be said to be “exhausted” in the District of Columbia, but rather it is consumed in California. Assuming that California and the District of Columbia have the same tax rates, it is theoretically possible to have this tourist pay a second consumption tax on the snow globe in California and then seek a refund from the District of Columbia; however, such a system would be horribly complicated and inefficient. Efficiency wins out over theory.
46. A Multistate Tax Commission document explains that

[there are three types of sales and use taxes: a vendee form, a vendor form and a combined form. A vendee sales tax is a sales tax that places the legal incidence of the tax on the purchaser, even though the seller may be required to collect and remit the tax from collections made from the purchaser. A tax that places the legal incidence of the sales tax on the seller but also requires the seller to collect the tax from the purchaser is also a vendee sales tax. A vendor sales tax is a sales tax that places the legal incidence of the tax on the seller, even though the seller may have the option to collect the tax from the purchaser. A combined sales tax is a sales tax that displays aspects of both a vendee form and a vendor form.

State Participant Revised Public Participation Working Group Draft of the Constitutional Nexus Guideline for Application of a State’s Sales and Use Tax to an Out-of-State Business 2 (1998), http://www.mtc.gov/PPWGS/Nexus/nexus24.pdf [hereinafter Constitutional Nexus Guideline]. The most common type of sales tax in the United States is one in which the seller is required to add the sales tax to all sales it makes at retail unless the sale is exempt from the sales tax. See, e.g.,
the sale occurs, with the retailer assigned the legal responsibility for collecting the tax based on a percentage of the gross receipts from the sale.\footnote{McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 343 (1819) (sales to the federal government are exempt under the Supremacy Clause).} The use tax is complementary to the sales tax, and is largely restricted to goods purchased outside the state.\footnote{See, e.g., MINN. STAT. § 297A.62, subd. 1 (2001) ("Except as otherwise provided . . . a sales tax of 6.5 percent is imposed on the gross receipts from retail sales as defined in section 297A.61, subdivision 4, made in this state or to a destination in this state by a person who is required to have or voluntarily obtains a permit under section 297A.83, subdivision 1.").} It seems odd to have two taxes that are basically identical—to tax the same items\footnote{Compare KAN. STAT. ANN. § 79-3603 (2004) (sales tax is imposed on the retail sale of tangible personal property in Kansas), with KAN. STAT. ANN. § 79-3703 (2004) (use tax is imposed on the amount of consideration paid for tangible personal property consumed in Kansas).} at the same rates\footnote{KAN. STAT. ANN. § 79-3603 (2004).} with the same exemptions,\footnote{KAN. STAT. ANN. § 79-3703 (2004).} and to require retailers to collect both taxes\footnote{Compare KAN. STAT. ANN. § 79-3604 (2004) (sales tax is paid by consumers and collected by retailers), with KAN. STAT. ANN. § 79-3705a (2004) (use tax is paid by consumers and collected by retailers).}—but the system works like this only because of a historical anachronism of constitutional proportions that has been preserved to this day.

The modern retail sales tax was introduced during the Great Depression as a way for the states to generate revenue at a time when revenue from state income tax was in dramatic decline.\footnote{H.R. REP. NO. 89-565, at 608–09 (1965). The "Willis Committee Report," as this report is known in the literature (Edwin E. Willis was chairman of the Special Subcommittee on State Taxation of Interstate Commerce), is the federal government's only examination of state and local taxation on a comprehensive basis. Between 1932 and 1937, thirty-one states adopted sales taxes to deal with the fiscal crisis of the Great Depression. See id. at 610.} Constitutional litigation following the introduction of the sales tax focused on the legitimacy of the states' ability to impose their sales taxes on interstate sales; "over-the-counter transactions present[ed] no federal constitutional problems."\footnote{Paul J. Hartman, Federal Limitations on State and Local Taxation § 10:1 (1981).} In 1944, the Court held that "[a] sales tax is a tax on the freedom of purchase . . . . [And] [a] use tax is a tax on the enjoyment of that which was purchased . . . . Though sales and use taxes may secure the same revenues and serve complementary purposes, they are . . . taxes on
different transactions and for different opportunities afforded by a State." The practical effect of this constitutional difference is that a retailer can only be required to collect the sales tax in the jurisdiction where the sale occurs, with the corollary that sales made outside of a state are not subject to the sales tax. However, if a state enacts a use tax and all jurisdictions that have a sales tax have enacted a complementary use tax, then that same retailer that is not required to collect the sales tax can be required to collect the use tax on the out-of-state sale when it is delivered to an in-state resident. Justice Douglas's dissent in *McLeod* rejected this form-over-substance argument noting the following:

A use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical. . . . I can see no warrant for an interpretation of the Commerce Clause which puts local industry at a competitive disadvantage with interstate business. If there is a taxable event within the State of the buyer, I would make the result under the Commerce Clause turn on practical considerations and business realities rather than on dialectics.

While it is true that an in-state retailer can be required to collect the sales tax and the use tax, the same is not true for out-of-state retailers that do not fall within the regulatory tax jurisdiction of the states where they send their merchandise. To avoid the problem of unfair tax treatment—unfair in the sense that people who purchase their items in the

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58. The out-of-state retailers not collecting the use tax are not only small businesses: they include large well-known companies such as Amazon.com; Coldwater Creek Inc.; DAMARK International, Inc.; Dell Catalog Sales, L.P.; Fingerhut Companies, Inc.; L.L. Bean, Inc.; and Spiegel.com. MI-1040 MICHIGAN INCOME TAX RETURN 5 (2000), http://www.michigan.gov/documents/mi1040f_2724_7.pdf.

59. In upholding the constitutionality of the use tax, Justice Cardozo explained: Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckon-
state pay the tax while others who have the item shipped from another state pay no tax—states require consumers to self-assess the use tax.\textsuperscript{60} Though states provide several mechanisms for residents to self-assess their use tax, such as use tax forms,\textsuperscript{61} line-items on state personal net income tax forms,\textsuperscript{62} and recently web-based on-line filing forms,\textsuperscript{63} most

\textsuperscript{60} For example, Virginia law provides the following:


1. Of the cost price of each item or article of tangible personal property used or consumed in this Commonwealth. Tangible personal property which has been acquired for use outside this Commonwealth and subsequently becomes subject to the tax imposed hereunder shall be taxed on the basis of its cost price if such property is brought within this Commonwealth for use within six months of its acquisition; but if so brought within this Commonwealth six months or more after its acquisition, such property shall be taxed on the basis of the current market value (but not in excess of its cost price) of such property at the time of its first use within this Commonwealth. Such tax shall be based on such proportion of the cost price or current market value as the duration of time of use within this Commonwealth bears to the total useful life of such property (but it shall be presumed in all cases that such property will remain within this Commonwealth for the remainder of its useful life unless convincing evidence is provided to the contrary).

2. Of the cost price of each item or article of tangible personal property stored outside this Commonwealth for use or consumption in this Commonwealth.

3. A transaction taxed under § 58.1-603 shall not also be taxed under this section, nor shall the same transaction be taxed more than once under either section.

4. The use tax shall not apply with respect to the use of any article of tangible personal property brought into this Commonwealth by a nonresident individual, visiting in Virginia, for his personal use, while within this Commonwealth.

5. The use tax shall not apply to out-of-state mail order catalog purchases totaling $100 or less during any calendar year.


\textsuperscript{62} See, e.g., ME. REV. STAT. ANN. tit. 36, §1861-A (West, Westlaw through 2005 Special Second Sess.) ("The assessor shall provide that individuals report use tax on items with a purchase price of $5,000 or less on their Maine individual income tax returns.")
consumers either are unfamiliar with the use tax,\textsuperscript{64} misunderstand its application,\textsuperscript{65} or choose not to self-assess their use tax liability.\textsuperscript{66} Unfortunately,

[c]ollecting the use tax from the purchaser, particularly where the purchaser is an individual, is often inefficient and not cost-effective. This is especially so because many consumers do not realize they are subject to the use tax. One possible solution is to require the out-of-state vendor to collect the tax from the purchaser and remit it to the taxing state. However, requiring an out-of-state vendor to collect the use tax from the in-state purchaser and remit it to the taxing state presents constitutional problems.\textsuperscript{67}

Because use tax self-assessment has not been very successful\textsuperscript{68}—small movable items have been difficult for states to track\textsuperscript{69} while a few


\textsuperscript{64} "The use tax is one of the most misunderstood and most unknown [taxes] out there," said Vic Anderson, a supervisor in the audit division of the state Board of Equalization, which oversees the tax." Verne Kopytoff, \textit{Pay Up, State Says}, S.F. CHRON., Jan. 9, 2004, at B1.

\textsuperscript{65} The passage of the Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998), has caused some confusion with the public, creating the perception that Internet sales are tax free when they are not. The Act prohibited discriminatory treatment (already prohibited by the Court's Negative Commerce Clause jurisprudence), Internet access charges, and new taxes on the Internet. A new tax might include something like a "bit tax," whereby each "bit" of transferred information would be taxed. At the time of the enactment of the Act, some feared that states would pass a "bit tax," though there is no evidence that any state ever considered such a tax. In any event, sales and use taxes are not new taxes, as they were enacted in many states in the 1930s.

\textsuperscript{66} As of the year 2000, the population of the State of Michigan was 9,938,444. U.S. Census Bureau, Michigan QuickFacts, http://quickfacts.census.gov/qfd/states/26000.html (last visited Feb. 19, 2006). Of this number, 72,872 self-assessed their use tax on their Michigan income tax return in 2002, with the state losing an estimated $188 million in use tax revenues in fiscal year 2002 (estimated to rise to $248 million in fiscal year 2005) from consumers that did not self-assess their use tax on their remote purchases. \textit{OFFICE OF REVENUE AND TAX ANALYSIS, MICH. DEP'T OF TREASURY, MICHIGAN'S SALES AND USE TAXES 2002}, at 6 (2002), http://www.michigan.gov/documents/SalesUseTaxReport_June_2003_69162_7.pdf. However, Michigan's revenue loss estimate may be too conservative. Two University of Tennessee professors reported that Michigan's revenue loss in 2001 was $502.9 million with nationwide revenue losses in 2001 reaching $13 billion, and rising to $54 billion by 2011. States would need to raise their sales tax rates by between 0.46 and 0.94 percentage points to replace the lost revenue. \textit{DONALD BRUCE AND WILLIAM FOX, STATE AND LOCAL SALES TAX REVENUE LOSSES FROM E-COMMERCE: UPDATED ESTIMATES 13 (2001)}, http://cber.bus.utk.edu/cocom/eocom0901.pdf.


\textsuperscript{68} California recently added a use tax self-assessment line on the California personal income tax return, though they only expect to collect $13 million of the $1.2 billion they are losing annually. Kopytoff, \textit{supra} note 64. The difficulty in getting consumers to self-assess a use tax may be overcome by more stringent penalties for failure to comply with the law or perhaps better education about the responsibilities of citizens concerning sales and use tax would promote greater compliance. In either case, a state is certainly free to attempt to do what is easier for the state and the consumer by attempting to assess the tax against businesses selling goods in the state.
larger, more expensive items have been easier to track—0—the rest of the Article will discuss the constitutional impediments to requiring out-of-state vendors to collect the use tax.71

Use tax collection is extremely important to businesses because once a business comes under a state’s use tax collection authority, that business must remit the tax, even if it failed to do so at the time of the sale.72 In practice, a business that guesses wrong on the nexus question will have to absorb the entire tax itself since it is not likely to be willing to go back to its customers and recoup the tax, especially for inexpensive items.74 Also, if the business cannot pay the use tax assessment, then

69. People purchase small movable items all the time that elude detection by state taxing authorities. For example, a person can buy an expensive $10,000 watch in a state, like Delaware, that does not have a sales tax, and take it back to his home state where the use tax is never self-assessed. Also, a person might purchase an expensive piece of artwork in one state and then have it shipped to his home in another state, where once again the tax is not self-assessed. In addition to these more expensive items, small-ticket items present their own difficulties. The low purchase price associated with many sales from direct mail-order catalog and internet retailers makes it impracticable for the state to collect the tax.

70. The states have been extremely successful in collecting the sales and use tax on certain expensive items. Automobiles are relatively easy to track because of their unique vehicle identification numbers and the requirement that they be registered with the state department of motor vehicles. The Federal Aviation Administration has similar registration requirements for airplanes that states can obtain, and many states require boat owners to register their boats with state regulatory agencies.

71. Recently the Hawaii Supreme Court challenged sixty years of United States Supreme Court precedent that started with McLeod, and held that its general excise tax could be imposed for sales that occurred outside of Hawaii and that Hawaii’s complementary use tax was not applicable. Baker & Taylor, Inc. v. Kawafuchi, 82 P.3d 804 (Haw. 2004). The Hawaii Court explained that the older case law “was decided at a time when the Supreme Court had held that state taxes on interstate commerce were per se unconstitutional.” Id. at 815. Moreover, the only physical presence involved in McLeod was solicitation by sales people who were domiciled in another state. Baker’s situation, on the other hand, did not involve mere solicitation and a sale that was final as the goods were transferred to a common carrier. Baker was involved with an ongoing, long-term contract . . . that required sales representatives to frequently meet with the [in-state purchaser] to discuss the quality of book delivery and to provide training for the software that Baker allowed the [in-state purchaser] to use to catalog books after the sales.

