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New Mexico Taxation & Revenue Department v. Barnesandnoble.com LLC: Reconsidering the Dormant Commerce Clause in an e-Commerce World

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New Mexico Taxation & Revenue Department v. Barnesandnoble.com LLC: Reconsidering the Dormant Commerce Clause in an e-Commerce World

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NEW MEXICO TAXATION & REVENUE DEPARTMENT V. BARNESANDNOBLE.COM LLC: RECONSIDERING THE DORMANT COMMERCE CLAUSE IN AN E-COMMERCE WORLD

ABSTRACT

Vacationing off the coast of Belize on a remote Central American island, I bought a book from Amazon's website while on a dock 100 yards into the ocean. Within seconds the book was downloaded onto my Kindle. From my hammock I marveled at the ease and simplicity of one-click purchasing without even considering the tax implications.

My experience is far from unique. E-commerce is a way of life for American consumers, which has tangible consequences for retailers and states. Brick-and-mortar bookstores are forced out of business because of online competition. Black Friday is not what it once was. Consumers now wait until Cyber Monday to make their holiday purchases to avoid long lines and sales taxes.

But our collective online shopping experience may soon change. A number of states have passed the so-called "Amazon tax," which requires Internet retailers to collect taxes if they have in-state affiliates. The Amazon tax and similar laws are designed to make up for the more than $20 billion in revenue states are losing each year due to online commerce. According to the Congressional Research Service, e-commerce has caused states to lose out on almost a third of their total tax revenue. Because of the losses, many states are considering unconventional ways to bring Internet retailers within their state's tax jurisdiction.

This Comment explains when the dormant Commerce Clause allows states to tax Internet retailers. The New Mexico Supreme Court faced that issue in *New Mexico Taxation & Revenue Department v. Barnesandnoble.com LLC*. The court held that New Mexico could impose gross receipts tax on an Internet retailer because of a relationship with an in-state sister corporation, which created a substantial nexus with the state. This Comment analyzes the court's opinion and uses that case as a lens to explore how other states deal with taxation of Internet retailers. In particular, this Comment discusses a New York case where a court found that the Amazon tax was constitutional and the U.S. Supreme Court's subsequent denial of certiorari in that case. This Comment argues that the New Mexico decision provides a practical approach to Internet retailer cases, including situations where retailers have affiliate agreements with in-state residents. According to the New Mexico court, there is a substantial nexus when a retailer "establish[es] and maintain[s] a market" within a state because of the economic presence of the retailer.

This Comment also contends that the Supreme Court missed an opportunity to modernize its dormant Commerce Clause jurisprudence when it denied certiorari in the New York case. It should have replaced an outdated physical presence requirement with an economic presence test to reflect the realities of the Digital Age.

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INTRODUCTION

The Commerce Clause grants Congress the power to regulate interstate commerce.[1] Implied in the Clause is the dormant Commerce Clause (DCC), which forbids states from burdening interstate commerce.[2] Courts have interpreted the DCC as prohibiting states from taxing Internet retailers when doing so would interfere with interstate commerce.[3] In 1967, in *National Bellas Hess, Inc. v. Department of Revenue*,[4] the U.S. Supreme Court held that a retailer had to be physically present within a state to be subject to the state's tax jurisdiction without offending the DCC.[5] In 1977, in *Complete Auto Transit, Inc. v. Brady*,[6] the Court held that the clause is not violated if a tax "is applied to an activity with a substantial nexus with the taxing State."[7] In 1987, in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*,[8] the Court held that an out-of-state retailer's activities could produce a substantial nexus if the "activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market" in the state.[9] Then in 1992, in *Quill Corp. v. North Dakota*,[10] the Court reaffirmed *Bellas Hess*'s bright-line rule, holding that a physical presence is required to satisfy the substantial nexus requirement of the DCC.[11] The Court has not updated its DCC jurisprudence as applied to out-of-state retailers since *Quill*.[12]

In the twenty-plus years since *Quill*, technological advancements and electronic commerce (e-commerce) have drastically changed retailers' ability to exploit state markets without being physically present. Because *Quill* does not account for this change in the national economy,

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1. U.S. CONST. art. I, § 8, cl. 3.
2. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).
3. *See generally id.* at 317–18 (holding that in order to be exposed to state sales and use taxes, retailers must be physically present within the state).
4. 386 U.S. 753 (1967), *overruled by* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
5. *Id.* at 757–58.
6. 430 U.S. 274 (1977).
7. *Id.* at 279.
8. 483 U.S. 232 (1987).
9. *Id.* at 250–51 (quoting Tyler Pipe Indus., Inc. v. Dep't of Revenue, 715 P.2d 123, 126 (Wash. 1986), *vacated*, 483 U.S. 232) (internal quotation marks omitted).
10. 504 U.S. 298 (1992).
11. *See* Emily L. Patch, Note, *Online Retailers Battle with Sales Tax: A Physical Rule Living in a Digital World*, 46 SUFFOLK U. L. REV. 673, 684–85 (2013).
12. Congress has, however, taken up the issue of internet taxation. In 1998, Congress passed the Internet Tax Freedom Act which bars states from taxing access to the Internet and placing multiple or discriminatory taxes on e-commerce. Internet Tax Freedom Act §§ 1100, 1101, 47 U.S.C. § 151 note (1998). The Act did not apply to internet use and sales taxes. *See* Scott M. Edwards, *Washington High Court Says Cable Internet Access Not Taxable as Telephone Utility Service*, 19 J. MULTISTATE TAX'N & INCENTIVES 36, 36 (2009). Rather, it prohibited states from taxing consumers as a result of making an online purchase or treating online shoppers differently. *Id.* The Act also allows state taxation that is otherwise constitutionally permissible. Internet Tax Freedom Act § 1101(b).

states have attempted to maneuver around strict adherence to the physical presence requirement. There are three ways states have sought to find a substantial nexus in order to tax out-of-state retailers: (1) through common ownership with in-state businesses, (2) through the economic presence of the retailer in the taxing state, and (3) through affiliate agreements with in-state residents. The general trend is that states have developed their own methodologies to address Internet retailers. Moreover, different courts have come to different conclusions as to the constitutionality of these taxation schemes, even with almost identical factual scenarios.

This Comment argues that the solution to the Internet retailer taxation problem lies in the economic presence test, which considers the extent of a business's economic contacts within a state, and better reflects the realities of e-commerce in the Digital Age.[13] In doing so, Part I of this Comment examines the relevant DCC case law and presents the Internet retailer and state taxation issue. Part II summarizes the facts, procedural history, and opinion of *New Mexico Taxation & Revenue Department v. Barnesandnoble.com LLC* (*Barnesandnoble.com II*),[14] which held that a substantial nexus occurs when an Internet retailer "establish[es] and maintain[s] a market" in a state.[15] Part III argues that the U.S. Supreme Court should have granted certiorari in a recent New York case in order to overrule *Quill*'s outdated physical presence requirement. Finally, Part III concludes that the economic presence test and the New Mexico Supreme Court's holding provide a workable framework for analysis.

I. BACKGROUND

In the context of the states' taxing powers, the Due Process Clause and the Commerce Clause are interrelated.[16] Both clauses place limits on the states' taxing authority.[17] However, there are distinct differences as well.[18] For instance, a state may have the power to tax certain taxpayers without violating the Due Process Clause, yet that same tax may offend the Commerce Clause.[19] This Part is concerned primarily with the DCC and its relation to states' taxing powers over out-of-state retailers. First, this Part summarizes the Due Process Clause with respect to state taxation. Second, this Part provides background material on the relevant

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13. This Comment uses the term "Digital Age" to refer generally to the last fifteen years of the twentieth century to the date of publication of this Comment.

14. 303 P.3d 824 (N.M. 2013).

15. *Id.* at 829.

16. Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992) (citing Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 756 (1967), *overruled by Quill*, 504 U.S. 298).

17. *Id.*

18. *Id.*

19. *Id.* For a further discussion on the distinction between the Due Process Clause and the Commerce Clause, see *infra* text accompanying notes 55–74.

DCC case law. Finally, this Part demonstrates how different states and courts have attempted to address the Internet retailer question.

A. The Due Process Clause and State Taxation

Under the Due Process Clause of the U.S. Constitution, no state may "deprive any person of life, liberty, or property, without due process of law."[20] At the heart of the Due Process Clause is the notion of fundamental fairness.[21] A state should not tax an entity if there is insufficient connection with the state because doing so would be unfair to the entity.[22] As the U.S. Supreme Court's due process jurisprudence evolved, it became evident that physical presence within a taxing state was necessary for a state to constitutionally levy a tax.[23] But in *Quill*, the Court explained the evolution of its due process jurisprudence as a corollary to judicial jurisdiction.[24] The Court further explained that it had expanded the relevant judicial jurisdiction inquiry from what was once a strict physical presence test to the "minimum contacts" test of *International Shoe Co. v. Washington*.[25] Thus, the Court has favored a more flexible due process inquiry.[26] To illustrate, in *Quill* the Court made clear that the Due Process Clause could be satisfied "irrespective of a corporation's lack of physical presence in the taxing State."[27] Nevertheless, the tax may still be unconstitutional if it violates the Commerce Clause.[28]

B. The Dormant Commerce Clause

Article I of the U.S. Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[29] One purpose of the Commerce Clause is to prevent states from burdening interstate commerce.[30] Although the

20. U.S. CONST. amend. XIV, § 1.

21. *Quill*, 504 U.S. at 312.

22. *See id.* (explaining that the touchstone of the due process fairness analysis is notice and fair warning, and that the minimum contacts test is a proxy for notice).

23. *Id.* at 306.

24. *Id.* at 306–07.

25. *Id.* at 307 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). In *International Shoe*, the Court held that judicial jurisdiction extends to situations where a person has "certain minimum contacts with [a state] such that the maintenance of [a] suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

26. *Quill*, 504 U.S. at 307. For example, in "[a]pplying these principles [the Court has] held that 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." *Id.*

27. *Id.* at 308.

28. *See id.* at 312.

29. U.S. CONST. art. I, § 8, cl. 3.

30. James L. Buchwalter, Annotation, *Construction and Application of Dormant Commerce Clause, U.S. Const. Art. I, § 8, cl. 3—Supreme Court Cases*, 41 A.L.R. FED. 2d 1, § 2 (2009); *see also* Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 760 (1967), *overruled by Quill*, 504 U.S. 298 (1992) ("The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.").

Commerce Clause specifically gives Congress the power to regulate interstate commerce, it does not expressly limit state activity.[31] The U.S. Supreme Court, however, has construed the Commerce Clause also to include its converse.[32] That is, implied in the Commerce Clause is the so-called "dormant Commerce Clause," which prohibits most state regulations that discriminate against interstate commerce in the absence of congressional action.[33] Although states are permitted to regulate their own intrastate commerce, a state regulation that adversely affects interstate commerce violates the DCC.[34] A state regulation that incidentally burdens commerce, however, is still valid if it is not designed to regulate interstate commerce and is aimed instead at promoting a public policy objective.[35] In contrast, where a state has specific intent to discriminate against other states, such facial discrimination is per se unconstitutional.[36] Thus, the DCC is implicated in cases concerning state tax jurisdiction over Internet retailers because it forbids states from interfering with interstate commerce[37] and most Internet retailers by their very nature are involved in interstate commerce. The following Subpart summarizes the relevant DCC case law of the last fifty years with respect to state taxation of out-of-state retailers and provides a foundation for an analysis of Internet tax issues.