Id. Because Hawaii is exercising its excise tax on an out-of-state seller with significant physical contacts in the state, this case may mark the beginning of the end for McLeod and its progeny—a victory for substance over form. In another sense, however, this case represents a Pyrrhic victory because Hawaii maintains in-state physical presence as the jurisdictional standard for its general excise tax. To paraphrase that famous line from Shakespeare’s Romeo and Juliet: What’s in a name? That which we call a tax by any other name would still be a tax.

72. See HELLERSTEIN & HELLERSTEIN, supra note 28, § 19.03.

73. Id.

74. It would be impracticable for a large company with mail-order sales in a state to send letters to their customers requesting a few dollars in use tax—the administrative costs would be prohibitive and the company would risk antagonizing customers. It is current practice by some mail-order companies that collect the use tax to absorb the use tax in situations where the consumer fills out an order form, fails to include the required tax, and then pays by check.
corporate officers and responsible employees may be held personally liable for the tax.\(^{75}\)

**B. State Tax Jurisdiction**

The Constitution limits states' ability to compel businesses selling goods in interstate commerce to collect sales and use taxes.\(^{76}\) For the first time in its tortured state tax jurisdiction history, the Supreme Court explicitly held in *Quill* that the Due Process and Commerce Clauses have differing purposes and that the nexus requirements are "not identical."\(^{77}\) Intellectually this is obvious, but practically it has revolutionized the field and increased litigation.

1. Due Process Clause

The purpose of due process is to ensure the "fairness of governmental activity."\(^{78}\) To implement this, the Supreme Court requires sufficient contacts with a state to make it fair for the state to exercise power over an out-of-state person.\(^{79}\) Contacts are sufficient when a person has "minimum contacts" with the state so that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"\(^{80}\) The Court has also held that as "long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that absence of physical contacts can defeat personal jurisdiction there."\(^{81}\) *Quill* reaffirmed the latter proposition, that the "requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State."\(^{82}\)

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76. See generally id. § 19.02.
78. Id.
79. Id.
81. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). The Supreme Court held that the District Court's exercise of jurisdiction pursuant to Florida's long-arm statute did not violate the Fourteenth Amendment's Due Process Clause since Rudzewicz established a substantial and continuing relationship with Burger King's Miami headquarters even though he did not physically enter the forum. Id. at 487. His actions were sufficient for specific personal jurisdiction because prior negotiations, contemplated future consequences, the terms of the contract, and his actual course of dealing amounted to the purposeful availment and foreseeability required for "minimum contacts" under *International Shoe* and its progeny. Id. at 479.
82. Quill, 504 U.S. at 308.
2. Commerce Clause

The Supreme Court has interpreted the Commerce Clause to prohibit state actions that discriminate against or unduly burden interstate commerce as part of its Negative Commerce Clause jurisprudence. A state’s attempt to tax out-of-state companies may be seen as such a burden if, among other things, the tax is applied to a company that does not have “substantial nexus” with the taxing state. Expressly rejecting a facts-and-circumstances test, which would have weighed various factors, the Quill Court instead created a simple bright-line test measured by physical presence in a state. The Quill Court held that the physical presence of a company in the taxing state satisfies the Commerce Clause substantial nexus test. Unfortunately, lower courts have found some ambiguity in Quill, and have struggled to apply the bright-line to the facts of real cases. Admittedly, part of the confusion lies in the name given to the legal requirement by the Quill Court: “substantial nexus.” The word “substantial” connotes weighing of factors, yet the Court attached a bright-line test to the legal phrase “substantial nexus.” Thus, we have a legal requirement that requires a company to have substantial nexus with a state before it can be subjected to a state’s regulatory use tax authority, but

83. Id. at 312.
84. All state taxes must meet three additional requirements to satisfy the Negative Commerce Clause: the tax must be one that is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the service provided by the state. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
85. See id. The wording of the Complete Auto test may indicate that courts should examine the particular transaction’s connection to the state (“transaction nexus”), but this notion was repudiated by the Supreme Court in National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977), where it upheld “entity nexus” as the correct inquiry. Id. at 562. The facts of that case provide an example of entity nexus: the company, which maintained offices in the taxing state for purposes other than the sale of products to the state’s residents, was found to satisfy the substantial nexus test via the unconnected in-state entities.
86. Quill, 504 U.S. at 315.
87. Id. (reaffirming Nat’l Bellas Hess v. Dep’t of Revenue, 386 U.S. 753 (1967)). A mail-order only business is characterized as a business that solicits the residents of the taxing state through U.S. mail or common carrier, receives and accepts orders outside of the taxing state, and delivers the product through U.S. mail or common carrier from outside the state. The business has no physical presence in and does not itself visit the state. Id. at 311 (citing Nat’l Bellas Hess, 386 U.S. at 758).
that legal requirement is determined by a bright-line physical presence test.

This lack of clarity by the Court is not new. Before *Quill*, the Court referred to the "substantial nexus" requirement alternatively as "sufficient nexus," "sufficiently connected," "requisite nexus," "necessary basis," "sufficient relation," "necessary nexus," "adequate nexus," "obvious nexus," "clear and sufficient nexus," and Chief Justice Rehnquist's colorful phrase "nexus aplenty." However, even after *Quill*—the seminal nexus case of the last twenty-five years—the Court has continued describing the "substantial nexus" requirement in different ways, such as "adequate nexus," "sufficient nexus," "Commerce Clause nexus," "nexus aplenty" (this phrase is apparently just too good for the Justices to let go), and, in one of its most recent state tax cases, "minimal connection." These interchangeable phrases suggest that the phrase "substantial nexus" in *Quill* is the Court's shorthand for Commerce Clause nexus—any substantive meaning of the phrase must be found in the case law and not in the phrase "substantial nexus" itself.

The *Quill* Court likewise lacks clarity when it describes the due process minimum contacts test: "due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him." It is curious that the Court describes the due process minimum contacts test as requiring substantial contacts; a threshold that is easily met by most companies doing business across state lines. Since the Court spent so

89. *Quill*, 504 U.S. at 311.
91. *Id.*
93. *Id.* at 557.
94. *Id.*
95. *Id.* at 558.
96. *Id.* at 562.
102. *Id.*
103. *Id.*
106. *Id.* at 312 (emphasis added).
107. *Id.*
much time explaining that there are two separate nexus tests, it would be odd for the Court to then define them similarly.

Examining the legal definition of “substantial” provides some light as to what the Court meant by “substantial nexus” in Quill. Black’s Law Dictionary defines “substantial” as “[b]elonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable.”\textsuperscript{108} This legal definition furnishes evidence that “substantial” is defined qualitatively, not quantitatively. Webster’s Dictionary also lends support to the qualitative nature of the word by defining its primary meaning as “consisting of or relating to substance; not imaginary or illusory: real, true; important, essential,”\textsuperscript{109} while the notion of “substantial” as quantitative is relegated to a secondary meaning of the word.\textsuperscript{110}

Though the phrase “substantial nexus” is amorphous, Quill does attempt to provide guidance for Commerce Clause nexus by providing a test that examines qualitative contacts that do and do not create nexus (i.e., the bright-line physical presence test). Specifically, the Quill Court eliminates any room for quantitative nexus speculation because its bright-line test “firmly establishes the boundaries of legitimate state authority.”\textsuperscript{111} A “substantial nexus” test that looks primarily at the quantity of contacts ignores both the bright-line test as well as the Court’s explicit rejection of “tests with more contextual balancing inquiries.”\textsuperscript{112} The Court was aware that it could have established a facts-and-circumstances test (i.e., a test where the number of contacts is weighed); however, the Court refused to do so after extensive discussion of the topic.\textsuperscript{113} A bright-line test is “artificial at its edges . . . [however] this artificiality . . . is more than offset by the benefits of a clear rule.”\textsuperscript{114} If a business has contacts that fall on one side of the state line they have nexus, while if their contacts are on the other side of the state line there is no nexus. This is a simple and clear rule that does not take into account factors like the number of contacts or the type of contact (e.g., solicitation, technical support, or training).

Given the history and context of the phrases used by the Court to describe Commerce Clause nexus, it is useless to try to discern any substantive meaning from the phrases “substantial nexus,” “sufficient nexus,” or “nexus aplenty” themselves. Should state tax jurisdiction debates be relegated to a tit-for-tat where those that want to avoid nexus

\textsuperscript{108} Black’s Law Dictionary 1280 (5th ed. 1979).
\textsuperscript{109} Webster’s New Collegiate Dictionary 1153 (1981).
\textsuperscript{110} Id.
\textsuperscript{111} Quill, 504 U.S. at 315.
\textsuperscript{112} Id. at 316.
\textsuperscript{113} Id. at 316–17.
\textsuperscript{114} Id. at 315.
use the phrase "substantial nexus" while those wanting to create nexus rely on the phrases "sufficient nexus" or "minimal contacts?" Only modern-day sophists would seriously contend that such debate would be useful. In the end it is case law that animates the concept of Commerce Clause nexus; out-of-context discussions on "substantial nexus" border on the frivolous and are shibboleths. The poet, admittedly taken out of context, nevertheless captures this debate best:

And we are here as on a darkling plain
Swept with confused alarms of struggle and flight,
Where ignorant armies clash by night.

So what kind of physical presence creates substantial nexus? "Whether or not a State may compel a vendor to collect sales or use taxes may turn on the presence in the taxing State of a small sales force, plant, or office." Moreover, the Court has rejected form-over-substance arguments and held that a part-time, non-exclusive, independent contractor can provide the necessary physical presence within a state to bring the foreign company into the state’s use tax jurisdiction.

115. The following is a brief description of sophists:
The most popular career of a Greek of ability [in the 5th Century B.C.] was politics; hence the sophists largely concentrated on teaching rhetoric. The aims of the young politicians whom they trained were to persuade the multitude of whatever they wished them to believe. The search for truth was not top priority. Consequently the sophists undertook to provide a stock of arguments on any subject, or to prove any position. They boasted of their ability to make the worse appear the better reason, to prove that black is white. Some, like Gorgias, asserted that it was not necessary to have any knowledge of a subject to give satisfactory replies as regards [to] it. Thus, Gorgias ostentatiously answered any question on any subject instantly and without consideration. To attain these ends mere quibbling, and the scoring of verbal points were employed. In this way, the sophists tried to entangle, entrap, and confuse their opponents, and even, if this were not possible, to beat them down by mere violence and noise. They sought also to dazzle by means of strange or flowery metaphors, by unusual figures of speech, by epigrams and paradoxes, and in general by being clever and smart, rather than earnest and truthful. Hence our word "sophistry": the use of fallacious arguments knowing them to be such.

116. Looking for substantive differences between these two phrases is reminiscent of the war between Lilliput and Blefuscu over the proper side of an egg to break—the larger end or the smaller end. Jonathan Swift, Gulliver’s Travels, in 34 GREAT BOOKS OF THE WESTERN WORLD 3, 22 (Mortimer J. Adler ed., Encyclopedia Britannica 2d ed. 1990) (1726).


118. Quill, 504 U.S. at 315 (citations omitted).
True, the ‘salesmen’ are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as ‘independent’ neither re-
Imagine a nexus continuum with a bright-line in the center. On the far reaches of the continuum, courts have had no problems dealing with the nexus question: on one end, a company that engages in business solely through mail-order catalogs has no nexus with a state, while on the other end a company with a manufacturing facility in a state has nexus. But how should courts approach situations where a company has only temporary physical presence in the state, as where a corporate salesperson enters a state for three days, or where a corporation holds title to tangible personal property in a state for two weeks? It is the cases near the bright-line, at the center of the continuum, where courts grapple with nexus even though Quill equated any physical presence with substantial nexus.

Adjectives like "some," "enough," "sufficient," and "substantial" obfuscate the bright-line physical presence test. For purposes of closer examination, consider two possible types of physical presence: some or any. Some physical presence in a state might include an occasional trip by a salesperson or the delivery of tangible personal property in a company-owned truck. But once a court accepts that Quill requires "some" physical presence, that court immediately transforms the bright-line test into a facts-and-circumstances test. The only physical presence test that maintains fidelity to a bright-line test—certainly from an internally consistent perspective—is one that looks for "any" physical presence in the taxing state rather than "some" physical presence.

The Quill test may appear harsh when applied near the edges of the bright-line, but that is the nature of any bright-line test. Congress can change the test if it chooses. Under the Court’s Negative Commerce Clause jurisprudence, this is a judicially-created test that the courts, ultimately, do not control.

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120. Compare Quill, 504 U.S. at 311, with Nat’l Bellas Hess, Inc. v. Dep’t of Revenue, 386 U.S. 753 (1967).
121. Quill, 504 U.S. at 318.
122. The Constitution grants Congress the right to regulate interstate commerce, thus any judicially created doctrine can be overturned at any time by federal legislation.