1. Dormant Commerce Clause Case Law

A distinct line of U.S. Supreme Court cases involves the taxing power of the states with respect to out-of-state retailers.[38] Specifically, these cases sought to address when a state goes too far in levying a tax against out-of-state retailers under the DCC.[39]

In 1967, the Supreme Court announced a bright-line rule in *National Bellas Hess, Inc. v. Department of Revenue*.[40] In *Bellas Hess*, the issue was whether Illinois could constitutionally tax an out-of-state mail order company that had no property or employees in the state.[41] The Court held that Illinois could not impose taxes on the out-of-state company, because

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31. Buchwalter, *supra* note 30, § 2.
32. *Id.*
33. *Id.*; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 231–32 (1824) (Johnson, J., concurring).
34. *See Gibbons*, 22 U.S. (9 Wheat.) at 72–73 (majority opinion).
35. *Id.* (holding that state laws which have a legitimate object, such as public health, are not unconstitutional if they "incidentally restrict or regulate" interstate commerce).
36. City of Philadelphia v. New Jersey, 437 U.S. 617, 628–29 (1978).
37. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).
38. *See id.* at 309; Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232 (1987); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967), *overruled by Quill*, 504 U.S. 298.
39. *See, e.g.*, *Quill*, 504 U.S. at 309.
40. *See Bellas Hess*, 386 U.S. at 758–60; Daniel Tyler Cowan, Recent Development, *New York's Unconstitutional Tax on the Internet:* Amazon.com v. New York State Department of Taxation & Finance *and the Dormant Commerce Clause*, 88 N.C. L. REV. 1423, 1424 (2010).
41. *Bellas Hess*, 386 U.S. at 753–54.

the company had no office, employees, solicitors, or property within the state.[42] The Court further held that physical presence was a requirement for taxation under both the Due Process and Commerce Clauses.[43]

In 1977, the Supreme Court expanded upon *Bellas Hess*'s physical presence rule.[44] In *Complete Auto Transit, Inc. v. Brady*, the Court once again considered whether an out-of-state corporation could be required to pay a state tax for activities conducted within the state.[45] The *Complete Auto* Court held that the state could tax the out-of state corporation.[46] In its holding, the Court announced a four-prong test extracted from prior decisions.[47] The Court declared that a tax does not violate the Commerce Clause when it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[48] The substantial nexus prong—the focus of this Comment and the cases discussed below—stands for the proposition that retailers having an insufficient or limited connection with a state cannot be taxed without offending the DCC.[49]

In 1987, the Supreme Court decided *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, a consolidated case raising the issue of whether Washington could constitutionally tax out-of-state manufacturers whose products were sold in the state.[50] The manufacturers did not have any property, offices, or employees in Washington.[51] But unlike the business in *Bellas Hess*, which did not have any sales representatives within the state, the out-of-state manufacturers had independent contractors in the taxing state who enabled them to establish and maintain a market in Washington.[52] The Court held that even though the companies had no traditional employees or property in Washington, the independent contractors' in-state activities established a nexus sufficient to permit the state to tax the out-of-state manufacturers.[53] In its reasoning, the Court used the language of the Washington Supreme Court, which said that

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42. *Id.* at 758–59. The Court also noted that where the only contacts with a state were by means of common carrier or United States mail, there were not sufficient connections so as to permit the state to tax the out-of-state company. *Id.* at 758.

43. *Id.* at 756–60.

44. *See generally* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (holding that a substantial nexus is required for a state to tax a business).

45. *Id.* at 276.

46. *See id.* at 277–78, 289.

47. *Id.* at 279; Jon Gworek, Comment, *The Imposition of Use Tax Collection Liability on Mail-Order Retailers: What Happens When the* Bellas Hess *Barrier Is Removed?*, 23 CONN. L. REV. 1087, 1108 (1991).

48. *Complete Auto*, 430 U.S. at 279. This Comment discusses the "substantial nexus" prong of the *Complete Auto* test in-depth. The other three prongs are beyond the scope of this Comment.

49. Quill Corp. v. North Dakota, 504 U.S. 298, 310–11 (1992).

50. *Id.* at 234, 249.

51. *Id.*

52. Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 754 (1967), *overruled by Quill*, 504 U.S. 298.

53. Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 250–51 (1987).

"the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."[54]

i. The Physical Presence Test: *Quill Corp. v. North Dakota*

Quill Corp. v. North Dakota provides the current law regarding out-of-state retailers and state tax jurisdiction. Before *Quill* there was significant overlap between Due Process Clause and Commerce Clause issues to the extent that it was sometimes difficult to distinguish the two in court decisions.[55] The *Quill* Court set out to clarify.[56]

Quill was similar to *Bellas Hess* in that it concerned a state tax against an out-of-state corporation that sold office products and solicited orders for its products through catalogs, advertisements, flyers, and telephone calls.[57] Quill had no significant property in North Dakota, nor did it have any employees or representatives within the state.[58] Like the business in *Bellas Hess*, it sold its products through mail order to consumers within the state.[59] North Dakota imposed a use tax on Quill, which it contested.[60] The state sued and the trial court ruled for Quill.[61] The North Dakota Supreme Court, however, rejected *Bellas Hess*'s bright-line physical presence rule with regard to the Commerce Clause and reversed the lower court's decision.[62] Instead, the court framed the question in terms of the minimum contacts test of the Due Process Clause[63] and whether Quill had been provided any opportunities, benefits, or protections from the taxing state.[64]

Thus, the main issue before the U.S. Supreme Court was whether North Dakota's tax violated the Due Process Clause or the Commerce

54. *Id.* (quoting Tyler Pipe Indus., Inc. v. Dep't of Revenue, 715 P.2d 123, 126 (Wash. 1986), *vacated*, 483 U.S. 232 (1987)) (internal quotation marks omitted).

55. Quill Corp. v. North Dakota, 504 U.S. 298, 305–06, 312 (1992) ("Despite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical.").

56. *See id.* According to the *Quill* Court, the Due Process Clause and the Commerce Clause each represent distinctive constitutional concerns. *Id.* at 305. Due process mainly involves the fundamental fairness of government action. *Id.* at 312. For instance, due process requires that a person's connections to a state be substantial enough to justify the state in exercising power over him. *Id.* Conversely, the Commerce Clause is concerned with "structural . . . effects of state regulation on the national economy" so that state activity does not burden interstate commerce. *Id.* Consequently, the inquiry into the validity of an exercise of state taxing power necessarily requires an independent analysis of the Due Process Clause and the Commerce Clause. *See* Cowan, *supra* note 40, at 1430–32.

57. *Quill*, 504 U.S. at 301.

58. *Id.* at 301–02.

59. *Id.*

60. *Id.*

61. *Id.* at 303.

62. *Id.* at 303–04.

63. *See supra* note 25 and accompanying text.

64. *Quill*, 504 U.S. at 304.

Clause.[65] With respect to whether the tax violated the Due Process Clause, the Court held that the state could tax the out-of-state corporation, because Quill had "purposefully directed its activities at North Dakota residents."[66] In expressly overruling past decisions that adhered to the physical presence requirement, the Court reasoned that the evolution of due process jurisprudence, particularly in the area of judicial jurisdiction, mandated such a holding.[67] In addition, the Court noted that there was a sufficient link between the tax and the benefits Quill received from access to the North Dakota market.[68]

After deciding the due process issue, the Court turned to the Commerce Clause. The Court held that Quill did not have a substantial nexus with the state because it had no offices or employees in North Dakota.[69] The Court rejected the North Dakota Supreme Court's ruling that if the minimum contacts test of the Due Process Clause is satisfied, then the substantial nexus test of the Commerce Clause is automatically met.[70] Instead, the Court reaffirmed *Bellas Hess*'s bright-line rule, and held that to satisfy the DCC an entity must have physical presence within the taxing state.[71]

In summary, the *Quill* Court distinguished the requirements of the Due Process Clause from those of the Commerce Clause.[72] Due process does not require physical presence if the minimum contacts test is satisfied.[73] The Commerce Clause, however, does require physical presence to satisfy the substantial nexus requirement.[74]

C. The Dormant Commerce Clause and the Question of Internet Retailers

Under the DCC, a business is exposed to a state's tax jurisdiction if it has a substantial nexus with the state.[75] A substantial nexus is established through physical presence.[76] However, the governing case—*Quill*—was decided over twenty years ago;[77] since then, the Internet has

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65. *See id.* at 301, 305.

66. *Id.* at 308.

67. *Id.* ("[T]o the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process."). For a discussion on the evolution of judicial jurisdiction, see *supra* Part I.A.

68. *Quill*, 504 U.S. at 308.

69. Cowan, *supra* note 40, at 1424.

70. *Quill*, 504 U.S. at 305, 312–13, 318 (explaining that a corporation could have the minimum contacts required under the Due Process Clause but still not meet the requirements of the substantial nexus test under the Commerce Clause).

71. Patch, *supra* note 11, at 684–85.

72. *Quill*, 504 U.S. at 312.

73. *Id.* at 307–08.

74. Patch, *supra* note 11, at 684–85.

75. *Quill*, 504 U.S. at 311.

76. *See id.*

77. *Id.* at 298.

greatly changed the face of commerce.[78] In response to the e-commerce revolution, states have begun to experiment with their own Amazon taxes,[79] which permit states to tax Internet retailers even if they are not physically present within the state.[80] The goal of these taxes[81] is to close the gap between state expenditures and revenue accrual.[82] Another goal is to level the playing field between brick-and-mortar and online businesses.[83] It is very much an open question, however, whether Amazon taxes are consistent with the Commerce Clause. Different courts have come to different conclusions. Some courts have found a substantial nexus through common ownership with an in-state business. Other courts have found a substantial nexus solely through the economic presence of the retailer in the taxing state. New York, for example, has attempted to establish a substantial nexus through affiliate agreements with in-state residents. In general, though, there is not a common methodology to deal with taxation of Internet retailers. The following three Subparts show how different states have attempted to establish a substantial nexus and how the outcomes have been inconsistent in state and federal courts.

1. Establishing a Substantial Nexus Through Common Ownership

Some states have sought to establish a substantial nexus when an Internet retailer and an in-state brick-and-mortar business have common ownership. This Subpart discusses three cases that examined the common ownership method and the different analyses the courts employed.

In 1991, in *SFA Folio Collections, Inc. v. Bannon*,[84] the Connecticut Supreme Court held that Connecticut could not tax a mail order company, because common ownership and sharing a brand name with an in-state affiliate did not create a sufficient nexus with the state.[85] In its reasoning, the court expressly rejected an economic presence test, declaring that the court was bound to *Bellas Hess*'s bright-line rule that required physical presence.[86]

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78. *See* Patch, *supra* note 11, at 699; *see also* discussion *infra* Part III.B.

79. For the purposes of this Comment, the term "Amazon tax" refers to any law or methodology that seeks to bring an Internet retailer into a state's tax jurisdiction.

80. Cowan, *supra* note 40, at 1429; *see infra* note 121 and accompanying text.

81. This Comment is concerned primarily with sales, use, and gross receipts taxes. A sales tax is "[a] tax imposed on the sale of goods and services." BLACK'S LAW DICTIONARY 1597 (9th ed. 2009). It is synonymous with the term "retail tax." *Id.* A use tax is "[a] tax imposed on the use of certain goods that are bought outside the taxing authority's jurisdiction." *Id.* A gross receipts tax is "[a] tax on a business's gross receipts, without a deduction for costs of goods sold, or allowance for expenses or deductions." *Id.* at 1595.

82. *See* Cowan, *supra* note 40, at 1423.

83. Brief for Respondents at 29–30, Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621 (N.Y. 2013) (No. 2013-0033).

84. 585 A.2d 666 (Conn. 1991).

85. *Id.* at 668. SFA Folio Collections, Inc. was a mail order company that was affiliated with Saks Fifth Avenue and shared the corporate name. *Id.*

86. *Id.* at 676.

In more recent times, however, some courts have been willing to adapt to the realities of e-commerce, while others have reached the same conclusion as the *SFA Folio* court. In 2005, in *Borders Online, LLC v. State Board of Equalization*,[87] a California appeals court found that Borders Online was subject to a use tax because of its affiliation with Borders' stores in California.[88] In 2007, a federal district court in Louisiana considered *St. Tammany Parish Tax Collector v. Barnesandnoble.com*,[89] a factually similar case to *Borders Online*.[90] The issue was whether Barnesandnoble.com had a substantial nexus with Louisiana as a result of in-state Barnes & Noble Booksellers (Booksellers) stores.[91] The district court evaluated the common use of the Barnes & Noble trademark, the return policy, the loyalty program membership, and the gift cards sold at brick-and-mortar Booksellers' locations that could be redeemed at Barnesandnoble.com.[92] In considering the shared activities, the court held that there was not a substantial nexus between Barnesandnoble.com and Louisiana.[93] The court reasoned that Booksellers' activities within the state were not sufficient to establish a market-based nexus.[94] Unlike the *Borders Online* court, which held that common ownership created a substantial nexus, the *St. Tammany Parish* court relied on the absence of an agency relationship in holding there was not state tax jurisdiction despite the common ownership.[95]

2. Establishing a Substantial Nexus Through Economic Presence

While some courts have looked to whether an out-of-state retailer had a corporate relationship with an in-state affiliate, other courts have considered the economic presence within a state by an outside vendor.[96]

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87. 29 Cal. Rptr. 3d 176 (Ct. App. 2005).

88. *Id.* at 178. The *Borders Online* court found that the use of a shared logo and return policy by both the Internet retailer and the in-state stores established a substantial nexus. *See id.* at 190. Moreover, the court noted that cross-marketing strategies enabled Borders Online to establish and maintain a market in California. *Id.* at 190–91. In reasoning that the Internet retailer benefited from the in-state stores' activities, the court found that Borders Online effectively had a representative in California, which created the requisite physical presence. *Id.* The court also explained that there was a link on Borders' website which directed consumers to Borders Online's Internet address. *Id.* Further, the two companies shared market and financial information. *Id.* Thus, according to the court, both companies were actively promoting the Borders trademark. *Id.* at 192.

89. 481 F. Supp. 2d 575 (E.D. La. 2007).

90. *St. Tammany Parish* is also factually similar to *Barnesandnoble.com II*, the focus of this Comment. *See infra* Part II.

91. *See St. Tammany Parish*, 481 F. Supp. 2d at 576–77.

92. *Id.* at 578.

93. *Id.* at 580. *But see infra* note 187.

94. *See St. Tammany Parish*, 481 F. Supp. 2d at 580. The court further reasoned that a common brand name and close corporate relationships did not impute physical presence to the Internet retailer. *Id.* at 580–81. Although the two companies shared a parent company, Barnesandnoble.com and Booksellers did not share managers or directors and were separate entities. *Id.* at 581. Finally, the court noted that there was no evidence that the companies had shared assets. *Id.*

95. *Id.* at 582.

96. *See* Adam B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 FLA. TAX REV. 157, 176–77 (2012); Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction*, 24 VA. TAX REV. 109, 112–13 (2004).

The courts applying an economic presence test found that a state's tax jurisdiction could be determined by an entity's economic presence in the state, rather than by literal physical presence.[97] Sales, property, or payroll can make up economic presence.[98] In addition, "deriving income from licensing intangible property for use in the state is sufficient to establish an economic nexus with the state."[99] Again, different courts have come to different conclusions. This Subpart analyzes how the economic presence test has been applied.

In 1990, in *Mississippi State Tax Commission v. Bates*,[100] the Mississippi Supreme Court held that there was not a sufficient nexus for Mississippi to tax an Alabama-based carpet seller who had no agents or employees in Mississippi.[101] The court reasoned that the state did not have the authority to tax the carpet retailer even though the retailer sold carpets to Mississippi residents, because the business did not conduct activities within the state.[102] In addition, the court noted that local Mississippi carpet installers did not receive any compensation from the Alabama-based retailer and were not agents or employees of the retailer.[103] Furthermore, the court appeared to rely on the physical presence requirement, because it based its decision on the lack of "underlying activities conducted *within* the state."[104]

Comparatively, in 1993, in *Geoffrey, Inc. v. South Carolina Tax Commission*,[105] the South Carolina Supreme Court held that a company that had no physical presence within the state, but which licensed valuable intellectual property, was subject to state taxation.[106] The court reasoned that the company had received income from licensing intellectual property for use in South Carolina.[107] The court also mentioned that reliance on *Bellas Hess*'s physical presence requirement was "misplaced" and that any business which consistently exploited a state's market should be subject to taxation.[108] The court reasoned that "[t]he presence of intangible property alone is sufficient to establish nexus."[109]

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97. *See* Joondeph, *supra* note 96, at 112–13.
98. *See id.*
99. Thimmesch, *supra* note 96, at 176. For further discussion on how economic presence works, see *infra* Part III.D.1.
100. 567 So. 2d 190 (Miss. 1990).
101. *Id.* at 191, 194.
102. *Id.* at 191, 193.
103. *Id.* at 193.
104. *Id.* (emphasis added).
105. 437 S.E.2d 13 (S.C. 1993).
106. *Id.* at 15 (noting that Geoffrey owned numerous trademarks and trade names, such as "Toys R Us").
107. *Id.* at 18 ("[T]he taxpayer need not have a tangible, physical presence in a state for income to be taxable there."); Thimmesch, *supra* note 96, at 173.
108. *Geoffrey*, 437 S.E.2d at 18.
109. *Id.* Additionally, the *Geoffrey* court dealt with *Quill* by reasoning that the physical presence requirement was limited to sales and use taxes. Thimmesch, *supra* note 96, at 173. Starting in 2005, other state courts consistently rejected the physical presence requirement and moved towards

In 2006, in *Tax Commissioner v. MBNA America Bank, N.A.*,[110] the West Virginia Supreme Court of Appeals[111] also rejected a physical presence requirement.[112] The court stated that the test "makes little sense in today's world."[113] The court held that a bank's solicitation and maintenance of state residents' credit cards created a "significant economic presence" which met the substantial nexus requirement.[114] The bank was incorporated in Delaware and had no property or employees in West Virginia.[115] Issuing and servicing credit cards was the primary business it conducted in the state.[116] In order to attract customers, the bank promoted its business through telephone solicitation and mail.[117] Under the "significant economic presence" test the court announced, a business has a substantial nexus with the state if it "purposefully directs its activities" at the state and has exploited the state market.[118] In addition, the court noted that technological advancements made *Quill*'s physical presence requirement obsolete.[119]

3. Establishing a Substantial Nexus Through Affiliate Agreements: The "Amazon Tax" Case

In addition to common ownership and economic presence, states have sought to establish a substantial nexus through affiliate agreements with third-party, in-state residents.[120] Under these Amazon taxes, Internet retailers are required to collect taxes from consumers even if affiliates are the only connection the retailers have with the state.[121] The following Subpart discusses a New York case involving two market-dominant Internet retailers and affiliate agreements.

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the economic presence standard. *Id.* at 174–76. However, these courts also distinguished *Quill* by reasoning that *Quill* did not apply to other types of taxes apart from sales and use taxes, such as income taxes. *Id.* To date, the Supreme Court has declined to clarify whether *Quill* extends only to use and sales taxes, or whether the physical presence requirement encompasses other taxes as well. *Id.* at 159, 173–74.

110. 640 S.E.2d 226 (W. Va. 2006).

111. The West Virginia Supreme Court of Appeals is the state's highest court.

112. *MBNA Am. Bank*, 640 S.E.2d at 234.

113. *Id.*

114. Megan A. Stombock, *Economic Nexus and Nonresident Corporate Taxpayers: How Far Will It Go?*, 61 TAX LAW. 1225, 1230 (2008).

115. *MBNA Am. Bank*, 640 S.E.2d at 227.

116. *Id.*

117. *Id.*

118. Stombock, *supra* note 114, at 1230.

119. *Id.* The *MBNA* court also distinguished between *Quill* and the current case by claiming that *Quill* did not extend to the Business Activity Tax, the tax at issue in *MBNA*. *Id.*

120. Cowan, *supra* note 40, at 1426, 1429.

121. *See generally* N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2012) ("[A] person making sales of tangible personal property or services . . . shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars . . . .").

In 2008, the Amazon tax made its debut in New York.[122] Under the New York law, Internet retailers such as Amazon.com or Overstock.com[123] are presumed to be doing business within the state if they enter into agreements with in-state affiliates or representatives.[124] Internet retailers are considered to be soliciting business within New York if state residents obtain commissions or consideration from sales of tangible property by means of referral to the seller, even if through a website or Internet link.[125] Thus, out-of-state Internet retailers are exposed to New York's tax jurisdiction if they receive online referrals from in-state affiliates that result in sales.[126]

Amazon.com (Amazon) is a Delaware corporation with its principal place of business in Washington State.[127] It has no property or offices in New York and its sole source of business is online retail through its website.[128] Likewise, Overstock.com (Overstock) is a Delaware corporation whose principal place of business is in Utah and does not have any property, offices, or employees in New York.[129] Both Amazon and Overstock (collectively, Online Retailers) have affiliate programs whereby third parties agree to place links on their own websites that direct consumers to the Online Retailer's site.[130] If the consumer buys merchandise after being redirected from an affiliate's website to the Online Retailer's website, both Amazon and Overstock pay the third party a commission.[131] The affiliate contracts between the third parties and the Online Retailers designate the affiliates as "independent contractors."[132]

In 2008, Amazon and Overstock sued the New York State Department of Taxation and Finance in response to the state's tax law amendments that created the Amazon Tax.[133] Both companies argued that the statute was unconstitutional because it violated the Due Process Clause and the Commerce Clause.[134]

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122. Cowan, *supra* note 40, at 1426, 1429.

123. Amazon.com and Overstock.com conduct their retail business entirely through Internet sales and do not have any brick-and-mortar retail stores.

124. Cowan, *supra* note 40, at 1426.

125. *Id.*

126. Rob Owen, Recent Development, *The "Amazon Tax" Issue: Washing away the Requirement of Physical Presence for Sales Tax Jurisdiction over Internet Businesses*, 2013 U. ILL. J.L. TECH. & POL'Y 231, 233.

127. Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621, 622 (N.Y. 2013).

128. *Id.*

129. *Id.* at 623.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 624.

134. *See id.* The due process question concerning the statutory presumption is beyond the scope of this Comment. The issue was whether the rebuttable civil presumption, which presumed that a retailer was doing business in the state if independent contractors received commissions from sales stemming from solicitation in the state, violated the Due Process Clause. *Id.* at 623.