In 1883 the Court stated in Parkersburg & Ohio River Transp. Co. v. City of Parkersburg, 107 U.S. 691, 701 (1882), "It is the congress, and not the judicial department to which the constitution has given the power to regulate commerce . . . among the several states." And in the same case it was made clear that "[i]n action by Congress" with respect to its regulatory powers "is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it (Congress) sees fit to act, they may be regulated by state authority." (Word in parentheses ours).

The underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve . . . . Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.\textsuperscript{123}

Until that day arrives, the test is what the Court says it is: the Commerce Clause nexus test is satisfied with \textit{any} physical presence in a state.\textsuperscript{124} Fairness considerations play no part in the \textit{Quill} Commerce Clause test.\textsuperscript{125}

3. Interrelationship Between the Two Nexus Tests

The Article so far has examined, separately, \textit{Quill}'s Due Process and Commerce Clause nexus tests that determine whether a state has sales and use tax jurisdiction.\textsuperscript{126} However, both tests need to be examined jointly, as \textit{Quill} made clear that the Due Process and Commerce Clauses are both implicated in state tax cases involving out-of-state sellers.\textsuperscript{127} While rejecting the physical presence requirement for Due Process (thus following the line of cases from \textit{International Shoe}\textsuperscript{128}), \textit{Quill} retained a physical presence requirement for the Commerce Clause as applied to

\begin{footnotesize}
\begin{enumerate}
\item[(123)] \textit{Quill}, 504 U.S. at 318.
\item[(124)] \textit{Id.} at 315.
\item[(125)] Whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office \ldots . This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. \textit{Id.}
\item[(126)] \textit{Id.} at 305.
\item[(127)] Though this Article does not distinguish between constitutional nexus standards applicable to sales and use taxes, the standard for the sales tax is different from that of the use tax. "It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184 (1995). Thus, if an out-of-state company ships its goods into a state in a manner where the sale is deemed to occur in that state (e.g., F.O.B. place of destination), then that out-of-state retailer can be required to collect the sales tax. Since the Uniform Commercial Code allows for a seller to decide where a sale occurs, this is a trap for the unwary draftsman that chooses F.O.B. place of delivery (sale occurs in state of destination) versus F.O.B. place of shipment (sale occurs in state of origin). U.C.C. § 2-319 (1998). However, the Court's sales tax jurisprudence in cases like Jefferson Lines has involved companies with physical presence in the state—there are no sales tax nexus decisions by the Court decided solely on the legal distinctions between shipment and destination found in the Uniform Commercial Code. See, e.g., Jefferson Lines, 514 U.S. 175.
\item[(128)] "As neither \textit{Bellas Hess} nor \textit{Quill} considers a sales tax, their holdings are limited to the imposition of a use tax collection duty and do not state what nexus rules apply to a sales tax on a sale in a cross-border transaction." Paull Mines, Conversing with Professor Hellerstein: \textit{Electronic Commerce and Nexus Propel Sales and Use Tax Reform}, 52 TAX L. REV. 581, 589 (1997).
\end{enumerate}
\end{footnotesize}
sales and use taxes. The Supreme Court described the difference as follows:

The “substantial nexus” requirement is not, like due process’ “minimum contacts” requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. Accordingly . . . a corporation may have the “minimum contacts” with a taxing State as required by the Due Process Clause, and yet lack the “substantial nexus” with the State as required by the Commerce Clause.129

That is, a “tax may be consistent with due process and yet unduly burden interstate commerce.”130 Because the Due Process Clause has a different threshold than does the Commerce Clause, due process may be satisfied even without physical presence.131 Indeed, in most of the cases involving constitutional limitations on sales and use taxes, due process is almost never contested.132

In post-Quill reported cases, it is relatively easy to satisfy the Due Process Clause minimum contacts test because state revenue agencies focus on out-of-state companies that regularly and systematically take advantage of their state’s market.133 Invariably, if the Commerce Clause is considered first when looking for tax nexus, the subsequent consideration of the Due Process Clause is unnecessary. This is because if a company meets the Commerce Clause nexus standard, it is axiomatic that it meets the Due Process Clause;134 if the company fails to meet the Commerce Clause nexus standard, any taxation on it is unconstitutional and any Due Process Clause analysis is extraneous.135

129. Quill, 504 U.S. at 313.
130. Id. at 313 n.7.
131. Id. at 307 (“[If a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State’s in personam jurisdiction even if it has no physical presence in the State.”).
133. State revenue agencies are likely to use their scarce litigation resources to bring companies with significant sales in the state into compliance, rather than litigate cases at the margin with questionable due process nexus.
134. See, e.g., Town Crier v. Dep’t. of Revenue, 733 N.E.2d 780, 787 (Ill. 2000); see also Burnham v. Superior Court, 495 U.S. 604, 617 (1990) (transient physical presence in a state satisfies the Due Process Clause).
Town Crier made clear that a company with Commerce Clause nexus will also have Due Process Clause nexus:

Since we have already determined that the use tax assessed against plaintiff passes contemporary commerce clause scrutiny, we could also find that it is a foregone conclusion that the assessment satisfied due process scrutiny as well . . . . Thus, we could decide that, because there exists a substantial nexus for commerce clause purposes, there is no question that the requirements of the due process clause have also been satisfied. However, employing the analysis suggested in Quill, we will address separately why the limitations imposed by the due process clause have also been satisfied.\(^\text{136}\)

The whole point of Quill was to distinguish and separate the nexus tests of the Due Process and Commerce Clauses; however, the lower courts have unfortunately merged the two tests into one test, as seen in Town Crier.\(^\text{137}\)

The interrelationship of contacts considered under both the Due Process and Commerce Clauses is nicely illustrated by Town Crier:

The record in this case shows that plaintiff had at least some minimum connection with Illinois during the audit period. By making 30 deliveries into Illinois in its own vehicles and installing blinds or shades in Illinois on five occasions, plaintiff exploited Illinois’ consumer furniture market. Plaintiff’s success in this effort is illustrated by the fact that, during the sampling period, more than half of plaintiff’s gross sales constituted sales of merchandise delivered into Illinois. Plaintiff’s extensive sales of items delivered into Illinois, coupled with its regular physical presence here, provide sufficient grounds for concluding that plaintiff has successfully availed itself of Illinois’ consumer markets.\(^\text{138}\)

The court had commented earlier that “by making deliveries into Illinois in its own vehicles, plaintiff ha[d] established a regular presence in Illinois that enhanced its ability to establish and maintain a market for its furniture sales.”\(^\text{139}\) Town Crier thus reflects the nature of contacts considered under both the Due Process and Commerce Clauses. Under the Due Process Clause, all contacts are taken into account. This holistic view stems from the Supreme Court’s interpretation that simple “purposeful availment” (or any attempt to solicit sales from residents of another state) will suffice to satisfy due process.\(^\text{140}\) Juxtapose this, however,

\(^{136}\) Town Crier, 733 N.E.2d at 787 (emphasis added).
\(^{137}\) See id.
\(^{138}\) Id. at 788.
\(^{139}\) Id. at 787.
\(^{140}\) See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).
with the contacts considered under the Commerce Clause—because physical presence is a requirement of substantial nexus, courts tend to focus their time and analysis on that aspect.\footnote{141}{See, e.g., In re Family of Eagles, Ltd., 66 P.3d 858 (Kan. 2003).}

Once fairness is taken out of the Commerce Clause and placed rightfully back into due process analysis, a corresponding shift in the types of contacts considered will occur. Generally, fairness has been invoked in an analysis that considered only physical contacts. Placing fairness back into a Due Process Clause inquiry will allow for a more logical discussion as to whether it would be fair to impose a use tax collection obligation on a business, based on all of its contacts with a state.

4. \textit{Quill} Footnote Eight Loophole

One lingering issue that needs to be addressed is footnote eight in \textit{Quill},\footnote{142}{Quill Corp. v. North Dakota, 504 U.S. 298, 315 n.8 (1992).} which creates a seeming loophole that blurs the bright-line test. At first glance, this footnote appears to say that “some” physical presence is allowed in a state without creating nexus, and some commentators maintain that this is an accurate reading.\footnote{143}{See, e.g., Jeff Nemerofsky, \textit{Sleepless Over the Hotel Tax}, 25 S. ILL. U. L.J. 527, 532–33 (2001).} The footnote reads:

In addition to its common carrier contacts with the State, Quill also licensed software to some of its North Dakota clients. The State “concedes that the existence in North Dakota of a few floppy diskettes to which Quill holds title seems a slender thread upon which to base nexus.” We agree. Although title to “a few floppy diskettes” present in a State might constitute some minimal nexus, in \textit{National Geographic Society v. California Bd. of Equalization}, we expressly rejected a “slightest presence” standard of constitutional nexus. We therefore conclude that Quill’s licensing of software in this case does not meet the “substantial nexus” requirement of the Commerce Clause.\footnote{144}{Quill, 504 U.S. at 315 n.8.}

However, making much of a footnote is itself problematic, given that the Court frowns on jurisprudence by footnote.\footnote{145}{The Court is disdainful of arguments made solely from footnotes, especially when a footnote counters clear precedent. See Carmell v. Texas, 529 U.S. 513, 538 (2000) (refusing to overturn}}
in the footnote raises a plausible objection to the analysis presented in this Article, and therefore should be addressed.

There are two issues raised by this footnote. First, can an out-of-state company own floppy diskettes in a state without creating nexus with that state? Second, does the Court recognize a test called the "slightest presence" test?

As to the first issue, the confusion stems from the Court's reference to "a few floppy diskettes," which are clearly tangible personal property. Logically, if a company could own some tangible personal property in a state without having a nexus with that state, then the bright-line test is obliterated. The test becomes one for determining if "some" physical presence is enough to create nexus, or if "any" physical presence is all that matters.

Although it is hard to imagine that the Court gave much thought to the wording of footnote eight, the footnote itself provides the key to unraveling this logical dilemma. The first sentence of the footnote explains that "licensed software" is the contact being examined, and the last sentence of the footnote concludes that "Quill's licensing of software in this case does not meet the 'substantial nexus' requirement of the Commerce Clause." Thus, the Court's focus was on the intangible property—the licensed software located in North Dakota—not on the diskettes, the tangible personal property that delivered the licensed software. Quill conceded this fact when it told the Court the following:

The Record does not support North Dakota's contention that Quill "retains title" to [the software program] while the diskettes are in the customer's possession or that Quill retains any physical control over [the software program] or the diskette after sale or gift of the diskette to the customer. The intangible right that Quill has under the software agreement to terminate access for inappropriate use of the program is distinct from the customer's ownership and use of

precedent based on language in footnotes); Mitchell v. Helms, 530 U.S. 793, 822 (2000) (discounting support cited by Respondent that was mentioned only briefly in a footnote).

146. Tangible personal property is defined as "[c]orporal personal property of any kind; personal property that can be seen, weighed, measured, felt, or touched, or is in any other way perceptible to the senses, such as furniture, cooking utensils, and books." BLACK'S LAW DICTIONARY 1254 (8th ed. 2004). In contrast, intangible property is "[p]roperty that lacks a physical existence. Examples include stock options and business goodwill." Id. at 1253.

While all agree that a floppy disk is tangible (i.e., can be touched), lower courts are split as to whether electronic information is tangible or intangible. Compare Fl. Dep't of Revenue v. Quotron Sys., 615 So. 2d 774 (Fla. Ct. App. 1993) (delivery of electronic information not tangible personal property), and In re AT&T Techs., Inc., 749 P.2d 1033 (Kan. 1988) (application software intangible personal property), with S. Cent. Bell Tel. v. Barthelemy, 643 So. 2d 1240 (La. 1994) (software tangible personal property because it is recorded in physical form and has physical existence on tapes, disks, or hard drives).