The New York Court of Appeals[135] addressed the question of whether the statute violated the DCC's substantial nexus test.[136] On March 28, 2013, the court upheld New York's tax law because the affiliate agreements created a substantial nexus with the state.[137] According to the court, the affiliation agreements with New York residents amounted to active advertisement by the Online Retailers.[138] The court reasoned that if a retailer pays a resident to solicit local business, the retailer should be subject to the state's tax law.[139] Furthermore, the court held that the Amazon tax did not violate the Due Process Clause.[140] The court explained that the Online Retailers had "purposefully directed" their activities in New York and therefore had notice that they could be subjected to state taxes.[141] Accordingly, the Amazon Tax was constitutional.[142]

Following the unfavorable New York ruling, Amazon and Overstock separately filed writs of certiorari with the U.S. Supreme Court.[143] In its petition, Amazon emphasized that the affiliate program, labeled the "Associates Program," is merely a marketing tool and that affiliates place "passive advertisements on their websites" which can link to Amazon's website.[144] According to Amazon, the New York court contravened *Bellas Hess*'s physical-presence rule.[145] Amazon also claimed that the court disregarded the rule from *Quill*, which held that advertisement by itself does not establish a substantial nexus.[146] Similarly, Overstock argued that the activities of the in-state, third-party affiliates did not impute a physical presence within the state because they were not agents of the company.[147] Overstock focused on the lack of an agency relationship with the third-party affiliates and argued that economic presence does not assign

135. The New York Court of Appeals is the state's highest court.
136. *Overstock.com*, 987 N.E.2d at 625.
137. *Id.* at 626.
138. *See id.*
139. *Id.*
140. *Id.*
141. *See id.* ("[A]n entity 'that is engaged in continuous and widespread solicitation of business within a State . . . clearly has fair warning that [its] activity may subject [it] to the jurisdiction of [the state],' even in the absence of physical presence." (second and third alterations in original) (omission in original) (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992))).
142. *Id.* at 627.
143. Petition for Writ of Certiorari, Amazon.com LLC v. N.Y. State Dep't of Taxation & Fin., 2013 WL 4508624 (U.S. Aug. 23, 2013) (No. 13-259); Petition for Writ of Certiorari, Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 2013 WL 4495978 (U.S. Aug. 22, 2013) (No. 13-252).
144. Petition for Writ of Certiorari at *3, *Amazon.com*, 2013 WL 4508624 (No. 13-259).
145. *See id.* at *8.
146. *See id.* A more precise reading of *Quill*, however, shows that the Court was more concerned with companies whose advertisements through a common carrier, such as through mail, were the only connection the company had with the state. *Quill*, 504 U.S. at 311. The Court stated that there is a "sharp distinction" between companies that advertise but have no physical presence and those that advertise and have some physical presence. *Id.* (internal quotation mark omitted).
147. Petition for Writ of Certiorari at *20–21, *Overstock.com*, 2013 WL 4495978 (No. 13-252).

physical presence.[148] On December 2, 2013, the Court denied certiorari without offering any commentary.[149]

II. NEW MEXICO TAXATION & REVENUE DEPARTMENT V. BARNESANDNOBLE.COM LLC

New Mexico Taxation & Revenue Department v. Barnesandnoble.com LLC (*Barnesandnoble.com II*)[150] is a common ownership case. The New Mexico Supreme Court, in a unanimous decision in favor of the state, framed the issue around the DCC and analyzed *Quill*'s physical presence requirement. While the court did not explicitly mention an economic presence test, it considered whether an in-state sister corporation's activities allowed the Internet retailer to maintain and exploit a market in New Mexico.[151] The New Mexico Supreme Court's analysis, therefore, is tantamount to an economic presence test. This case is a recent and quintessential example of how courts have injected their own reasoning in light of the outdated *Quill* test.

A. Facts

Barnesandnoble.com (bn.com) does not have a physical presence in New Mexico.[152] It has no property or employees in the state.[153] Incorporated in Delaware, bn.com is an out-of-state Internet retailer that sells books, media, and other products through its website.[154] Bn.com was a wholly owned subsidiary of barnes&noble.com, inc. during the time at issue, and at least forty percent of the ownership of barnes&noble.com, inc. had been owned by B&N.com Holding Corp.[155] The parent corporation, Barnes & Noble, Inc. (Parent) had an interest in bn.com because B&N.com Holding Corp. was a wholly owned subsidiary of Parent.[156] Further, Parent owned Barnes & Noble Booksellers, Inc. (Booksellers), which currently has three retail stores in New Mexico.[157]

In addition to the common ownership, there is significant business interrelationship between the two companies. Bn.com and Booksellers sell Barnes & Noble gift cards that can be redeemed online or in a store.[158] On the back of the gift card is bn.com's website address.[159] Both

148. *Id.* at 21–24.

149. Amazon.com LLC v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621 (N.Y. 2013), *cert. denied*, 134 S. Ct. 682 (2013); Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621 (N.Y. 2013), *cert. denied*, 134 S. Ct. 682 (2013).

150. The case is referred to as *Barnesandnoble.com II* to distinguish it from the lower court case.

151. *Barnesandnoble.com II*, 303 P.3d 824, 825 (N.M. 2013).

152. *Id.*

153. *In re* Barnesandnoble.com LLC (*Barnesandnoble.com I*), 283 P.3d 298, 300 (N.M. Ct. App. 2012).

154. *Barnesandnoble.com II*, 303 P.3d at 825–26.

155. *Barnesandnoble.com I*, 283 P.3d at 300–01.

156. *Id.*

157. *Id.* at 301.

158. *Id.*

bn.com and Booksellers sell loyalty program memberships that give members online and in-store discounts.[160] The membership fees go to Parent, bn.com, and Booksellers.[161] In addition, return policies, which are reciprocated by bn.com and Booksellers, allow customers to return items bought online at bn.com to Booksellers' retail stores.[162] Finally, bn.com's website informs customers of Booksellers' store locations.[163]

In 2006, the New Mexico Taxation and Revenue Department (Revenue Department) audited bn.com and assessed a gross receipts tax against the Internet retailer for a seven-year period from 1998 through 2005 for its sales to New Mexico customers.[164] The Revenue Department conducted the assessment under the authority of the Gross Receipts and Compensating Tax Act.[165]

B. Procedural History

Bn.com contested the gross receipts tax, claiming that it violated the Due Process Clause of the U.S. Constitution.[166] A state hearing officer granted summary judgment to bn.com, finding that it was unconstitutional to tax the Internet retailer.[167] On appeal, the court of appeals reversed, finding that bn.com did have a substantial nexus with New Mexico as required by the Commerce Clause of the U.S. Constitution.[168] The appeals court relied heavily on *Tyler Pipe*, in which the Supreme Court held that physical presence can be created through the establishment and maintenance of a market.[169] As a result, the court reasoned that bn.com's affiliation with Barnes & Noble stores through cross-marketing activities and the shared use of trademarks created a substantial nexus.[170] Bn.com petitioned the New Mexico Supreme Court, which granted certiorari.[171]

C. Opinion

In 2013, New Mexico's highest court unanimously affirmed the appeals court's decision.[172] The sole issue before the court was whether the

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159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. Gail O'Gradney, *Taxation of Online Retailer Did Not Run Afoul of Commerce Clause*, 31 NO. 7 FLETCHER CORP. L. ADVISOR 6 (2013).
165. *See* N.M. STAT. ANN. §§ 7-9-1 to -114 (2012).
166. *Barnesandnoble.com I*, 283 P.3d at 301. *See generally* Joondeph, *supra* note 96, at 120 (explaining that the Due Process Clause places limits on the states' taxing powers by prohibiting states from taxing interstate activities if there is not a minimal connection between the state and the interstate activities).
167. *Barnesandnoble.com II*, 303 P.3d 824, 825–26 (N.M. 2013).
168. *Id.*; *Barnesandnoble.com I*, 283 P.3d at 300. The appeals court declined to address the due process claim, saying that it had no merit. *Id.* at 307.
169. *Barnesandnoble.com I*, 283 P.3d at 302.
170. *Barnesandnoble.com II*, 303 P.3d at 825–26.
171. *Id.*
172. *Id.*

Revenue Department could impose New Mexico gross receipts tax on bn.com without violating the Commerce Clause, even though bn.com had no physical presence in the state.[173] The court held that the state may do so without violating the Commerce Clause because there was a substantial nexus between bn.com and the state.[174]

The New Mexico Supreme Court framed the issue around the DCC and the substantial nexus test.[175] Analyzing the Supreme Court's decision in *Quill*, the court said that "[t]he Commerce Clause has been interpreted not only as an affirmative grant of power to Congress, but also as a limitation on state actions that interfere with interstate commerce."[176] In referring to the part of Commerce Clause doctrine known as the negative or dormant clause, the court said that the DCC is offended when interstate commerce is burdened by state taxation.[177] Under the *Complete Auto* test, however, states are allowed to tax parties involved in interstate commerce without federal authorization if there is a substantial nexus between the state and the party's activities within the state.[178] According to the court, therefore, the only question presented was whether bn.com's online sales to New Mexico customers had a substantial nexus with the state.[179]

Having clarified the issue to be decided, the court turned to whether the DCC had been violated.[180] After evaluating Supreme Court precedent, the New Mexico court determined that absence of physical presence was not dispositive.[181] The court reasoned that the "Supreme Court has consistently taken a functional approach to the substantial nexus analysis."[182] Therefore, the court reframed the issue as "whether

173. *Id.* at 825.

174. *Id.*

175. *See id.* at 826; *see also* U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress "[t]o regulate Commerce . . . among the several States").

176. *Barnesandnoble.com II*, 303 P.3d at 826 (citing Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992)).

177. *Id.*

178. *Id.* (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

179. *Id.*

180. *Id.* at 826–27. The court compared *Quill*, where the U.S. Supreme Court held that North Dakota could not constitutionally tax a mail order company with no property or employees within the state, with *Tyler Pipe*. *Id.* In the latter case, the Court held that even where a vendor had no employees or property within a state, in-state activity could establish a sufficient nexus. *Id.*; *see also* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 250 (1987) ("[T]he crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." (quoting Tyler Pipe Indus., Inc. v. Dep't of Revenue, 715 P.2d 123, 126 (Wash. 1986), *vacated*, 483 U.S. 232 (1987)) (internal quotation marks omitted). The court also referred to *Scripto, Inc. v. Carson*, a 1960 U.S. Supreme Court case in which the Court held that a business that had no property or full-time employees in Florida could nonetheless be exposed to the state's tax jurisdiction. *Barnesandnoble.com II*, 303 P.3d at 826–27 (citing Scripto, Inc. v. Carson, 362 U.S. 207, 208–09, 211 (1960)). The Court had reasoned that contractors had solicited business within Florida on the company's behalf. *Id.*

181. *See Barnesandnoble.com II*, 303 P.3d at 826–27.

182. *Id.*

Booksellers performed activities on behalf of bn.com [which were] significantly associated with bn.com's ability to establish and maintain a market for its sales in New Mexico."[183]

The court then addressed Booksellers' activities in New Mexico that were associated with bn.com.[184] The court held that Bookseller performed activities in the state that "were significantly associated with bn.com's ability to establish and maintain a market" in New Mexico.[185] The court reasoned that a substantial nexus existed because of the sale of gift cards at Booksellers that displayed bn.com's web address, the loyalty program membership sold by both companies, and the return policy that enabled customers to return items bought at bn.com to Booksellers' locations in New Mexico.[186] Further, the court noted that bn.com and Booksellers shared their patrons' email addresses with each other, both companies used the Barnes & Noble trademark, and as a result, bn.com benefitted from consumer brand loyalty established at Booksellers' stores.[187] Accordingly, the court concluded that Booksellers' in-state activities, including the use of the shared trademark, helped bn.com "establish and maintain a market" in New Mexico.[188] Therefore, the Court held that the Commerce Clause did not prevent the Revenue Department from collecting gross receipts tax from bn.com, because the company had a substantial nexus with the state.[189]

III. ANALYSIS

In *Barnesandnoble.com II*, the New Mexico Supreme Court explored the controversial issue of whether Internet retailers could be subjected to state sales taxes by virtue of affiliations with in-state entities without violating the DCC.[190] In this case, direct affiliation through common use of trademarks and business policies established enough of a nexus to allow New Mexico to impose a gross receipts tax.[191] In its dis-

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183. *Id.* at 827.
184. *Id.*
185. *Id.* at 829.
186. *See id.* at 827.
187. *Id.* at 827–28. In its discussion, the court also considered the *Borders Online*, *SFA Folio*, and *St. Tammany Parish* cases. *Id.* at 828–29. In doing so, the court noted the divergent viewpoints and holdings. *Id.* at 829. In particular, the court mentioned that *St. Tammany Parish* was nearly identical to *Barnesandnoble.com II*, yet had come out differently. *Id.* at 829. The New Mexico Supreme Court then claimed that the district court in *St. Tammany Parish* had erroneously applied a higher standard than *Tyler Pipe* demanded. *Id.* According to the New Mexico court, *Tyler Pipe* required that the activities performed on behalf of the business be "significantly associated with [bn.com's] ability to establish and maintain a market." *Id.* (alteration in original) (quoting Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 250 (1987)) (internal quotation marks omitted). The *St. Tammany Parish* court, however, had read that requirement to mean that a sufficient nexus occurred only when another entity was acting as an agent of the out-of-state retailer. *Id.*
188. *Id.* at 829.
189. *Id.*
190. *Id.* at 826–28. In relying on *Quill*, the court held that the physical presence of an in-state sister corporation satisfied the requirements of the DCC. *Id.* at 826, 829.
191. *See id.* at 827–28.