147. Quill, 504 U.S. at 315 n.8 (emphasis added).
[the software program]. That intangible right is indistinguishable from the protections offered under trademark, trade name, copyright and patent laws . . . . Any right that Quill has under the software agreement has no connection with North Dakota.\footnote{148}

Interestingly, the Court did not repudiate the possibility that intangible property located in a state might meet the physical presence test,\footnote{149} but rather noted that the test was not met "in this case."\footnote{150} In all likelihood, the Court did not address the issue of whether the use of intangible property can create a sufficient nexus because of the evidence in Quill itself: "Quill sold or gave [the software program] to six customers in North Dakota, only one of whom has ever used it to order merchandise from Quill."\footnote{151} The use of one diskette by one customer is rather weak grounds for extending the definition of nexus to include intangible property, especially for such a minor legal issue. Though whether intellectual property can constitute physical presence in a state has yet to be decided by the United States Supreme Court,\footnote{152} at least one lower court has found that intellectual property can create sufficient nexus for sales and use tax purposes.\footnote{153}

The second issue created by footnote eight is the statement by the Court that the diskettes might create some "minimal nexus" in conjunction with the Court's "express['] reject[ion of] a 'slightest presence' standard of constitutional nexus."\footnote{154} Prior to Quill, the Court decided \textit{National Geographic}, which upheld California's ability to require an out-of-

\footnotetext{149}{"A remote seller's interest in an intangible (software) can supply a sufficient relationship to support a finding of nexus for the imposition of a sales tax or a use tax collection duty." Paul M. Mines, \textit{Conversing with Professor Hellerstein: Electronic Commerce and Nexus Propel Sales and Use Tax Reform}, 52 Tax L. Rev. 581, 607 (1997).}
\footnotetext{150}{\textit{Quill}, 504 U.S. at 315 n.8.}
\footnotetext{151}{Reply Brief for Respondent, \textit{supra} note 148, at 15.}
\footnotetext{152}{\textit{Contra Quill}, 504 U.S. at 331 n.3 (White, J., concurring in part and dissenting in part) ("Instead of remanding for consideration of whether Quill's ownership of software constitutes sufficient physical presence under its new Commerce Clause nexus requirement, the majority concludes as a matter of law that it does not.").}
\footnotetext{153}{See Kmart Props., Inc. v. Taxation and Revenue Dep't., No. 21,140 (N.M. Ct. App., Nov. 27, 2001) ("Being intangible property, a trademark can only have 'physical presence,' beyond the state of its creation, in those locales where it is put to tangible use."); see also Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13, 17-18 (S.C. 1993). When Kmart Corporation uses Kmart Properties Incorporated's marks in a highly visible and commercially purposeful fashion in New Mexico, it logically follows that those marks are physically present during their period of use, otherwise, trademarks could never be physically present anywhere other than where the taxpayer designates for its own tax purposes. See Geoffrey, 437 S.E.2d at 17-18 (rejecting a similarly restrictive argument regarding the use of intangible trademarks in taxing state). The Constitution does not impose such a taxpayer-driven restriction on New Mexico's taxing policy. See Sonic Indus. v. State, 11 P.3d 1219, 1223 (N.M. Ct. App. 2000).}
\footnotetext{154}{\textit{Quill}, 504 U.S. at 315 n.8.}
state company to collect the California Use Tax based on the physical presence of two National Geographic offices in California.\(^{155}\) Although the Court ruled in California's favor in *National Geographic*, it rejected California's legal characterization of the use tax collection nexus test (i.e., the "slightest presence" test).\(^{156}\) While both the United States Supreme Court and the California Supreme Court discussed the slightest presence test in dicta, neither court defined the phrase in their opinions in *National Geographic*.\(^{157}\)

In footnote eight the Court was attempting, imprecisely, to apply the well known maxim *de minimis non curat lex* (i.e., the law does not deal with trifles).\(^{158}\) After all, one diskette owned by a North Dakota resident used only once to order goods from Quill, in the context of an

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156. *Id.*
158. "The function of the maxim is . . . as an interpretive tool to inject reason into technical rules of law and to round-off the sharp corners of our legal structure." Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV 537, 543 (1947). Another application of the *de minimis* maxim is in the area of inadvertence. The Multistate Tax Commission has noted the following:

The presence is inadvertent when it does not represent a conscious choice of the out-of-state business to submit to the jurisdiction of the taxing State. A conscious choice to submit to the jurisdiction of the taxing State exists when the presence arises from a regular and systematic business practice, the pursuit of an established company policy on a continuing basis, an affirmative decision of management, or a step taken to assist in the establishment and maintenance of a market in the taxing State with respect to the sale for which the imposition of a use tax collection obligation may be imposed . . . .

Example 3: Corporation A is an out-of-state business with respect to State 1. Corporation has a presence in State 1 derived solely from the fact that a customer in violation of its affirmative covenants to the business moved the property sold by installment and which the business has a perfected security interest from an authorized locality in another State to State 1. The presence of Corporation A in State 1 is *de minimis*. The presence is inadvertent, because it did not arise from Corporation A’s conscious submission to the jurisdiction of State 1.

Example 4: Corporation A is an out-of-state business with respect to State 1. Corporation A’s business is the rental of scaffolding for use at construction projects. Corporation A’s business is generally limited to contractors who operate in the same State as Corporation A. Corporation A has a presence in another State, State 1, derived solely from the fact that one of its customer's [sic] has rented scaffolding that it has taken to a construction project in State 1. Corporation A’s rental agreement with this customer gives no indication, and the personnel of Corporation A have no understanding, that the scaffolding was to be used in State 1. Corporation A has no reason to know that any of its scaffolding has ever been used before in State 1 or that it was going to be used in State 1 in this instance. The presence of Corporation A in State 1 is *de minimis*. The presence is inadvertent, because it did not arise from Corporation A’s conscious submission to the jurisdiction of State 1.

*Constitutional Nexus*, *supra* note 46, at 13–14. Though these draft guidelines were never promulgated, they express many years of thought by their primary drafter, Paul Mines, General Counsel to the Multistate Tax Commission.
insignificant legal sideline issue, is not the stuff of which jurisprudence should be made.

C. Inconsistent Application of the Bright-Line Test

Lizzie, Lizzie, have you tasted
For my sake the fruit forbidden?
Must your light like mine be hidden,
Your young life like mine be wasted,
Undone in mine undoing
And ruined in my ruin,
Thirsty, cankered, goblin-ridden?159

Courts interpreting Quill have struggled to divine what satisfaction of the Commerce Clause requires from a number of Supreme Court and appellate court interpretations, particularly laboring on the meaning of the bright-line physical presence test.160 This is exactly the opposite of what the Quill Court intended, as the Court thought it was offering a clear rule.161 It did no such thing. Instead, constitutional jurisprudence in this area remains a "quagmire."162

In Brown’s Furniture, for example, an out-of-state company made 942 in-state deliveries over ten months.163 The court found that the defendant’s actions had "traveled well beyond the ‘safe harbor [created] for vendors whose only connection with customers in the [taxing] State is by common carrier or the United States mail.”164 “Through its deliveries, Brown’s Furniture [was] physically present in Illinois on an almost continuous basis.”165 However, when faced with this situation, is a court not asking itself, in the face of any other clear direction, whether it would be fair to tax the defendant?166

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159. Rossetti, supra note 1, at 294–95.
160. See Quill, 504 U.S. at 331 (White, J., concurring in part and dissenting in part) (“[I]t is a sure bet that the vagaries of ‘physical presence’ will be tested to their fullest in our courts.”).
161. See id. at 315 (“Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes.”).
162. Id. (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959)).
164. Id.
165. Id. (internal citations omitted).
166. The Brown’s Furniture court spends some time examining the number of contacts, describing them as 942 total visits “averaging between 15 and 18 trips into Illinois per month, or a minimum of about one every other day.” Id. The court then quoted Justice White’s statement in Quill that “[r]easonable minds surely can... differ over what showing is required to make out a ‘physical presence’ adequate to justify imposing responsibilities for use tax collection.” Id. (quoting Quill, 504 U.S. at 330–31 (White, J. concurring in part and dissenting in part)) (alterations in original). Unfortunately, the Brown’s Furniture court took the quote out of context. In context, Justice White was explaining that the “few floppy disks” Quill had in North Dakota might satisfy the physical presence test. This Illinois court used an out-of-context quote to reject the bright-line test because,
Because fairness is at the heart of the Due Process Clause, not the Commerce Clause, the courts should employ the bright-line nexus test created by Quill: they should examine physical presence in the state before sales and use tax jurisdiction attaches. The use of the Quill-mandated bright-line test would have several effects. First, it would make sales and use tax nexus jurisprudence theoretically consistent by shifting fairness considerations back into the due process arena. Second, it would restore the clear holding of Quill. Third, it would provide the lower courts with certainty in the area of sales and use tax collection.

Because physical presence is no longer the sine qua non of a Due Process Clause inquiry as it was during the Pennoyer era, the modern minimum contacts test is easily met. Thus, courts tend to pay only lip service to due process, yet wind up engaging in fairness calculations in their Commerce Clause analysis. Courts should begin their constitutional inquiry with the Commerce Clause, and then proceed to the Due Process Clause. By discussing the Commerce Clause first, the mistake made by some courts confusing Commerce Clause concerns with Due Process Clause concerns can be avoided.

Cases with fact patterns close to the bright-line have caused lower courts the most difficulty in applying Quill. The Florida, Arizona, and Kansas cases below illustrate three different ways that courts have avoided the physical presence bright-line test, while the New York case implicitly, it wanted to weigh all the factors before finding that there was "physical presence" in Illinois. Because trucks are physical and they can enter a state, it is logical to argue that the truck was physically present in the state it entered.

167. Congress has plenary authority to enact legislation regulating interstate commerce, but if that legislation does not comport with notions of fundamental fairness the Court can invalidate congressional legislation on Due Process Clause grounds. Quill, 504 U.S. at 305; Paul J. Hartman & Charles A. Trost, Federal Limitations on State and Local Taxation § 2:1 (1981). For example, Congress could pass legislation allowing states to require every seller of tangible personal property in interstate commerce to collect the destination state's sales tax, and that the collected tax must be remitted, in-person by the owner of the company, on an hourly basis. While this legislation would be valid under the Commerce Clause, it would certainly run afoul of the Due Process Clause.

168. Adam Smith, the 18th century Scottish philosopher who many consider the father of capitalism, explained that every good tax must have four characteristics, one of which is certainty. Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 778 (Edwin Cannan ed., 1965) (1776). The bright-line test provides this desired certainty when applied to out-of-state entities with any physical presence in the state.

169. See Quill, 504 U.S. at 315 (bright-line test "reduces litigation").

170. See Pennoyer v. Neff, 95 U.S. 714 (1877). Decided shortly after the ratification of the Fourteenth Amendment, Pennoyer stood for the proposition that the Due Process Clause required physical presence in a state before a state court could exercise in-personam jurisdiction over a non-domiciliary. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The physical presence era ended when the Court decided International Shoe in 1945. See id. (substituting "minimum contacts" for "physical presence").
below is an example of a court applying Quill's simple test as it was meant to be applied.

1. Share International

In Share, the Florida Supreme Court misinterpreted Quill by creating two Commerce Clause nexus tests. Share involved a Texas-based corporation that entered Florida for three days each year to sell and display chiropractic merchandise at a chiropractic convention. The court adopted the Florida District Court of Appeals' reasoning that Quill created two tests under the Commerce Clause. The lower court first held that the bright-line test must be met, which Share met through its physical presence in Florida. Second, the court found that a facts-and-circumstances test must be met to establish "substantial nexus." Applying this third and otherwise unknown nexus test, the court found that Share did not have nexus because three days in a state is not enough to create "substantial nexus."

Baffling is the word that comes to mind after reading Share because it turns Quill on its head. Quill considered adopting a facts-and-circumstances test, but expressly rejected that approach for the simplicity of a bright-line test. One could dismiss Share as aberrational, but such a characterization would be unfounded given the number of jurists who have examined the case. A more plausible answer lies in the sub-text of the case: the state revenue department required an out-of-state company to pay $77,933 in taxes for all of its sales into Florida during a three-day visit to a convention in Miami Beach.

At first blush it might not seem fair to subject an out-of-state company to the state's tax jurisdiction for a three-day visit. However, if the Share court was concerned with fairness, it should have addressed those concerns under the familiar Due Process Clause rubric by applying the minimum contacts test and determining whether, under all of the circumstances, Florida violated "traditional notions of fair play and substantial

171. See Dep't of Revenue v. Share Int'l, Inc., 676 So. 2d 1362 (Fla. 1996), aff'd 667 So. 2d 226 (Fla. Dist. Ct. App. 1995). The Florida Supreme Court adopted the District Court of Appeals' opinion as its own. See id. at 1362.
172. Id. at 1363.
173. Id. at 1362-63.
174. Share, 667 So. 2d at 230.
175. Id.
176. Id.
178. In all likelihood, by the time this litigation began, it was impracticable for Share to pass along this tax to its customers given statute of limitation constraints.
179. Share, 676 So. 2d at 1363.
justice” in the application of its use tax in this case. After all, if a company purposefully avails itself of a market, it should not complain of the state’s tax jurisdiction.

The Share court could have written an opinion consistent with Quill by doing the following: First, the court should have looked at the Commerce Clause and held, as it did, that Share had crossed the bright-line test established by Quill. Second, the court should then have discussed the Due Process Clause and fleshed out any fairness concerns over Florida’s application of its regulatory tax scheme. The court would have noted that Share had “nexus aplenty” in Florida through the following activities: mailing flyers into the state, mailing catalogs into the state, selling thousands of dollars worth of equipment to Florida chiropractors, and yes, attending a trade show for three days each year. From a due process standpoint, Share had nothing to complain about as its activities were directed to Florida chiropractors. If Share had wanted to avoid Florida’s tax jurisdiction, it merely had to avoid ever entering the state and thereby never cross the bright-line. If the Florida court had looked at the case in reverse by evaluating the Commerce Clause first and the Due Process Clause second, it should have come to the conclusion mandated by Quill. Under International Shoe and its progeny, it would have been fair to impose Florida’s tax jurisdiction on Share.

2. Care Computer

In Care Computer, the Arizona courts misinterpreted Quill by ignoring the bright-line physical presence test and using Quill’s rejected facts-and-circumstances test instead. Care Computer, located in Washington State, provided software and hardware to nursing homes located in Arizona. Most of its transactions were by mail and telephone, but some of its activities occurred in Arizona. These in-state activities included the following: a lease for a general ledger program, a lease for

180. See Quill, 504 U.S. at 307.
181. Id. at 308 (company that mails goods into a state “clearly has ‘fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign.’”).
183. Share, 676 So. 2d at 1363.
184. In addition, this tax met the other three requirements that all state taxes must meet: the tax was fairly apportioned since only Florida was asserting the right to tax Share; the tax did not discriminate against interstate commerce since in-state sellers were treated identically to Share; and the tax was fairly related to the service provide by the state as demonstrated by Florida’s roads, police services, and functioning court system. See generally Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977).
186. Id.
187. Id.
three programs with a computer, a salesman entering the state for one- to two-day trips each year, and software training personnel entering Arizona for approximately twenty-one days each year.188 Based on these facts, the Arizona State Board of Tax Appeals held that Care Computer did not have enough nexus with Arizona to bring Care Computer into Arizona’s tax jurisdiction.189 The Board reasoned that “a business must have more than just a large number of sales and occasional visits of personnel.”190 Counting the number of visits is a clear indication that the Board was employing a facts-and-circumstances test over the bright-line physical presence test.

The Arizona Court of Appeals overturned the Board’s decision, but did so using Due Process Clause language in place of Commerce Clause language.191 The court explained that the “focus [is] on whether the activities performed on Care’s behalf in Arizona were ‘significantly associated with the taxpayer’s ability to establish and maintain a market in this state for sales.’”192 The court got to the right result, but used the wrong reasoning;193 the bright-line was all that was needed.

3. Intercard

The Kansas Supreme Court also misinterpreted Quill when it applied a facts-and-circumstances test, counting the number of in-state visits; it did not apply Quill’s straight-forward bright-line test.194 Intercard was a Missouri-based business that sold electronic card reading systems to Kinko’s stores in Kansas.195 Intercard’s technicians entered Kansas eleven times during the three-year audit period to install the machines.196 The Kansas Supreme Court summarized the case law properly by stating:

[T]he Commerce Clause requires a taxing state to have substantial nexus with an out-of-state business to impose use tax collection and remittance duties. Substantial nexus requires a finding of physical presence in the taxing state. The continuous physical presence of of-

188. Id. at 471–72.
190. Id.
191. Care Computer Sys., Inc., 4 P.3d at 471 (examining number of contacts to determine if there was substantial nexus).
192. Id. (quoting Tyler Pipe Indus. v. Wash. State Dep’t of Revenue, 483 U.S. 232, 250 (1987)).
193. As cases move to either extreme of the bright-line, courts tend to use less precise language because the nexus has become clear enough to do so. Cases closer to the line require more thoughtful analysis.
195. Id. at 1113.
196. Id.
fices and employees in a taxing state is sufficient to impose a use tax collection duty even though the in-state presence is unrelated to the transaction being taxed. Mail-order sales without more are a ‘safe harbor’ for out-of-state vendors . . . . The physical presence requirement may turn on the presence in the taxing state of a small sales force, plant, or office.197

But then in the next sentence, the Intercard court imports due process language into the Quill Commerce Clause test: “The question is whether Intercard’s installation activities in the state of Kansas constitute a physical presence sufficient to establish a substantial nexus with the state.”198 The word “sufficient” changes the bright-line test into a facts-and-circumstances test. The court then proceeds to hold that eleven visits by technicians is not enough to establish a substantial nexus in Kansas.199

Intercard is likely to plague the Kansas courts for years as companies struggle to determine whether they have a nexus in the state.200 Clearly eleven visits is not enough to create sales and use tax nexus in Kansas.201 What about twenty visits? Maybe fifteen is enough? Or how about twelve? “[A bright-line] rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes.”202 Intercard does not advance Quill’s goal of reduced litigation, moving instead in the opposite direction towards years of increased litigation in Kansas.

If the Intercard court had instead reversed its inquiry, it may have come to a different conclusion. First, the court should have addressed the Commerce Clause nexus test and determined that Intercard was indeed physically present in the state. Intercard never denied sending its employees into Kansas. Second, the court should have examined whether it would nonetheless have been fair for Kansas to impose its sales and use tax jurisdiction on this Missouri-based company. The fairness inquiry

197. Id.
198. Id. (citations omitted).
199. Id. at 1122–23.
200. The Kansas Supreme Court has already begun to distinguish Intercard by describing it as a case where the taxpayer’s “only presence in Kansas [was] related to post-sale service . . . .” In re Family of Eagles, Ltd., 66 P.3d 858, 865 (Kan. 2003). Why post-sale contacts would be less significant than pre-sale contacts is unclear. For example, many consumers purchasing expensive personal computers through a mail-order catalog might be hesitant to purchase the equipment without an on-site warranty contract. Is the Kansas court really saying that post-sale contacts to install or repair tangible personal property are less significant than pre-sale activities, especially when the post-sale contacts were contemplated at the time of purchase? In any event, a pre-sale versus post-sale discussion requires a facts-and-circumstances inquiry expressly rejected by Quill when it established the bright-line test, and attempts to move Negative Commerce Clause jurisprudence back one hundred years to a time when such formal inquiries were meaningful.
201. Intercard, 14 P.3d at 1122–23.
would have looked at Intercard’s contacts with Kansas: delivery of card reading machines through a common carrier; eleven employee visits into Kansas to install the card reading machines; and 158 sales into Kansas totaling $164,967. It certainly would be fair to subject a company with this many purposeful contacts to Kansas’ sales and use taxes.

The main problem in Intercard occurred when the court separated the eleven visits from the other contacts, applying a fairness analysis only to the eleven visits. However, even under the Due Process Clause, eleven visits should have been sufficient because the Supreme Court has made clear the following:

[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of “traditional notions of fair play and substantial justice.” That standard was developed by analogy to “physical presence,” and it would be perverse to say it could now be turned against that touchstone of jurisdiction.

Counting the number of contacts with a state only blurs the bright-line established by Quill and can only lead to years of litigation over how many contacts are required before an out-of-state business is required to collect the use tax.


204. At oral argument, a justice on the Kansas Supreme Court asked the Department of Revenue why they did not assess Kinko’s stores, the consumer of the tangible personal property. The Department of Revenue conceded that they had missed the statute of limitations for assessing Kinko’s stores, but could still assess Intercard since the non-filer statute of limitations was longer. The justice commented that the state was after “the pot of gold.” Telephone Interview with Shirley Sicilian, former General Counsel, Kansas Department of Revenue (Jan. 9, 2004). But this justice merely had to look at the Kansas statute to realize that the legislature authorized the Department of Revenue to issue an assessment either against the retailer or the consumer—this decision was left to the discretion of the Department of Revenue. Nevertheless, if the Intercard court thought that there was a fairness problem, it should have addressed it as a fairness problem, not as a Commerce Clause problem.

205. Burnham v. Superior Court, 495 U.S. 604, 619 (1990). Burnham, a New Jersey resident, was served with process by a California court while visiting his children in California over a single weekend. He maintained that the California court did not have personal jurisdiction over him because he did not have “minimum contacts” with California, apparently disregarding the fact that physical presence remains the foundation and hallmark of a court’s ability to establish personal jurisdiction. The sole basis for jurisdiction over the defendant was the defendant’s physical presence in California.
4. Orvis

A completely different line of thought stems from Orvis, a New York case.\(^{206}\) *Orvis* stands for the proposition that "the physical presence requirement within the substantial nexus prong of the *Complete Auto* test . . . need not be substantial."\(^{207}\) In other words, the amount of visits is irrelevant since the test is only of physical presence.

Orvis was a Vermont-based company that sold its products almost exclusively through mail-order catalogs, though it did sell some merchandise to wholesalers in New York.\(^{208}\) Sales to New York customers ranged from $1 million to $1.5 million during the audit period, with approximately fifteen percent of the sales consisting of wholesale purchases by approximately nineteen wholesale customers.\(^{209}\) Orvis' testimony at trial "suggest[ed] systematic visitation to all of its as many as 19 wholesale customers on the average of four times a year."\(^{210}\)

While Orvis conceded that it had physical presence in New York, it contended that the *Quill* standard was "substantial physical presence" (i.e., a facts-and-circumstances test).\(^{211}\) The New York Court of Appeals opined that

[A]cceptance of the thesis urged by [the taxpayers]—that *Quill* made the substantial nexus prong . . . an in-State substantial physical presence requirement—would destroy the bright-line rule . . . . Inevitably, a *substantial* physical presence test would require a "case-by-case evaluation of the actual burden imposed" on the individual vendor involving a weighing of factors such as number of local visits, size of local sales offices, intensity of direct solicitations, etc., rather than the clear-cut line of demarcation the Supreme Court sought to keep intact.\(^{212}\)

By separating the Commerce and Due Process Clauses, the *Orvis* court kept apples and oranges separate and, as such, was able to apply the physical presence test as articulated in *Quill*. The court did not even feel the need to discuss the Due Process Clause, except in passing, because of Orvis' sales of $1 million directed to New York customers. *Orvis* will help reduce litigation in New York because tax professionals un-


\(^{207}\) *Orvis*, 654 N.E. 2d at 960–61.

\(^{208}\) Id. at 955.

\(^{209}\) Id. at 961.

\(^{210}\) Id. at 962.

\(^{211}\) Id. at 959.

\(^{212}\) Id. at 960 (citations omitted) (emphasis in original).
derstand that their clients "dare not dip their toes within New York's borders without incurring New York taxes."\textsuperscript{213}

III. BRIDGING THE \textit{QUILL} CHASM

There are four remaining issues that need to be addressed before the \textit{Quill} chasm can be fully bridged, bringing us to a complete understanding of this seminal state tax case. First, because \textit{Quill} employed a physical presence test, this Part will review some cases decided when physical presence was the test for Due Process Clause nexus cases. Second, the issue of how long a nexus lasts once it is established is discussed. Third, a model statute that states can enact to reduce the compliance costs on very small out-of-state businesses is provided. Fourth, a hard look is taken at the ethics of the tax profession and asks how \textit{Quill}, a case that purported to provide clarity, could cause so much confusion.

\textit{A. Physical Presence Before International Shoe}

The physical presence test is not a new test, and was, up until 1945, used exclusively by courts in the United States to determine personal jurisdiction over out-of-state businesses.\textsuperscript{214} Examining these older cases allows us to consider how courts employed the physical presence test, and apply those cases to the post-\textit{Quill} world.

Let us step back for a moment and ask ourselves what it really means for a corporation to be physically present in a jurisdiction. After all, corporations are legal fictions that really do not exist anywhere except on a piece of paper, which is often in a drawer in Delaware. Judge Learned Hand understood this issue, sixty years before \textit{Quill}, when he wrote the following:

\begin{quote}
It scarcely advances the argument to say that a corporation must be "present" in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question to be answered. Indeed, it is doubtful whether it helps much in any event. It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purposes. The shareholders, officers and agents are not individually the corporation, and do not carry it with them in all their legal transactions. It is only when engaged upon its affairs that they can be said to represent it, and we can see no qualitative distinction between one part of its doings and another, so they carry out the common plan. If we are to attribute
\end{quote}

\textsuperscript{213} Id. at 181 (Bellacosa, J., dissenting).

\textsuperscript{214} Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
locality to it at all, it must be equally present wherever any part of its work goes on, as much in the little as in the great. 215

The presence of an individual is fairly simple to determine (barring an existential inquiry far beyond the scope of this Article); a person lives in New York and vacations in Florida, with a global positioning system being able to track his exact location anywhere along I-95 as he travels back and forth. Even an anomalous situation such as the "four corners" area of the United States, where it is possible to be in Arizona, Colorado, New Mexico and Utah simultaneously, presents little in the way of intellectual complexity when trying to determine where an individual is present. 216 Anglo-American jurisprudence has been dealing with jurisdiction based on physical presence for centuries, 217 with the earliest reported case on the subject predating England's first colony in America—Sir Walter Raleigh's lost colony and its famous baby Virginia Dare 218—by over one hundred years. 219

Corporations, however, are much harder to locate than are people. Justice Frankfurter noted that "[w]hen the litigants are natural persons the conceptions underlying venue present relatively few problems in application. But in the case of corporate litigants these procedural problems are enmeshed in the wider intricacies touching the status of a corporation in our law." 220 These "intricacies" have resulted in a long, somewhat tortured development of the law, and though they occasionally result in different outcomes, they have all been grounded in the notion "that the foundation of jurisdiction is physical power." 221

Initially, corporations were considered present only in the jurisdiction of their creation. This doctrine resulted from developments under which laws governing private corporations were based on the existing

216. For example, X is a tourist standing in all four states simultaneously. His archenemy Y takes this moment to shoot him because he wants to be the first person to shoot someone in four states simultaneously. X survives the shooting and sues Y. Where? He could sue in the state where he was present when the shooting occurred, which here means he can sue in Arizona, Colorado, New Mexico, or Utah.
217. See Burnham v. Superior Court, 495 U.S. 604, 608-09 (1990) (upholding use of the physical presence test when someone was temporarily in California).
218. In 1587, the English established their first settlement in the New World on Roanoke Island, North Carolina. During that first year, Virginia Dare became the first person born to English parents in America, though what became of her has become a mystery. When English ships returned to the colony in 1590, the colony was missing. There is much speculation as to whether they may have been massacred by the Indians or by the Spanish, against whom the English were at war during that time.
219. Burnham, 495 U.S. at 608 (citing Bowser v. Collins, 145 Eng. Rep. 97 (Ex. Ch. 1482) (the first reported case holding that a court judgment is void when there is lack of jurisdiction)).
221. McDonald v. Mabee, 243 U.S. 90, 91 (1917).
law of municipal corporations. This situation soon proved impracticable and unjust. The industrial revolution led to the development of the large, multistate corporation operating in several jurisdictions. When unable to attach property for an *in rem* suit, the injured were left without recourse for acts committed outside a corporation’s state of incorporation. It became clear that the old laws were obsolete.