cussion, the court identified *Quill* as providing the governing law, but looked beyond the literal meaning of the physical presence requirement,[192] recognizing that strict adherence to *Quill* was impracticable in an e-commerce world. In fact, the court adeptly employed an economic nexus-type analysis, under the guise of the physical presence test.[193] Thus, according to the court, when an entity is able to "establish and maintain a market" in a state, even in the absence of in-state employees or property, there is state tax jurisdiction, because the business's presence within the state creates a substantial nexus.[194] This reasoning is more in line with an economic presence analysis, in which economic exploitation is comparable to physical exploitation.[195]

With the backdrop of the *Barnesandnoble.com II* decision as a guidepost, this Part first contends that the U.S. Supreme Court missed an opportunity to weigh in on the precise standard courts should use when determining substantial nexus when it denied certiorari of the recent New York case. As demonstrated in Part I.B., courts have applied varying standards and the outcomes have been unreliable; therefore, the Court should have alleviated the uncertainty with respect to the DCC and Internet retailers by setting a clear standard that comports with modern day realities. Next, this Part argues that the *Quill* decision is irrelevant in the Digital Age. In addition, this Part contends that *Bellas Hess*'s bright-line physical presence rule and *Quill*'s affirmation of that rule should be overruled. Moreover, this Part discusses congressional attempts to overrule the physical presence requirement and the Marketplace Fairness Act of 2013. Finally, after having established the problem with the current state of the law, this Part recommends a solution: the Court should adopt the economic presence standard because it is more viable in the Digital Age. Further, in arguing for adoption of an economic presence standard, this Part concludes by suggesting that the New Mexico Supreme Court's holding in *Barnesandnoble.com II* provides a practical approach to Internet retailer taxation cases.

A. The Supreme Court Should Have Weighed in: Amazon and Overstock

The U.S. Supreme Court had an opportunity to address Internet retailer taxation in a pair of high-profile cases that made their way to Washington.[196] On August 22, 2013, Overstock petitioned the Court for a writ of certiorari following the New York Court of Appeal's ruling,

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192. *See id.* at 826–27. The court noted that bn.com did not have any property or employees in the state but asserted that there could nonetheless still be a substantial nexus. *Id.* at 826–27.

193. *See generally id.* at 829 (holding that a substantial nexus existed because the in-state sister corporation had enabled bn.com to "establish and maintain a market" in New Mexico).

194. *Id.* at 826–27, 829.

195. *See* Thimmesch, *supra* note 96, at 195.

196. *See supra* Part I.C.3..

which held that affiliate agreements created a substantial nexus.[197] The next day, Amazon followed with its own petition.[198] The cases concerned the constitutionality of New York's Amazon Tax.[199]

The Court, however, has left many questions unanswered. On December 2, 2013, the Court denied the writs of certiorari without offering any commentary.[200] The Court should have taken the opportunity to update its DCC jurisprudence in light of the changing nature of interstate commerce.

As noted in Part I.B., different courts have come to different conclusions, and the Court's failure to settle the matter leaves the nation in a continued state of uncertainty. For example, some courts have held that common ownership with an in-state sister corporation establishes a substantial nexus with the state.[201] Like the *Barnesandnoble.com II* court, these courts have reasoned that the DCC is not offended if the Internet retailer "establish[es] and maintain[s] a market" in the taxing state.[202] However, not all courts have reached similar conclusions under almost indistinguishable factual scenarios.[203] For instance, in *St. Tammany Parish*, a federal district court held that shared marketing activities between Booksellers and bn.com did not create a substantial nexus despite the factual similarities to *Barnesandnoble.com II*.[204] Still other courts have guessed as to the applicability of *Quill* in employing an economic presence test.[205] Again, courts considering the economic presence test have come out differently.[206] And finally, the Amazon and Overstock cases represent yet another methodology used by states to subject Internet retailers to state tax jurisdiction—affiliate agreements with third-party, in-state residents.[207]

197. Petition for Writ of Certiorari, Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 2013 WL 4495978 (U.S. Aug. 22, 2013) (No. 13-252).

198. Petition for Writ of Certiorari, Amazon.com LLC v. N.Y. State Dep't of Taxation & Fin., 2013 WL 4508624 (U.S. Aug. 23, 2013) (No. 13-259).

199. Greg Bensinger, *Amazon Asks Supreme Court to Decide Sales Tax Fight*, WALL ST. J., Aug. 28, 2013, http://blogs.wsj.com/digits/2013/08/28/amazon-asks-supreme-court-to-decide-sales-tax-fight/.

200. Amazon.com LLC v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621 (N.Y. 2013), *cert. denied*, 134 S. Ct. 682 (2013); Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621 (N.Y. 2013), *cert. denied*, 134 S. Ct. 682 (2013).

201. *See, e.g.*, Borders Online, LLC v. State Bd. of Equalization, 29 Cal. Rptr. 3d 176, 192 (Ct. App. 2005).

202. *See Barnesandnoble.com II*, 303 P.3d 824, 829 (N.M. 2013).

203. *See* St. Tammany Parish Tax Collector v. Barnesandnoble.com, 481 F. Supp. 2d 575, 580 (E.D. La. 2007).

204. *Id.*

205. *See* Thimmesch, *supra* note 96, at 173–76; *see also* discussion *supra* Part I.B.1.

206. *Compare* Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13, 18–19 (S.C. 1993) (holding that a company which had no physical presence within the state, but which licensed valuable intellectual property for use within the state, was subject to state taxation), *with* Miss. State Tax Comm'n v. Bates, 567 So. 2d 190 (Miss. 1990) (holding that there was not a nexus sufficient for Mississippi to tax an Alabama-based carpet seller who had no agents or employees in Mississippi).

207. *See* Cowan, *supra* note 40, at 1426; *see also supra* Part I.C.3.

Thus, there are three ways courts have analyzed state taxation of out-of-state retailers: (1) establishment of a substantial nexus through common ownership, (2) establishment of a substantial nexus through economic presence, and (3) establishment of a substantial nexus through affiliate agreements.[208] As is demonstrated by these different methods of analysis, there is no one standard courts can look to in determining whether an Internet retailer has a substantial nexus with a state such that it can be exposed to taxation without offending the DCC.

The Court had the opportunity to address the Internet retailer issue and establish unambiguous rules for state taxation of e-commerce. Instead, the Court chose to deny certiorari in the Amazon and Overstock case. As a result, states are employing various and inconsistent standards to obtain tax jurisdiction. In the absence of clear direction from the Court, interstate commerce will remain in a continued state of flux with respect to taxation and Internet retailers.[209] For instance, state legislators may pass similar Amazon taxes in the wake of the New York ruling,[210] in which the New York court held that the state's tax law did not violate the Commerce Clause because affiliate agreements created a substantial nexus with the state.[211] The Court should have at the very least set guidelines and rules for state taxation of e-commerce.[212] The absence of such guidance has left a void in which courts have applied varying and sometimes incompatible interpretations of the DCC in Internet retailer cases.[213]

The impact on small businesses engaged in e-commerce is also palpable. Because unambiguous rules concerning state taxation facilitate settled expectations and encourage individuals and business owners to invest,[214] a clear rule is needed. The Court's lack of direction will probably encourage other states to implement their own Amazon taxes.[215] Consequently, businesses will be compelled to update their infrastructure and incur compliance costs in order to conform to state laws.[216] For example, businesses will need to upgrade their accounting software and take-on licensing and maintenance costs.[217] These changes will disproportionately affect small businesses.[218] The Court's decision to deny re-

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208. *See supra* Part I.C.

209. Petition for Writ of Certiorari at *33, Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 2013 WL 4495978 (U.S. Aug. 22, 2013) (No. 13-252).

210. Petition for Writ of Certiorari at *24–25, Amazon.com LLC v. N.Y. State Dep't of Taxation & Fin., 2013 WL 4508624 (U.S. Aug. 23, 2013) (No. 13-259).

211. Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621, 626 (N.Y. 2013).

212. Petition for Writ of Certiorari at *26, *Amazon.com*, 2013 WL 4508624 (No. 13-259).

213. *See* discussion *supra* Part I.C.

214. Quill Corp. v. North Dakota, 504 U.S. 298, 316 (1992).

215. Brief for Scrapbook.com, et al. as Amici Curiae Supporting Petitioner at 2, *Overstock.com*, 987 N.E.2d 621 (Nos. 13-252, 13-259).

216. *See id.*

217. *Id.* at 2–3.

218. *Id.* at 2.

view creates more ambiguity in an already uncertain climate.[219] If businesses cannot be sure about the scope of state tax jurisdiction, they cannot effectively plan their compliance costs.[220] The legal uncertainty will only lead to a chill on investments and a downturn in economic growth.[221]

In addition, the New York court's decision raises questions about the continued relevance of *Quill*'s substantial nexus rule[222] because states are continuously looking for a way to maneuver around the physical presence requirement. Therefore, the Court should have taken the opportunity to set a clear standard.

B. Quill *Is Not Relevant in an E-Commerce World*

Quill's utility is limited in the modern era of e-commerce. Yet *Quill* remains the governing law regarding out-of-state retailers and state taxation, despite that it was decided more than twenty years ago.[223] Since the 1992 *Quill* decision, commerce has changed drastically and *Quill*'s physical presence test is largely outdated.[224] As the New York Court of Appeals stated, "An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet."[225] Consequently, an overhaul of DCC jurisprudence is needed in order to reconcile retailers' interests in uniform tax collection rules with the states' interest in closing the gap between expenditures and revenue.[226]

The physical presence test, announced in 1967 and then reaffirmed in 1992, does not take into account modern-day realities.[227] Indeed, when the rule was first articulated, physical presence was generally required for a retailer to enter a state's market.[228] For instance, to generate meaningful business in a state, retailers would have once needed employees, warehouses, or offices within the state.[229] This is not the reality today.[230] Communication technology has proliferated to the extent that it is possible, and likely, that a retailer will establish and maintain a market without a physical presence.[231] Therefore, any retailer that consistently exploits a state's market, such as through cross-marketing strategies with

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219. *See id.* at 3.
220. *See id.*
221. *See id.* at 15.
222. Cowan, *supra* note 40, at 1444.
223. David H. Gershel, Comment, *The Day of Reckoning: The Inevitable Application of State Sales Tax to Electronic Commerce*, 14 TUL. J. TECH. & INTELL. PROP. 335, 339 (2011).
224. Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621, 625 (N.Y. 2013).
225. *Id.*
226. Patch, *supra* note 11, at 694–95.
227. Tax Comm'r of W. Va. v. MBNA Am. Bank, N.A., 640 S.E.2d 226, 234 (W. Va. 2006).
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*

in-state sister corporations or with third-party affiliate agreements, should be exposed to state tax jurisdiction.[232]

Not everyone recognizes the impact of technological advancements.[233] In his dissent in the Amazon and Overstock case, Justice Smith failed to consider the far-reaching changes e-commerce has brought, and wrongly contends that a website owner who is "trying to persuade members of the public" is not equivalent to a sales agent.[234] Justice Smith attempted to bolster his argument by claiming that a traditional salesman, who seeks to promote a specific product so that he will get a commission, is not comparable to a website owner that promotes an Internet retailer's products.[235] Instead, he argued "no website owner promotes Overstock or Amazon for a similar reason [as a traditional salesman does], because everyone who wants to buy from either of those firms can go to the retailer's website directly."[236] But this view is mistaken, particularly in the age of e-commerce where the pace of commerce has increased exponentially to where transactions occur by a simple click of a button.