The courts set out to remedy this problem, first through the consent theory of jurisdiction where corporations doing business within a state were required by law to consent to the state’s jurisdiction over them. Because states were legally able to exclude corporations from their state altogether, they could place conditions on corporations’ admission to the state, including advance consent to state court jurisdiction. Often such consent required corporations to designate an officer upon whom service of process could be made for the corporation. Sometimes, however, consent was deemed implied by virtue of the corporation’s operation within the state. In such instances, a state official was served with process in place of an agent of the corporation.

In the midst of the development of consent theory, a second basis for jurisdiction was developing, namely presence of the corporation. This basis of jurisdiction was developed by the courts believing consent would not always hold. States could not legally prevent corporations engaged in interstate commerce from entering their borders, and so there would not always be a formal admission resulting in implied consent. Thus, a basis for jurisdiction based on corporate location was needed. As discussed above, corporate presence was often a difficult concept to articulate, other than with an “I know it when I see it” kind of response. Corporate presence came to be defined by actions taken on the corporation’s behalf. Eventually, such actions came to be known as “doing business” in a state or, in other words, “doing business within the state in

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223. “An action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property.” *Black’s Law Dictionary* 32 (8th ed. 2004) (defining “action in rem”).


225. Cahill, supra note 222, at 678.

226. *Id.* at 689.


228. Haffer, supra note 224, at 640.

229. Justice Potter Stewart made this phrase famous in an obscenity case that was before the Court. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
such manner and to such extent as to warrant the inference that it is present there."

It is no surprise that decisions regarding what constitutes "doing business" have always been very fact specific, but nevertheless several key principles have arisen from these physical presence Due Process Clause cases—principles that can be imported into the Negative Commerce Clause physical presence test mandated by Quill. When determining whether a corporation has a physical presence in a state, most inquiries focus on a few key areas: the use of representatives, the parent corporation's use of subsidiaries, and the corporation's overall course of business within the state.

Having representatives in the state is one of the more common means by which a corporation has been found to be doing business. The Sixth Circuit held that a corporation's employment of a mechanic who routinely adjusted and maintained machines it had manufactured was a sufficient contact, and held that the corporation was doing business in Ohio. However, the maintenance was not performed as part of the sales contract; it was performed whether or not the machinery had been purchased directly from the corporation, and continued for an indefinite period of time. Another typical example comes from the Third Circuit, where a corporation was held to have presence through its representatives when it employed local agents to purchase wood pulp that was then shipped free on board to the out-of-state manufacturing plant.

Under general corporate law, corporations are treated as distinct legal entities; however, in the area of jurisdiction, courts examine more closely the relationship between a parent corporation and its subsidiaries to determine whether one or the other is doing business in a state. A railroad company was found to be doing business in New York by virtue

231. Cahill, supra note 222, at 695–96 ("A corporation may be said to be present in a state when any member of the corporate group is within the state's territorial limits on authorized business.").
232. A representative is nothing more than "[o]ne who stands for or acts on behalf of another." BLACK'S LAW DICTIONARY 1328 (8th ed. 2004).
234. Id. at 595.
235. "Free on board" is a mercantile-contract term allocating the rights and duties of the buyer and the seller of goods with respect to delivery, payment, and risk of loss, whereby the seller must clear the goods for export, and the buyer must arrange for transportation. BLACK'S LAW DICTIONARY 671 (8th ed. 2004).
237. JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS §7.01 (2d ed. 2003) ("Recognition of a corporate personality generally is considered to be the most distinct attribute of the corporation.").
of the strong ties it maintained with its parent. The parent owned all of the funded debt, mortgages, obligations, and assets of the subsidiary, and the two appeared to jointly operate the rail line from a common office located in New York City. The United States Supreme Court further explained that the two companies shared common officers and agents, and that the annual report referred to the subsidiary as part of the parent.

In another parent-subsidiary case, a West Virginia bus line was held to be doing business in Virginia due to the activities of a subsidiary. Although the bus lines were separate legal entities, each operating in its respective state, their relationship was very informal. There were no written contracts between the two, and the two corporations had a common directorate and office.

In at least one instance, however, the Supreme Court respected the corporate form when a parent and wholly-owned subsidiary had properly and vigorously maintained separate operations. The corporations maintained separate books, and all their transactions were conducted as if the two were completely separate. In reaching its decision, the Court noted that although the separation may have been "merely formal," it was "real" and "not pure fiction."

In some instances, the Supreme Court has focused not on a particular circumstance, but rather on the totality of a corporation's contacts with a state to determine whether it is doing business there. In *International Harvester Co. of America v. Commonwealth of Kentucky*, the Court held that a corporation was doing business in Kentucky by virtue of its course of business in the state, including the solicitation of orders and collection of payments. The court said these were not sporadic activities, but rather were regular and systematic activities in Kentucky, even though the corporation had attempted to withdraw itself.

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239. *Id.*
240. *Id.* at 224.
241. *Id.* at 225.
243. *Id.* at 167.
244. *Id.*
247. *Id.* at 337.
249. *Int'l Harvester Co.*, 234 U.S. at 585.
from Kentucky by removing all offices, revoking the resident agent’s authority to accept orders, and shipping all products free on board from a carrier outside the State.\textsuperscript{250}

The Court has also ignored form-over-substance arguments concerning contractual formalities to hold that contractual niceties will not trump business realities. In 1905, the Court ruled that a business with no offices or permanent agents in New York was nonetheless present in New York, even though the company was incorporated in Pennsylvania, had its office in Pennsylvania, and made out and executed all of its contracts in Pennsylvania.\textsuperscript{251} This company was in the business of insuring property in several states and argued that because all of its contracts were made in Pennsylvania, it was only doing business in Pennsylvania.\textsuperscript{252} A skeptical Court opined

\textit{[I]f not doing business in such case, what is it doing? It is doing the very act provided for in its contract, at the very place where, in case a loss occurred, the company contemplated the act should be done; and it does it in furtherance of the contract, and in order to carry out its provisions, and it could not properly be carried out without this act being done; and the contract itself is the very kind of contract which constituted the legal business of the company, and for the purpose of doing which it was incorporated . . . . We think it would be somewhat difficult for the defendant to describe what it was doing in New York, if it was not doing business therein, when sending its agents into the state to perform the various acts of adjustment provided for by its contracts, and made necessary to carry them out.}\textsuperscript{253}

These Due Process Clause cases exemplify some of the activities that were found to create physical presence. While an exhaustive survey of the Pennoyer era cases is beyond the scope of this Article, it is clear that the tendency in this era was for courts to interpret physical presence descriptively; the contacts with the forum would create jurisdiction.\textsuperscript{254} Judge Learned Hand avoided the substantive metaphysical interpretation by explaining that \textit{"[w]hen we say, therefore, that a corporation may be sued only where it is ‘present,’ we understand that the word is used, not literally, but as shorthand for something else."}\textsuperscript{255}

\textsuperscript{250} See id. at 584.
\textsuperscript{252} Id.
\textsuperscript{253} Id. at 415.
\textsuperscript{254} See, e.g., Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930).
\textsuperscript{255} Id.
With the *International Shoe* decision in 1945, the courts were free to find jurisdiction under a different rubric than physical presence. If *International Shoe* had not been decided, the courts undoubtedly would have kept adding to the list of activities that created jurisdiction under the physical presence test, if for no other reason than to keep the law current with modern commercial life. In other words, the *Pennoyer* era cases should not be seen as the sole means of creating physical presence jurisdiction, just as the nexus activities identified in *Quill* should not be viewed as exhaustive. The Due Process Clause case law evolution demonstrates that this was a continually evolving area of the law that was cut short by the more appropriate Due Process Clause minimum contacts test. Likewise, the Commerce Clause physical presence test established by *Quill* should be viewed as one that will gradually grow over time. When the *Quill* Court rejected a pure economic nexus standard, it was rejecting a hurried approach to expanding nexus in favor of the more traditional common law development to nexus.

**B. Duration of Nexus**

*Days, weeks, months, years . . .* 256

*Quill* resolved the question of when an out-of-state business has to begin collecting the use tax, yet it left unanswered an equally important question: When can the company stop collecting the tax? *Quill* established the rule that once a business has a physical presence in a state, it must start collecting the use tax. 257 For example, if a traveling salesman sells goods in a state for a few weeks, that salesman has subjected his company to a use tax collection. But when that salesman leaves, should the company be able to argue that it no longer has nexus, even though it continues to make sales into the state through its website? The answer is yes, and that collection requirement should last at least for one year after the last physical contact with the state as explained below.

The duration of a sales and use tax collection obligation is a fairness inquiry that essentially asks the following: “Now that you have established nexus in a state, how long should you remain under that state’s regulatory tax authority?” While this issue has not been addressed explicitly by the lower courts, it has been dealt with implicitly. Could it be that cases like *Intercard* and *Share* were actually disguised duration of nexus cases?

How long does nexus last? Does it end the day of the last contact, or can it last forever? Logically, terminating nexus the day after the

257. See *supra* Part II.B.
physical contact ends does not seem right. For example, imagine a company located in State Y with a showroom in State Z that ships all of its items by common carrier to its State Z customers. The showroom is the only nexus creating activity in State Z. On Monday the company closes the showroom and it no longer has any physical presence in State Z. On Tuesday the company receives an Internet order and ships an item from its warehouse in State Y to a customer in State Z. Is this company required to collect and remit the tax to the state?

There is little guidance in this area, and states’ responses vary widely. Three states have publicized twelve months as the duration of nexus for sales and use tax collection purposes, the State of Washington has a five year duration of nexus regulation, two states have ruled that nexus ends on the day that physical presence ends, and in Indiana, nexus apparently lasts forever. Regardless of duration-of-nexus, companies registered to collect a state’s sales and use tax are required by that state to continue collecting the taxes until the company notifies the state that it intends to stop filing. Should a company fail to follow a state’s administrative procedures and deregister with the state taxing authority, it may be subject to an assessment for failure to collect the tax even when nexus ceases.

261. IND. CODE §§ 6-2.5-3-1, 5.3-2, 5.3-6 to 5.3-8 (2006). Indiana may be taking a proximate cause approach to duration of nexus where each transaction is examined to see if it can be tied to some past physical presence in the state.
263. The Virginia Department of Taxation ruled that an out-of-state manufacturer was required to collect the use tax even though it no longer had nexus with Virginia. Specifically, the Department pointed to the fact that the company was still registered to collect the tax, changing its status from a company required to collect the tax to a company volunteering to collect the tax. "[T]he taxpayer, by voluntarily registering, consented to the sales tax jurisdiction of the state and despite filing zero returns, the taxpayer was a dealer for purposes of the sales tax." § 58.1-1821 Application: Retail Sales and Use Tax, No. 95-250, 1995 WL 624420, at *1 (Va. Dep’t of Taxation). From a policy
A related problem in this area is the reestablishment of nexus within a certain period of time. For example, a company establishes nexus in State G on January 1st by sending an employee into the state to conduct market enhancement activities. This employee departs on January 31st. The company then reestablishes nexus by sending a second employee into State G on December 1st for a two week sales solicitation visit. Did nexus cease from February 1st to November 30th?

Courts have implicitly accepted that nexus is not determined on a day-to-day basis. In 1944, the Supreme Court examined Iowa’s use tax in a case involving a company that “from time to time . . . sent traveling salesmen from Minnesota into Iowa, none of whom lived in Iowa or had headquarters in Iowa.” During the four year audit period, this Minnesota company did not maintain a permanent physical presence in Iowa, but rather would come in and out based on its business needs. In affirming Iowa’s use tax, the Court explained that

The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device.

The Court tacitly accepted that nexus was created during the entire audit period and not merely on the days in which the company had its employees in Iowa.