For example, consider a small business owner engaged in the lawn mower industry who repairs broken lawn mowers and who sells lawn mower components. Next, assume the company does not actually sell lawn mowers. It may, however, advertise on its website for the particular kinds of lawn mowers it services and sells parts for. In this respect, it is in the small business owner's interest to solicit business for an Internet retailer that sells lawn mowers. The more people in the locality that own a particular brand of lawn mower, the more business the company will see through repairs and sales of component parts. The same reasoning holds true for a small business that sells the primary product but does not sell the components. In other words, contrary to Justice Smith's argument, people may not always go directly to an Internet retailer's website to buy a certain product and it is advantageous to the small business owner and the Internet retailer to engage in such mutually beneficial solicitation tactics. As demonstrated above, the Internet has completely changed the face of commerce. It is high time to recognize that what

232. *See* Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13, 18 (S.C. 1993).

233. This is especially true for out-of-touch judges well into their life tenures. *See generally* Joseph Goldstein, *Life Tenure for Federal Judges Raises Issues of Senility, Dementia*, PROPUBLICA (Jan. 18, 2011, 7:30 AM), http://www.propublica.org/article/life-tenure-for-federal-judges-raises-issues-of-senility-dementia (describing an eighty-four year old judge that needed to have email explained to him and a 2010 study that found that approximately twelve percent of federal judges are over eighty years old).

234. Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621, 628 (N.Y. 2013) (Smith, J., dissenting).

235. *Id.*

236. *Id.*

constitutes a substantial nexus in 2014 is very different from what constituted a substantial nexus in 1992.[237]

As the facts of recent legal disputes make clear, the physical presence requirement is arbitrary and anachronistic in an age where physical boundaries have little to no import.[238] For instance, the foundation of the physical presence requirement is the fundamental prohibition against extraterritorial taxation.[239] The ban on extraterritorial taxes is a basic limit on state authority, which the nation's highest court has recognized since the mid-1800s.[240] This reflects the principle that states are generally limited to taxing those activities which occur within state borders.[241] But traditional notions of state boundaries and borders have changed dramatically in the Digital Age. Chief Justice John Marshall recognized the evolving nature of the national landscape in the pioneering case, *McCulloch v. Maryland*.[242] In his opinion, Chief Justice Marshall explained that it was "impossible for [the framers] to foresee the infinite variety of circumstances . . . [that would impact this] society [of] ours [because it is] for ever changing and for ever improving."[243] Stated differently, there is room for adaptability in the nation's jurisprudence.

When *Quill* was decided, the emergence of individual Internet usage was just beginning.[244] In fact, in 1992, the same year the *Quill* Court came down with its decision, Congress first permitted the government, including the military, to use the Internet.[245] It was not until 1994 that people began to use the Internet for business.[246] Fast-forward twenty years: The Internet has revolutionized commerce and emergent technologies have transformed state economies.[247] For instance, in 2005, the U.S Census Bureau reported that the total adjusted amount of e-commerce retail sales was $90.1 billion.[248] But in the first quarter of 2014 alone, e-commerce accounted for $71.2 billion of total retail sales and are on pace to reach $285 billion by the end of the year.[249] And according to the National Conference of State Legislatures, the states missed an estimated $23.3 billion in revenue in 2012 because they were not allowed to collect

237. *See generally* Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992) (discussing the DCC and the substantial nexus requirement in the context of mail order businesses).

238. *See* Joondeph, *supra* note 96, at 112.

239. *Id.* at 122.

240. *Id.*

241. *Id.* at 122–23.

242. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 384–85 (1819) (holding that the states have no power to tax or burden a national bank created by Congress and establishing that Congress has implied powers apart from those enumerated in the Constitution).

243. *Id.* at 385.

244. *See* Patch, *supra* note 11, at 675–76.

245. *Id.* at 675.

246. *Id.* at 676.

247. *See id.* at 699.

248. *See* Press Release, U.S. Census Bureau, Quarterly Retail E-Commerce Sales: 1st Quarter 2014 (May 15, 2014), *available at* https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

249. *Id.*

and remit sales and use taxes from Internet retailers.[250] The current tax scheme makes little sense in an e-commerce world, because sales and use taxes are central to the states' fiscal health.[251] As it is, states already face budget shortfalls.[252]

In conclusion, *Quill*'s substantial nexus test, which requires physical presence in the taxing state,[253] has lost relevance in our Internet and technology driven society.[254] The change to a service-based economy from a mercantile economy, together with the increased mobility of capital, further shows that *Quill* is outdated because companies can conduct their in-state business from almost anywhere.[255] Geography and physical presence do not have the significance they had when *Quill* was decided.[256] As a consequence of the antiquated rule, Internet retailers have been able to evade taxes.[257] Furthermore, Internet retailers have used the current tax rules in order to create price advantages over their brick-and-mortar counterparts who are required to collect state taxes.[258] Requiring Internet retailers to collect state taxes does nothing more than oblige those retailers to collect what other vendors that do business within a state already have to do.[259] Therefore, continued adherence to *Quill*'s physical presence rule fails to reflect the realities of doing business in the Digital Age.

C. Bellas Hess *and* Quill *Stare Decisis Should Be Overruled*

The majority's holding in *Quill* was illogical.[260] In his dissenting opinion, Justice White explained that affirmation of *Bellas Hess*'s bright-line physical presence rule would create perverse results.[261] For example, an out-of-state retailer with just one in-state employee could be brought into a state's tax jurisdiction, even if the employee's activities were unrelated to sales within the state.[262] Meanwhile, an out-of-state retailer that is the dominant retailer in a state could "creat[e] . . . infrastructure burdens and undercut[] the State's home companies by its comparative price advantage in selling products free of use taxes."[263] Nevertheless, the out-

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250. Jessica Nicole Cory, *The Gap Created by E-Commerce: How States Can Preserve Their Sales and Use Tax Revenue in the Digital Age*, 8 OKLA. J.L. & TECH. 57 (2012).

251. Joondeph, *supra* note 96, at 110.

252. Gershel, *supra* note 223, at 335–36.

253. Cowan, *supra* note 40, at 1424.

254. *See* John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 321 (2003).

255. *Id.*

256. *Id.* at 344.

257. *See* Cory, *supra* note 250.

258. *Id.*

259. Brief for Respondents, *supra* note 83, at 29–30.

260. Quill Corp. v. North Dakota, 504 U.S. 298, 328 (1992) (White, J., concurring in part and dissenting in part).

261. *Id.* at 328–29.

262. *Id.* at 328.

263. *Id.* at 328–29.

of-state retailer would be immune from the state's tax jurisdiction under the physical presence rule.[264] According to Justice White, "[t]he majority clings to the physical-presence rule not because of any logical relation to fairness or any economic rationale related to principles underlying the Commerce Clause, but simply out of the supposed convenience of having a bright-line rule."[265] This, he says, is illogical, and disagrees with the majority's ruling that is based on stare decisis grounds.[266] The Court should have instead given the physical presence rule the "complete burial" it deserved.[267]

Because the *Quill* Court reaffirmed *Bellas Hess*'s bright-line physical presence rule primarily under stare decisis grounds,[268] and the reasons for doing so no longer exist today, the Supreme Court should have overruled *Quill*.[269] The social, technological, and economic changes of the Digital Age demonstrate that strict adherence to a physical presence standard is no longer relevant.[270] Further, the old rule is proving unworkable because states are losing out on vast amounts of revenue as a result of the *Quill* standard.[271] Therefore, the Court should have discarded a literal interpretation of *Quill*'s physical presence standard; particularly in light of the dramatic changes that e-commerce brings to the digital marketplace. Therefore, it makes sense to interpret physical presence broadly so that Internet retailers are subject to a state's tax jurisdiction when they have affiliate agreements with state residents or share common ownership with in-state brick-and-mortar businesses.

In holding that the physical presence test continues to control, the *Quill* Court dedicated much of its opinion to the benefits of stare decisis.[272] In fact, three concurring Justices adhered to *Bellas Hess*'s bright-line rule solely on stare decisis principles.[273] The majority opinion, however, admitted that the *Bellas Hess* rule was "artificial at its edges."[274] In recognizing that the physical presence rule was artificial, the Court stated that the benefit of an unambiguous rule outweighs its artificiality.[275] The Court reasoned that the physical presence rule established clear bounda-

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264. *Id.*
265. *Id.* at 329.
266. *See id.* at 317–19 (majority opinion); *id.* at 328–29 (White, J., concurring in part and dissenting in part).
267. *Id.* at 322 (White, J., concurring in part and dissenting in part). Justice White was referring to the *Quill* Court's overturning of the physical presence requirement of the Due Process Clause and its affirmation of the physical presence requirement under the Commerce Clause. *See id.* at 321–22.
268. *See* Swain, *supra* note 254, at 329, 331 (noting that many commentators view stare decisis as the crux of the *Quill* decision).
269. *See generally id.* at 332 (defining stare decisis as "a bedrock principle of law" which "provides that courts will adhere to existing precedent and not disturb settled points").
270. *See* discussion *supra* Part III.B.
271. *See* Cory, *supra* note 250; *see also supra* text accompanying notes 250–52.
272. *See Quill*, 504 U.S. at 315–17 (majority opinion).
273. Swain, *supra* note 254, at 330.
274. *Quill*, 504 U.S. at 315.
275. *Id.*

ries for state tax jurisdiction and in doing so decreased litigation potential regarding sales and use taxes.[276] But the Court has not always been reluctant to turn away from stare decisis:

> [It] has identified four factors that it considers [when overruling existing precedent]: (1) whether there has been significant change in related principles of law; (2) whether there has been a change in the factual milieu (social, economic, cultural, technological, and so on); (3) whether the old rule has become unworkable; and (4) whether there are strong reliance interests in the old rule that would be harmed by a change.[277]

In *Quill*, the Court looked to the reliance interest factor in finding that individuals and businesses seeking to invest would benefit from the bright-line rule.[278] But any basis that existed for the holding in 1992 is not applicable in 2014, because the rationale for the physical presence standard has been displaced by modern developments.[279] In fact, the Court could have very well overturned the physical presence requirement based on factors one to three if it had granted certiorari in the Amazon and Overstock case. Furthermore, the *Quill* Court's affirmation of *Bellas Hess*'s bright-line physical presence standard on stare decisis grounds was weak.[280] By openly admitting the artificiality of the rule, the Court essentially acknowledged that the physical presence standard had vulnerabilities.[281]

In addition, in affirming the bright-line rule, the *Quill* Court validated *Bellas Hess*'s reasoning, which was based largely on administrative concerns.[282] The *Bellas Hess* Court had reasoned that "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [the company's] interstate business in a virtual welter of complicated obligations to local jurisdictions."[283] Thus, at the core of the Court's holding was the concern that imposing state tax jurisdiction based on anything other than physical presence could ensnare the national economy with local issues, which was the very thing the Commerce Clause was designed to avoid.[284] The *Bellas Hess* Court, however, then asserted that it was within the domain of Congress to settle such matters.[285] The *Quill* Court repeated that sen-

276. *See id.* at 315–16.

277. Swain, *supra* note 254, at 332.

278. *See Quill*, 504 U.S. at 316.

279. *See id.* at 327–28 (White, J., concurring in part and dissenting in part); *see also supra* Part III.B.

280. Alexander Smith, Quill *by Affiliation*, 66 U. MIAMI L. REV. 755, 761 (2012).

281. *See Quill*, 504 U.S. at 315 (majority opinion).

282. *See generally* Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 759–60 (1967), *overruled by* Quill Corp. v. North Dakota, 504 U.S. 298, 306–08, 315–16 (1992) (establishing that the bright-line rule would provide for ease of tax administration).

283. *Id.* (footnotes omitted).