Another approach to duration of nexus is one that merges a fixed period nexus requirement with a “proximate cause” analysis. The Multistate Tax Commission noted in a proposed guideline that

Once minimum contacts nexus or substantial nexus exists under principles of this guideline, that nexus will continue to exist for any sale, even though the circumstances that gave rise to the nexus have ended, in accordance with the following principles. First, nexus will

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267. Id.
269. See id. at 336.
be conclusively presumed to last for at least the one-year period begin-
ning at the temporal point of the end of the circumstance that
gave rise to nexus. Second, nexus will continue to exist where the
pre-existing circumstances that gave rise to the nexus have any
meaningful connection to the sale.\footnote{271}

This approach may be problematic from a notice standpoint. It is
deemed to end immediately upon termination of physical presence in the
state, though it is coupled with the concept of reestablishment of nexus
upon a later visit. A company that conducts business solely through tem-
porary contacts in the state is left with no guidance as to when its obliga-
tion to collect the tax ends. A company might send its employee into
State X for one week in January, thereby creating nexus, but in a situa-
tion where it does not know if it is going to have any further physical
contacts with State X during the next year. Thus, in a state like Virginia
where nexus is deemed to end the moment the physical presence ends,\footnote{272}
the out-of-state company is left with no real guidance. If this out-of-state
company guesses and stops collecting the sales and use tax in January—
when its physical presence ended—they will be fine if there are no fur-
ther trips into State X. However, if they guessed incorrectly because they
had to make a few more trips into State X, they will be held liable for the
uncollected tax in the interim. At a minimum, the Due Process Clause
requires fair warning of state action. An on-again-off-again duration-of-
nexus statute measured on a daily basis is unworkable and does not pro-
vide companies with adequate notice.

It is possible that lower courts have blurred Quill’s bright-line test
because of the lack of guidance on the duration of nexus. For example, in
Share, sales were made into Florida after a three-day visit.\footnote{273} Was the
separation of time between the in-state visit and the out-of-state sale a
concern to the Florida court? A clear duration-of-nexus statute or regula-
tion would help courts address the fairness\footnote{274} concerns that arise in cases
close to the bright-line.

One year from the last contact with the state, at a minimum, should
be the answer to the duration-of-nexus question. There are examples in
other taxes for a one year rule. Income taxes at the federal and state level
are assessed on a yearly basis, with almost every American under-

\footnote{271} Id.
\footnote{273} Dep’t of Revenue v. Share Int’l, Inc., 676 So. 2d 1362, 1363 (Fla. 1996), aff’g 667 So. 2d
\footnote{274} "[D]ue process standards for adjudicative jurisdiction and those for legislative (or pre-
scriptive) jurisdiction are [not] necessarily identical." Quill Corp. v. North Dakota, 504 U.S. 298,
ing the significance of April 15th.\textsuperscript{275} State property taxes are assessed on a yearly basis.\textsuperscript{276} One might also look to the cycle of life, where we measure our lives, seasons, and anniversaries in one year segments. While there is nothing magical about a one year duration-of-nexus rule, it does provide a needed level of certainty.

\textit{C. Model Statute}

One potential criticism to allowing any physical presence to create a use tax collection obligation is that it will require all out-of-state business owners with nexus to collect the use tax, even when they are small businesses. In some cases there might be a perceived unfairness. Amid discussions pertaining to this Article, a colleague recounted the following story. Some years ago he conducted a seminar in a state other than his state of residency. During breaks at the seminar, he sold a few hundred dollars worth of books to participants. Some time after the seminar, he received a letter from the state taxing authority demanding that he file a sales and use tax return. He called the state to explain that he only sold a few items, had not collected any tax, and in any event owed less than forty dollars in tax to the state. He perceived the tax as unfair because he compared the amount of tax due with the amount of time spent complying with the state’s requirements (e.g., reading the demand letter, phone calls with the tax authority, and hiring a tax accountant to help him prepare the forms). Though he had nexus in the state, a statutory minimum filing threshold would have solved the problem for him and countless other small out-of-state businesses.

States should create an exemption mechanism for out-of-state businesses that exempt the first $2000 of gross sales and its accompanying tax liability of $100 in a state with a five percent sales and use tax rate.\textsuperscript{277} The idea is not to exempt every taxpayer’s first $2000 of gross sales; the exemption should apply only to those very small businesses that enter the state.\textsuperscript{278} The following is a suggested model statute for State Z:

\begin{quote}
\textbf{State Z Statute for Exemption of Small Sales (property, tax, etc.)}
\end{quote}

\textsuperscript{275} April 15th is the date on which every federal income tax return is due unless an extension to file a return is submitted by that date. I.R.C. § 6072(a) (1996).

\textsuperscript{276} E.g., VA. CODE ANN. § 58.1-3010 (2005) (property must be assessed on January 1st of each year).

\textsuperscript{277} States are in the best position to determine what amount they may want to exempt. Each state should go through its own cost-benefit analysis and determine how much it may be willing to exempt. For some states, $100 in tax liability may be too much, while for others it may be too low. In any event, there is a dollar amount at which it is economically inefficient for a state to require the filing of a tax return based solely on processing costs.

\textsuperscript{278} States have dealt with small sales in other contexts, such as garage sales. One tax service has noted that

Most statutes exempt casual or isolated sales, sometimes also called occasional sales. The exemption is usually limited to those not regularly engaged in the retail selling of tangible
SMALL BUSINESS SALES & USE TAX COLLECTION EXEMPTION ACT

1. PURPOSE

1.1 The purpose of this Act is to exempt out-of-state small businesses from collecting and remitting the sales and use tax to State Z under the enumerated limited circumstances.

2. DEFINITIONS

2.1 For purposes of this Act, a “small business” is an entity that has annual worldwide gross sales of $10,000 or less, is a non-resident of State Z, and makes less than $2000 of gross sales to State Z residents on an annual basis.

3. SALES & USE TAX EXEMPTION

3.1 A small business that is not registered to collect the sales and use tax with State Z is not required to register, collect, or remit the tax to State Z until it reaches $2000 of gross sales in the state. The small business is required to register, collect, and remit the sales and use tax to State Z for all of its sales exceeding $2000 of gross sales in the state.

3.2 This sales and use tax exemption shall apply only until the first year in which the small business reaches the $2000 gross sales threshold, after which

personality. The statute may limit the exemption to a specified number of sales or a specified dollar amount of sales per year. For example, no more than two sales a year or no more than $500 of sales a year may be allowed as exempt casual or isolated sales. Unless specifically listed in the statute as exempt, an exemption for these sales can’t be taken, except when the statute is so worded as to not apply to casual or isolated sales. In some states, the exemption applies to retailers’ nonrecurring sales of items that aren’t held in inventory. For example, the exemption may be allowed under a statute that taxes only sales “in the ordinary course of business.” Example:

A tax statute gives this definition: “‘Isolated or occasional sale’ means the nonrecurring sale of tangible personal property, or services taxable hereunder by a person not engaged at the time of such sale in the business of selling such property or services.”

RIA, ALL STATES TAX GUIDE, § 5205 (2006).
this exemption may not be claimed in any future years.

3.3 This exemption shall not apply to any small business that is owned by a corporation, limited liability company, publicly traded partnership, or any other business entity that has world-wide gross sales of more than $10,000.

3.4 All taxes collected by the business must be remitted to the State.

This proposed law provides a safe harbor for small businesses and helps focus state tax enforcement resources on larger out-of-state businesses that attempt to plan around the state’s use tax collection laws.

D. Ethics and Professionalism

I ate and ate my fill,  
Yet my mouth waters still;  
To-morrow night I will  
Buy more . . . 279

The final issue that needs to be examined is ethics within the tax profession. It seems odd that Quill—a case that was written to provide clarity—could cause so much confusion among practitioners and jurists. Is the problem that tax practitioners are using poor hermeneutics in their briefs, or is it a lapse of ethics? 280 I suspect the latter. Pushing the legal envelope is not the problem; the problem is ignoring the existence of an envelope altogether.

Several examples from the news illustrate that there are those in the tax profession that prefer financial success to ethics. 281 Perhaps most notoriously, the “Big Four” accounting firms 282 who dominate the tax field used to be the “Big Five”: Arthur Andersen disintegrated after the government pursued a criminal investigation against it for deceptive auditing activities related to the collapse of Enron, Inc. 283

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279. Rossetti, supra note 1, at 287.
280. Ethics is defined as “[o]f or relating to moral action, conduct, motive or character.” BLACK’S LAW DICTIONARY 496 (5th ed. 1979).
281. See Barney Jopson, Auditors Say Fraud Can Be Hard to Detect, FIN. TIMES, Oct. 18, 2005, at 29.
282. Deloitte & Touche, Ernst & Young, KPMG, and PricewaterhouseCoopers.
283. Before Enron entered bankruptcy, it was the seventh largest corporation in the United States. The top executives took nearly $1 billion from the company and investors took away nothing. See BETHANY MCLEAN & PETER ELKIND, SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND
Similarly, in August 2005, a number of "former" employees of KPMG were indicted for criminal tax violations—former in that they either were allowed to retire or were terminated before the indictment was made public. Although these partners and employees are legally entitled to a presumption of innocence, KPMG as an entity has accepted criminal fault, entered into a deferred prosecution agreement with the United States Department of Justice, and decided not to pay more than $600,000 for the criminal defense of their former employees. Additionally, as part of the agreement with the Justice Department, KPMG has agreed to pay nearly $500,000,000, and possibly up to $600,000,000, to the United States Treasury, to close its private client practice, to close its compensation and benefits practice, and to refrain from developing or selling any pre-packaged tax product, among other significant restrictions on its practice.

These recent scandals are not isolated lapses of judgment, but rather are symptomatic of the moral vacuum of our time. Nietzsche, the German philosopher, has summarized the prevailing metanarrative, or worldview, by stating the following:


285. See Parker, supra note 284.


A metanarrative can include any grand, all-encompassing story, classic text, or archetypal account of the historical record. They can also provide a framework upon which an individual’s own experiences and thoughts may be ordered. These grand, all-encompassing stories are typically characterized by some form of “transcendent and universal truth” in addition to an evolutionary tale of human existence (a story with a beginning, middle and an end). The majority of metanarratives tend to be relatively optimistic in their visions for human kind, some verge on utopian, but different schools of thought offer very differing accounts.

Id.


A worldview is a commitment, a fundamental orientation of the heart, that can be expressed as a story or in a set of presuppositions (assumptions which may be true, partially
What, then is truth? A mobile army of metaphors, metonyms, and anthropomorphisms—in short, a sum of human relations, which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people: truths are illusions about which one has forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins.\(^{290}\)

This understanding—or better, misunderstanding—of truth, coupled with avarice, have led to the perfect tax storm. If all truth is merely subjective, something found only within each individual, then no outside standard applies for purposes of judging anything, including a legal system. Everything becomes a matter of personal interpretation with no right or wrong answers. "Put briefly, if the law is 'not a brooding omnipresence in the sky,' then it can be only in one place: in us."\(^{291}\) One might choose to live one's life with that level of uncertainty, but a legal system will not survive if relativism is the philosophy behind the system. Imagine for a moment a legal system based on individual subjective truth:

The obvious first move is to decide whether one can found a system on the premise that each person is his own ultimate evaluative authority . . . . Everyone can declare what ought to be for himself, and no one can legitimately criticize anyone else's values—what they are or how they came to be—because everyone has equal ethical dignity . . . . Each individual's normative statement are, for him, performative utterances: what is said to be bad or good, wrong or right, is just that for each person, solely by reason of its having been uttered.\(^{292}\)

When people choose to ignore universal principles and rely on themselves for truth, serious problems often result. In the context of use tax collection, weak to non-existent arguments have been made to discredit applicable Supreme Court precedent. For example, the argument has been made that *Scripto, Inc. v. Carson*\(^{293}\) is no longer good law.\(^{294}\) One state tribunal has refuted this spurious argument:

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true or entirely false) which we hold (consciously or subconsciously or inconsistently) about the basic constitution of reality, and that provides the foundation on which we live and move and have our being.

*Id.*


\(^{292}\) *Id.* at 1235.

\(^{293}\) 362 U.S. 207 (1960).
CFC [Consolidated Fuel Corporation] also relies on *Quill Corp. v. North Dakota* . . . for the proposition that the rule of *Scripto, Inc. v. Carson*, supra, is no longer good law. CFC misunderstands—or misrepresents—*Quill*. *Quill* does not represent a new departure in Commerce Clause jurisprudence; *Quill* is a clarification of the present state of that law. More importantly, *Quill* expressly ratified the *Scripto* rule.295

Should we be surprised by this result when the prevailing metanarrative allows people296 to interpret cases and statutes according to what is right in their own eyes?

For thousands of years, the West297 has recognized that truth is universal and knowable by all.298 The Western legal tradition, from which the American legal system derives,299 was formed with the presupposition that there are in fact universals that are transcendent.300 The notion that truth might be subjective and not universal, something known only to the individual observer, is relatively new to Western thought and can

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294. See *Do Debt Collectors and Inventory Create Nexus?*, 15 *State Tax Notes* 641, 642 (1998); *Nexus Issues Part II: Is Scripto Good Law?*, 15 *State Tax Notes* 839, 839 (1998).


296. This Part of the Article is not meant to disparage the honest work of many tax practitioners. Many people do their work honestly and ethically, and in fact have a duty to ensure that their clients do not pay one penny more than what they owe—that is what tax practice is about. This section is aimed at the practitioner who either ignores the rules or is unable to see them objectively. Also, some areas of the law are open for honest debate because there are situations where simple analysis is not possible—tax professionals would not be needed if everything was easy to understand.


The West is . . . a cultural term, but with a very strong diachronic dimension. It is not, however, simply an idea; it is a community. It implies both a historical structure and a structured history. For many centuries the community of those people was manifested in their common allegiance to a single spiritual authority, the Church of Rome.

Id.

298. Socrates and Plato, two of the greatest thinkers of all time, believed in universal truth. Socrates refused to acquiesce in the idea that truth is relative, that there is no stable norm, no abiding object of knowledge. He was convinced that ethical conduct must be founded on knowledge, and that that knowledge must be knowledge of eternal values which are not subject to the shifting and changing impressions of sense or of subjective opinion, but are the same for all men and for all peoples and all ages. Plato inherited from his Master this conviction that there can be knowledge in the sense of objective and universally valid knowledge.


be traced to the Enlightenment. While one could argue that Galileo Galilei (1564–1642)\textsuperscript{301} was the first to break with the Western view of truth, the primary person to do so was René Descartes (1592–1650)\textsuperscript{302} with his belief that doubt was the way to arrive at certain truth.\textsuperscript{303} This Cartesian redirection “symbolized a retreat into the individual self-consciousness as the one sure starting-point in philosophy . . . . \[It\] set[] up the individual consciousness as the final criterion of truth.”\textsuperscript{304} Within a hundred years, Isaac Newton (1642–1727) and John Locke (1632–1704) took Descartes’ revolutionary change to the next step and “denied altogether the capacity of the human mind to achieve absolute truth.”\textsuperscript{305}

Does belief in an objective standard for truth mean that we will all come to agreement on every possible issue, including a perfect understanding of the Court’s use tax collection jurisprudence? Of course not. Reasonable minds can and will disagree on many issues. As heirs of the Western legal tradition, a common understanding of truth will ensure that everyone is playing the same game with the same rules.

The United States Treasury Department has responded to the current ethical crisis by raising the standards of tax practice, and is going after unethal practitioners as well as taxpayers. Given that the government has no power to force people to do good, the power to punish bad behavior will have to do as a poor substitute.\textsuperscript{306} The primary vehicle for regulating practice and ethics before the Treasury Department is Circular 230.\textsuperscript{307} Early in 2005, Circular 230 was significantly changed, and now tax professionals can be punished for a wider range of activities that the Treasury Department has labeled inappropriate. While this is a good start, it is only the placing of the finger in the proverbial dike.

\begin{footnotes}
\item[301] “Galileo shattered the Aristotelian view of the universe by his skepticism concerning the possibility of arriving at certain truth through the evidence of the senses and his resort to mathematics as the primary method of achieving certain knowledge of physical nature.” HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 266 (2003).
\item[302] He was “the father of modern philosophy;’ [and] a mathematical, scientific, and philosophical genius.” RICHARD L. PURTILL ET AL., PHILOSOPHICAL QUESTIONS: AN INTRODUCTORY ANTHOLOGY 120 (1985).
\item[303] “Descartes claimed that it is possible to arrive at indubitable knowledge through the rigorous and systematic application of doubt to one’s beliefs.” NORMAL L. GEISLER & PAUL D. FEINBERG, INTRODUCTION TO PHILOSOPHY: A CHRISTIAN PERSPECTIVE 91 (1980).
\item[304] COLIN BROWN, PHILOSOPHY & THE CHRISTIAN FAITH 52–53 (1968).
\item[305] BERMAN, supra note 297, at 267.
\item[306] “[I]t was necessary that external laws be handed down and that external penalties be established for law-breakers. In this way, it was possible for people not moved by love of virtue to be protected from evil fear of punishment and to be restrained by their responsibilities.” Hieronymus Zanchi, On the Law in General, 6 J. OF MARKETS & MORALITY 305, 338 (Jeffrey J. Veenstra trans. 2003), available at http://www.acton.org/publicat/m_and_m/2003_spring/zanchi/.
\item[307] 31 C.F.R. § 10.0 (2002).
\end{footnotes}
The real problem is that a large number of practitioners have a worldview that permits them to engage in behavior that is destructive to the laws of our nation. In the legal profession, this downward slide toward relativism is reflected in the ethical documents of the American Bar Association (ABA). In 1908, the ABA created its first ethics document, which stated the following in its preamble: "The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men." The Canons of Professional Ethics ("Canons") remained in force until 1969, when they were superseded by the Code of Professional Responsibility ("Code"). The Canons assumed that an objective standard of justice existed, and that a universal standard defined "just men"; however, the Code eliminated these objective standards and moved the profession toward relativism by noting the following in its preamble:

Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. Thus, the legal profession stopped searching for the universal ideal of justice and instead adopted an inward looking approach. The universal ideal was traded for the respectability of the group, which may or may not be upholding a universal concept of truth, justice, or ethics.

After only fourteen years under the Code, the ABA adopted the Model Rules of Professional Conduct ("Rules"), which states in its preamble that "a lawyer is also guided by personal conscience and the approbation of professional peers." This same concept was echoed by that childhood philosopher, Jiminy Cricket, when he told Pinocchio to "let your conscience be your guide." Again the ABA denied the need for a universal ideal in favor of a subjective standard, which really means that people are free to create whatever standards they want as long as their peers agree. If a person's conscience is rightly formed it might act as an appropriate guide, but the conscience is not the ultimate source of morality and ethics. One does not have to look very deeply into the lives

308. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS app. E, at 1180 (Practioner's ed. 1986) (ABA Canons Preamble (1957)).
309. Id. app. B, at 1022 (ABA Code Preamble (1969)).
310. Id. app. C, at 1098 (ABA Model Rules of Professional Conduct Preamble (1983)).
311. PINOCCHIO (Walt Disney Studios 1940).
of notorious people that "followed their consciences" to discover violations of principles of universal truth, justice, and morality.\textsuperscript{312}

At best, the ABA Rules are incomplete. They are complete for those with properly formed consciences, who are thereby impelled to do good. They are incomplete for those with improperly formed consciences, who do not feel bound by universal principles that exist deep within every human being.\textsuperscript{313}

Given these negative changes in society and the legal profession over the past hundred years, is it really surprising that the Treasury Department and state tax agencies are having problems collecting taxes? State tax cases do not make up a large percentage of trial and appellate dockets, so judges must rely on briefs. If some practitioners are willing to argue positions that do not closely follow Quill, then it follows that Court opinions are more likely to deviate from a close reading of Quill. Jurists do not have the time to become experts on every legal issue that comes before their courts. This is especially true with tax cases, which jurists jokingly identify as the most dreadful type of case that one could hear.\textsuperscript{314}

A tax professional who loses his moral compass is likely to write an obfuscating legal brief, which in turn may lead to a court opinion that misinterprets a case like Quill. Some tax practitioners have eaten at the Goblin Market, and now they cannot get enough.

\textsuperscript{312} For example, Hans Frank was the leading Nazi jurist who was tried and executed at Nuremberg after the Second World War. The following quotations from Frank provide insights into his conscience, which speak for themselves.

It is so obvious that it hardly needs mentioning that any participation whatsoever of the Jew in German law—be it in a creative, interpretative, educational or critical capacity—is impossible. The elimination of the Jews from German jurisprudence is in no way due to hatred or envy but to the understanding that the influence of the Jew on German life is essentially a pernicious and harmful one and that in the interests of the German people and to protect its future an unequivocal boundary must be drawn between us and the Jews.

Hans Frank, Speech at the Congress of the Reich Group of University Professors at the National Socialist Jurists’ League (Oct. 3, 1936). “I have not been hesitant in declaring that when a German is shot, up to 100 Poles shall be shot too.” Hans Frank, Remarks at a meeting of political leaders of the NSDAP at Cracow (Jan. 15, 1944). While on trial at Nuremberg, he was able to recognize that he and his fellow Nazis had violated universal truth and morality when he said from the stand that “a thousand years will pass and the guilt of Germany will still not be erased.” JOE J. HEYDECKER & JOHANNES LEEB, THE NUREMBERG TRIAL 347 (R.A. Downie ed. and trans., World Pub. Co. 1958).

\textsuperscript{313} “[T]he problem is mainly volitional—that it has to do with the state of our will . . . . [B]y and large we know what’s right and wrong but wish we didn’t, and that we try to keep ourselves in ignorance so that we can do as we please.” J. BUDZISZEWSKI, WRITTEN ON THE HEART 185 (1997).

\textsuperscript{314} Paul L. Caron, Tax Myopia, or Mamas Don’t Let Your Babies Grow Up To Be Tax Lawyers, 13 VA. TAX REV. 517, 525-26 (1994) (“[W]hen asked why he sings along with the Chief Justice at the Court’s annual Christmas party, Justice Souter replied, ‘I have to. Otherwise I get all the tax cases.’ [S]imilar remarks have been attributed to other justices.”).
IV. CONCLUSION

One may lead a horse to water,
Twenty cannot make him drink.
Though the goblins cuffed and caught her,
Coaxed and fought her,
Bullied and besought her,
Scratched her, pinched her black as ink,
Kicked and knocked her,
Mauled and mocked her,
Lizzie uttered not a word;
Would not open lip from lip
Lest they should cram a mouthful in . . .
At last the evil people,
Worn out by her resistance,
Flung back her penny, kicked their fruit
Along whichever road they took,
Not leaving root or stone or shoot. 315

The Supreme Court’s mandate for sales and use tax nexus is a bright-line test measured by physical presence. If a company has physical presence in a state, it has Commerce Clause nexus. 316 The current confusion in lower courts can be resolved by the application of the two nexus clauses in the following order: First, courts should apply the Commerce Clause nexus test. If there is no physical presence in the jurisdiction, that is the end of the inquiry, and the out-of-state company cannot be required to collect the sales and use tax. But if there is any physical presence, the inquiry then proceeds to the second nexus test. Second, courts should then apply the Due Process Clause nexus test, which examines whether it would be fair to impose a sales and use tax collection obligation on the out-of-state company. Invariably, that answer will be yes because the totality of the company's contacts will generally satisfy the Due Process Clause tests articulated in International Shoe and its progeny.

The American legal system seeks, in part, to reduce litigation. 317 Employing clear nexus rules is one method of accomplishing this goal. 318

315. Rossetti, supra note 1, at 293–94.
316. Possible exceptions to the bright-line test include accidental or coerced entry into a state. For example, a corporate jet may be forced into a state temporarily due to bad weather or because it is forced to land after being hijacked.
318. Over the past years, a number of states have been working on the Streamlined Sales Tax Project—a compact of member states. Its mission statement is to “develop measures to design, test and implement a sales and use tax system that radically simplifies sales and use taxes.” Streamlined
Admittedly, unambiguous nexus rules were not visible in the past, but the Quill Court created a clear rule with a fairly high hurdle—states must show that a company purposefully created physical presence. In today's world of Internet sales, mail-order catalogs, and telephone sales, companies can avoid multiple state tax jurisdictions simply by never leaving their home states; when a company chooses to leave its safe harbor by entering another state, it should not complain when it has to comply with that state's sales and use tax laws.

Recognition of Quill's two tests in the right order—Commerce Clause first and Due Process Clause second—will help bring coherence to the current confusion and will assist states in controlling their tax base. After all, the bulk of the tax collection problem is not with small businesses that enter a state, but rather is with large businesses that can create separate subsidiaries to avoid nexus rules. Collecting the use tax from all taxpayers promotes confidence in the tax system; allowing the Internet savvy to avoid the use tax only encourages them to bypass their local merchants for a small percentage savings found on a website. This type of avoidance is neither good tax policy nor good economic policy.

_We must not look at goblin men,_  
_We must not buy their fruits:_  
_Who knows upon what soil they fed_  
_Their hungry thirsty roots?_  

Sales Tax Governing Board, Inc. Home Page, http://www.streamlinesalestax.org (last visited Feb. 21, 2006). When operational, this system will greatly help in sales tax collection, though it may take an act of Congress or a decision by the Supreme Court to overturn Quill; however, in _U.S. Steel Corp. v. Multistate Tax Comm'n_, 434 U.S. 452 (1978), the Court allowed a state compact without Congressional approval because that compact did not increase the power of the states over the federal government. Presumably, the Streamlined Sales Tax Project would not increase state power over the federal government, thereby not implicating the restrictions of the Compact Clause to the Constitution.

319. The Negative Commerce Clause component portion of Quill can be overturned by Congress at any time because Congress "has the ultimate power to [change the test]." _Quill_, 504 U.S. at 318. However, enforcement of the use tax is likely to be viewed as a "new tax" (even though the tax is over sixty years old) and thus as an impediment for Congress to relax the physical presence standard.