284. *Id.*

285. *Id.* at 60.

timent saying that "the underlying issue is . . . one that Congress may be better qualified to resolve . . . [and] one that Congress has the ultimate power to resolve."[286]

But Congress has already attempted to resolve the issue with a law that explicitly does not bar states from collecting taxes from Internet retailers and with legislation aimed at bringing Internet retailers within the scope of state tax jurisdiction. The Internet Tax Freedom Act of 1998 (ITFA)[287] placed a moratorium on taxing specific Internet transactions.[288] The ITFA prohibits states from taxing access to the Internet.[289] It also prevents states from placing multiple or discriminatory taxes on e-commerce.[290] In other words, the ITFA did not address sales and use taxes themselves.[291] Rather, it barred states from taxing online consumers differently than consumers that shop in brick-and-mortar stores.[292] The ITFA's tax moratorium extends to November 14, 2014.[293] Congress could have included sales and use taxes in the moratorium, but specifically chose not to.[294] This indicates that Congress's intent was to permit states to tax in-state sales that occur via e-commerce.[295]

The Marketplace Fairness Act of 2013 (Fairness Act)[296] is Congress's attempt to respond directly to the Court's holdings in *Bellas Hess* and *Quill*.[297] The Fairness Act addresses the Court's concerns by authorizing states to tax Internet retailers if the states simplify their sales and use tax policies.[298] The Fairness Act, however, has yet to become law although it passed the Senate in May of 2013.[299] Proponents of the bright-line physical presence rule may argue that Congress's inability to take decisive action and pass the bill in the House demonstrates that Congress has not resolved the issue, as the Court advised it could do. However, this argument will likely not prevail because the Court has no problem taking action in the face of congressional inaction when action

286. *Quill*, 504 U.S. at 318.

287. Internet Tax Freedom Act § 1100, 47 U.S.C. § 151 note (1998).

288. Matthew G. McLaughlin, Comment, *The Internet Tax Freedom Act: Congress Takes a Byte out of the Net*, 48 CATH. U. L. REV. 209, 212 (1998).

289. Internet Tax Freedom Act § 1101(a).

290. *Id.* § 1101(a)(2).

291. *See* Edwards, *supra* note 12, at 36.

292. McLaughlin, *supra* note 288, at 236 (explaining that sales taxes are permissible as long as taxes on mail order and retail transactions are applied the same way).

293. Internet Tax Freedom Act Amendments Act of 2007, Pub. L. No. 110-108, 121 Stat. 1024 (2007).

294. *See* Internet Tax Freedom Act § 1101.

295. *See generally* Matthew Adam Susson, Comment, *Thinking out Cloud: California State Sales and Use Taxability of Cloud Computing Transactions*, 17 CHAP. L. REV. 295, 313 (2013) (explaining that states retain their ability to tax out-of-state vendors under the ITFA).

296. S. 743, 113th Cong. (2013) (as passed by Senate, May 6, 2013).

297. *See infra* text accompanying notes 381–85.

298. S. 743 § 2. For a discussion on how states may simplify their sales and use tax policies under the Fairness Act see *infra* text accompanying notes 386–87.

299. S. 743.

is necessary.[300] To illustrate this point, the *Quill* Court noted that Congress had made various attempts to pass legislation that would overrule *Bellas Hess*'s due process holding,[301] but ultimately decided not to take such action.[302] Nevertheless, the *Quill* Court, noting the legislative attempts, overruled *Bellas Hess*'s due process holding despite Congress failing to pass any law.[303] Likewise, in the immediate situation, Congress has recognized the DCC problem posed by *Bellas Hess* and *Quill*.[304] Although Congress has been unable to pass the legislation, the Fairness Act is further proof that the physical presence test is irrelevant in the modern era. Moreover, accounting for "a few thousand local tax rates is no longer an insurmountable technical, administrative, or financial burden."[305] Accordingly, the foundation for the *Bellas Hess* rule is no longer applicable and adherence to it on stare decisis grounds is improper.

Although stare decisis is an essential consideration, it should not trump other relevant factors.[306] Some commentators, however, argue for continued adherence to the physical presence requirement, because it provides a plain rule and allows taxpayers to plan for tax compliance.[307] But the Court could have readily found that the advantages which stem from the bright-line rule do not outweigh the disadvantages, such as the enormous revenue states are losing out on as a result of *Quill*'s physical presence requirement.[308] Additionally, the physical presence requirement promotes perverse results, as Justice White pointed out.[309] Moreover, stare decisis only works if the precedent is still applicable.[310] As discussed in detail above, *Quill* is no longer relevant in an era where commercial transactions happen instantaneously and one-click transactions are increasingly becoming the norm. Thus, continued observance of the physical presence requirement on stare decisis justifications is not sensible.

D. Reconsidering the Economic Presence Test

Because *Quill* is irrelevant in the present era, analyzing and establishing a substantial nexus with state tax jurisdiction requires a new

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300. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992).

301. In *Quill*, the Supreme Court overruled the due process holding of *Bellas Hess*, holding that the Due Process Clause does not require physical presence in a state for the state to subject a business to state tax jurisdiction. *Id.* at 306–08.

302. *Id.* at 318.

303. *Id.*

304. *What Is the Marketplace Fairness Act?*, MARKETPLACEFAIRNESS.ORG, http://www.marketplacefairness.org/what-is-the-marketplace-fairness-act/what-is-the-MFA.pdf (last visited June 27, 2014).

305. *Id.*

306. *See* Cory, *supra* note 250.

307. Smith, *supra* note 280, at 776; Stombock, *supra* note 114, at 1237.

308. *See* Cory, *supra* note 250.

309. *See supra* text accompanying notes 260–64.

310. *See supra* text accompanying notes 268–70.

framework.[311] Pragmatically speaking, an economic presence standard makes sense in light of the modern economy[312] in which economic exploitation is equivalent to physical exploitation.[313] In other words, the Internet and other technologies have transformed commerce to a point where certain companies no longer need to maintain brick-and-mortar stores in order to carry out business.[314] In fact, businesses can exploit markets more comprehensively with a digital presence than with a physical presence alone.[315] Thus, it is sensible to apply a state tax jurisdiction analysis that reflects the realities of e-commerce in the twenty-first century.[316] The following Subparts describe how an economic presence standard works and the public policy reasons for adopting an economic presence test.

1. How Economic Presence Works

Economic presence refers to connections businesses have within a state as determined by their economic contacts.[317] This economic nexus standard permits states to tax entities that do not have a physical presence within state lines, but which conduct a sufficient amount of economic activity within the state.[318] Nexus refers to a business's relationship with a state and the state's concomitant ability to tax that business.[319] The economic presence test's underlying principle is that economic realities are significantly more relevant than traditional concepts of physical presence, particularly when considering if a business has a substantial nexus with a state.[320] Furthermore, the economic presence test considers the benefits and opportunities an entity receives by doing business within the taxing state.[321] It also accounts for actual physical contacts with the state.[322] Under this approach, "the state's infrastructure creates and maintains the consumer market and economic climate that fosters demand for the seller's goods and services."[323] In other words, economic nexus oc-

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311. *See* Thimmesch, *supra* note 96, at 195 (explaining that the economic nexus standard stems from social and technological changes).

312. *See id.*; *see also* Joondeph, *supra* note 96, at 112–13.

313. Thimmesch, *supra* note 96, at 195.

314. *Id.*

315. *Id.*

316. Under the Due Process Clause, economic presence is enough to impose state tax jurisdiction on a business that does not have a physical presence within a state. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992). However, this Comment is concerned with the economic presence test as applied to the DCC. This Comment argues that the economic presence standard should be extended to the DCC and Internet retailer cases because e-commerce may create the necessary substantial nexus.

317. Thimmesch, *supra* note 96, at 159; *see supra* text accompanying notes 97–99.

318. Thimmesch, *supra* note 96, at 159.

319. *Id.* at 166.

320. R. Todd Ervin, *State Taxation of Financial Institutions: Will Physical Presence or Economic Presence Win the Day?*, 19 VA. TAX REV. 515, 531–32 (2000).

321. *Id.* at 532.

322. *Id.*

323. *Id.* (quoting State v. Quill Corp., 470 N.W.2d 203, 218 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992)) (internal quotation marks omitted).

curs when a business creates a market within a state and derives revenue from the established market.[324]

More specifically, economic nexus is comprised of substantive jurisdiction and enforcement jurisdiction.[325] Substantive jurisdiction deals with a state's substantive connection with a business's revenue source, whereas enforcement jurisdiction deals with a state's power over a business.[326] That is, substantive jurisdiction refers a state's ability to tax "the subject matter of the exaction," such as goods or services consumed inside a state but purchased elsewhere.[327] Enforcement jurisdiction involves the power of a state to collect taxes from items it has substantive jurisdiction over.[328] This includes the question of whether a state has the authority to enforce tax collection on an out-of-state retailer.[329]

According to the U.S. Supreme Court, the DCC requires states to have substantive jurisdiction over the value or activity it intends to tax and enforcement jurisdiction with the entity it imposes the tax on.[330] Under *Quill*, the Court held that a business needs to be physically present within the taxing state to have the requisite substantial nexus with both substantive and enforcement jurisdiction.[331] The central premise of this Comment, however, is that substantive and enforcement jurisdiction can be established through economic presence.[332] Further, the New Mexico Supreme Court, in *Barnesandnoble.com II*, provides a practical framework for analysis: substantive and enforcement jurisdiction is established when a business "establish[es] and maintain[s] a market" in the taxing state.[333]

2. Public Policy Reasons for Adopting the Economic Presence Test

Tax policy in America reflects a utilitarian view that taxation is essential in order to promote the overall good of society.[334] By imposing

324. *Id.*; Julie Roman Lackner, Note, *The Evolution and Future of Substantial Nexus in State Taxation of Corporate Income*, 48 B.C. L. REV. 1387, 1388–89 (2007).

325. Thimmesch, *supra* note 96, at 166; *see also* Joondeph, *supra* note 96, at 113 ("Substantive jurisdiction concerns a state's jurisdiction over the value or activity that it seeks to tax—the income, the property, the sale, or the consumption, for example. Enforcement jurisdiction, in contrast, concerns a state's regulatory authority over the person or entity that it requires to pay or to collect the tax.").

326. *Id.*

327. Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1, 3 (2003).

328. *Id.*

329. *Id.* at 3–4.

330. Joondeph, *supra* note 96, at 113.

331. *See* Patch, *supra* note 11, at 684–85.

332. It is widely understood that *Quill*'s physical presence requirement only applies to sales and use taxes. Smith, *supra* note 280, at 770. However, this Comment contends that the economic presence test should apply to sales, use, and gross receipt taxes (the type of taxes at issue in the *Barnesandnoble.com II*, *Amazon*, and *Overstock* cases).

333. *Barnesandnoble.com II*, 303 P.3d 824, 827 (N.M. 2013).

334. *See* Swain, *supra* note 254, at 374–75.

and collecting taxes, the sovereign is able to pay for its operations.[335] Underlying the theory behind taxation are three fundamental values designed to promote public policy goals: (1) equity, (2) efficiency, and (3) administrability.[336] An economic presence standard, as applied to Internet retailers, better promotes the goals of tax policy. Therefore, there are persuasive public policy reasons for adopting an economic presence standard.

i. An Economic Presence Standard Promotes Equity

Tax policy should be fair.[337] It should promote equity[338] by ensuring that all businesses that benefit from conducting activities within a state are subject to state taxation.[339] Otherwise, a corporation could exploit a state's market while receiving the benefits and protection of the state, yet evade state taxation.[340] This would hardly be just. The basic premise of the utilitarian view is that taxes are necessary for the sovereign to pay for its expenditures.[341] Consequently, if a corporation benefits from the sovereign's functions it should pay for those expenses.[342] For example, Internet retailers profit from "the benefits and protections the State confers in providing for a stable and secure legal-economic environment."[343] Therefore, the economic presence test helps to ensure equity by requiring all retailers that reap benefits from a state market—regardless of their physical presence—to be exposed to the state's tax jurisdiction.[344]

In addition, application of an economic presence test is necessary in order to avert further breakdown of tax equity between brick-and-mortar and Internet retailers.[345] For example, the New York Amazon tax,[346] which requires Internet retailers to collect taxes from in-state consumers, is aimed at "restor[ing] a level playing field" between in-state retailers with physical stores and Internet retailers.[347] Equity is achieved by ensuring that Internet retailers without a physical presence do not remain free

335. *Id.*
336. *Id.* at 374.
337. *See id.* at 377.
338. Tax equity incorporates the principles of horizontal and vertical equity. *Id.* at 375. Horizontal equity stands for the proposition that people that have an equal ability to pay should pay equal taxes. *Id.* Likewise, vertical equity allows people with unequal abilities to pay taxes the ability to pay different taxes. *Id.*
339. *See id.* at 377.
340. *See id.* at 380 (arguing that if a business benefits from the ability to do business within a state, the state is justified in subjecting the business to taxation).
341. *See id.* at 374–75.
342. *See generally id.* ("[T]he sovereign has clear normative authority to impose broad-based taxes to fund its operations . . . .").
343. Brief for Respondents, *supra* note 83, at 28 (quoting Orvis Co. v. Tax Appeals Tribunal, 654 N.E.2d 954, 959 (N.Y. 1995)) (internal quotation marks omitted).
344. Swain, *supra* note 254, at 377.
345. John A. Swain, *Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?*, 75 S. CAL. L. REV. 419, 473 (2002).
346. *See supra* note 121 and accompanying text.
347. Brief for Respondents, *supra* note 83, at 9.

from their obligation to collect state sales tax.[348] In other words, it is fair to tax an Internet retailer as if it were a retail store with a physical location. This is particularly true when the Internet retailer profits from the benefits and protections afforded by doing business within the state.[349] Therefore, requiring Internet retailers to collect the same taxes brick-and-mortar stores already have to collect promotes equity, because it alleviates the disparity in state tax collection.[350] Accordingly, an economic presence standard advances tax equity.

ii. Efficiency is Enhanced with an Economic Presence Test

The economic presence standard reduces market inefficiencies.[351] While tax policy should be efficient,[352] many economists believe taxes inherently create market inefficiencies.[353] For instance, people may make decisions based on their considerations of tax implications.[354] A clever consumer, for example, may drive to a no sales tax state to purchase a particular product to avoid paying the tax.[355] Such behavior creates further inefficiencies in the market.[356] When the primary motivation for business activity is tax avoidance and that activity would not occur absent the specific tax scheme, the tax policy is producing greater inefficiencies than would otherwise occur.[357] Therefore, the goal of tax policy is more accurately stated as reducing inefficiencies because inefficiency is intrinsic to any taxing scheme to begin with.[358]

In keeping with this goal, an economic presence standard is better suited to minimize inefficiencies.[359] The physical presence test enables out-of-state retailers to avoid paying taxes that similarly situated in-state retailers have to pay.[360] Economic behavior is therefore distorted.[361] Under the physical presence standard, businesses are encouraged to "engage in the economically wasteful enterprise of rearranging their operations or corporate structure solely to minimize their tax liability."[362] In contrast, an economic presence standard would likely reduce the possibility for such inefficient tax avoidance strategies,[363] because it does not provide

348. *See id.*; *see also* Swain, *supra* note 345, at 473.

349. Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 761–62 (1967), *overruled by* Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (Fortas, J., dissenting).

350. Brief for Respondents, *supra* note 83, at 29–30.

351. Swain, *supra* note 254, at 387, 389.

352. *See id.* at 374.

353. *Id.* at 375.

354. *Id.* at 376.

355. *Id.* at 375–76.

356. *Id.*

357. Quinn T. Ryan, Note, *Beyond BATSA: Getting Serious About State Corporate Tax Reform*, 67 WASH. & LEE L. REV. 275, 318 (2010).

358. *See* Swain, *supra* note 254, at 375–76.

359. *See id.* at 383–84.

360. *See id.*; *see also supra* text accompanying notes 258-59.

361. Swain, *supra* note 254, at 383.

362. *Id.*

363. *See id.*

the same opportunities for businesses to avoid taxes through corporate reorganization.[364] Under an economic presence standard, businesses would probably not have a high incentive to restructure because of a state's tax jurisdiction over the exploited market.[365] Stated another way, the benefit of restructuring to avoid taxation would likely not outweigh the benefit of exploiting a state market and the sales derived from that market.[366] Moreover, it is easier to change where goods are produced than where they are consumed.[367] Therefore, if a state has jurisdiction to tax via the economic presence standard there is less market inefficiency, because the risk of avoidance behavior is minimized.[368] Thus, the economic presence standard reduces market inefficiencies.[369]

iii. Equity and Efficiency Gains Outweigh Administrative Concerns and the Marketplace Fairness Act of 2013 Addresses Such Concerns

Another goal of tax policy is administrability.[370] Taxpayers should be able to easily calculate their potential tax liability and states should be able to administer tax policy easily.[371] Thus, the focus of administrability is enforcement and compliance.[372] Undue burdens should be avoided in both areas.[373] Although a physical presence rule arguably promotes administrability interests, such concerns are overstated.[374] The equity and efficiency benefits arising from an economic presence standard outweigh any enforcement or compliance burdens.[375]

Proponents of the physical presence standard argue that a bright-line rule enables a taxpayer to easily determine whether the taxpayer will be exposed to a state's tax jurisdiction.[376] Admittedly, a simple rule does promote clarity.[377] However, this argument fails to consider the unjust results that occur when bright-line rules are favored over rules that seek to take into account modern realities.[378] The problem with the physical

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364. *See id.* at 384.

365. *See generally* Ryan, *supra* note 357, at 318 (analyzing the benefits of an economic presence standard with regard to state income taxes).

366. *See generally* Swain, *supra* note 254, at 387 (arguing that the economic nexus standard reduces market inefficiencies).

367. *Id.*

368. *See generally id.* ("The economic presence test, coupled with a destination-based receipts factor, dampens the effect of shifts in property and payroll because the receipts factor ensures that at least some income is apportioned to jurisdictions exploited by economically present taxpayers." (footnote omitted)).

369. *Id.* at 387, 389.

370. *Id.* at 374; *see also* Ryan, *supra* note 357, at 319.

371. Ryan, *supra* note 357, at 319.

372. Swain, *supra* note 254, at 389.

373. *See id.*

374. *See id.* at 389–90.

375. *See id.*

376. *Id.* at 389.

377. Ryan, *supra* note 357, at 320.

378. *See id.*

presence argument "is that the physical presence test completely sacrifices the other tax policy values of equity and efficiency."[379] Conversely, tax policy that incorporates an economic presence approach is more capable of addressing a wide array of circumstances,[380] such as the Internet retailer issue.

Further, there is a solution to the administrative concerns—the Fairness Act.[381] Under the Fairness Act, states have the ability to tax Internet retailers if they address administrative issues.[382] The goal of the Fairness Act is to deal with the issue of Internet retailers by "restor[ing] States' sovereign rights to enforce State and local sales and use tax laws."[383] The Fairness Act is Congress's response to *Bellas Hess*'s and *Quill*'s unworkable physical presence rule.[384] It provides states the option to require Internet retailers to collect sales and use taxes if states simplify their tax laws.[385] There are two options for states wishing to impose sales and use taxes on Internet retailers: (1) adopting the Streamlined Sales and Use Tax Agreement (SSUTA),[386] which is a mechanism formulated by forty-four states and over eighty-five businesses that aims to make sales tax collection simpler; or (2) meeting five simplification requirements listed in the Fairness Act:

- Notify retailers in advance of any rate changes within the state
- Designate a single state organization to handle sales tax registrations, filings, and audits
- Establish a uniform sales tax base for use throughout the state
- Use destination sourcing to determine sales tax rates for out-of-state purchases (a purchase made by a consumer in California from a retailer in Ohio is taxed at the California rate, and the sales tax collected is remitted to California to fund projects and services there)

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379. Swain, *supra* note 254, at 390.
380. Ryan, *supra* note 357, at 320.
381. S. 743, 113th Cong. (2013) (as passed by Senate, May 6, 2013).
382. MARKETPLACEFAIRNESS.ORG, *supra* note 304.
383. S. 743.
384. MARKETPLACEFAIRNESS.ORG, *supra* note 304.
385. *Id.*
386. Streamlined Sales Tax Governing Bd., Inc., *Streamlined Sales and Use Tax Agreement*, (as amended October 30, 2013), http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA_As_Amended_10-30-13.pdf [hereinafter SSUTA]. The SSUTA is an agreement among participating states to cooperate in tax compliance on a multistate level and provides model sales and use tax laws participating states must adopt. *See id.* For an in-depth discussion of the SSTUA, see John A. Swain, *Reforming the State Corporate Income Tax: A Market State Approach to the Sourcing of Service Receipts*, 83 TUL. L. REV. 285, 336–41 (2008).

- Provide software and/or services for managing sales tax compliance, and hold retailers harmless for any errors that result from relying on state-provided systems and data[387]

Therefore, the Fairness Act addresses administrative concerns. However, after passing the Senate with a vote of 69 to 27, the bill was referred to the House Judiciary Committee where it has stalled.[388] Nevertheless, the equity and efficiency gains of an economic presence test outweigh administrative concerns. Furthermore, the Fairness Act, should it pass the House and be signed by the President, provides an answer to the administrative issues. Therefore, the benefits derived from an economic presence test offset administrative concerns, which will be addressed once Congress passes the Fairness Act.

In sum, the economic presence test should replace *Quill*'s irrelevant physical presence requirement because of the transformation of the national economy in the Digital Age. A substantial nexus can be established when a state has substantive and enforcement jurisdiction because of a retailer's economic presence within a state. Additionally, there are persuasive public policy reasons to replace the physical presence requirement with an economic presence test. Equity and efficiency are increased and outweigh any administrative concerns. The Fairness Act also provides solutions to some enforcement and compliance issues. Therefore, the economic presence test is superior to the outdated *Quill* test, and the *Barnesandnoble.com II* court provides a workable framework for the analysis. Specifically, a state has substantive and enforcement jurisdiction over an out-of-state retailer when the retailer establishes and maintains a market within the state.

CONCLUSION

The purpose of the DCC is to prevent states from burdening interstate commerce. By requiring a retailer to have a substantial nexus with a state before it is exposed to the state's tax jurisdiction, undue burdens on interstate commerce are avoided. However, the *Quill* Court's affirmation of *Bellas Hess*'s bright-line physical presence requirement is a relic of the past and should be treated as such. And as states have suffered massive budget shortfalls, in part as a result of their inability to tax Internet retailers, they have attempted to experiment with laws that would enable them to establish tax jurisdiction over Internet retailers. But different courts have come to different conclusions and there is sense of national uncertainty regarding Internet retailers and the bounds of state taxation. Therefore, the Supreme Court should have taken the opportunity presented in the *Amazon* and *Overstock* case to set a clear standard with respect to Internet retailers and state taxation. In addition, the Court should have

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387. MARKETPLACEFAIRNESS.ORG, *supra* note 304.
388. *See id.*

overruled the physical presence requirement, because Internet retailers can comprehensively exploit state markets regardless of geography or physical presence. Thus, any vestiges of a physical presence standard are irrelevant in today's Internet and technology driven society. Further, the *Quill* Court's adherence to *Bellas Hess* on stare decisis grounds was artificial, as the Court admitted. Therefore, the Court should not adhere to the existing precedent, because it is no longer applicable. Rather, the proper test is the economic presence standard, which advances tax equity and efficiency.

The New Mexico Supreme Court's approach in *Barnesandnoble.com II* provides a practical approach for analyzing Internet retailer cases. The court's holding—that a substantial nexus is created when a business establishes and maintains a market within a state—is an appropriate way to evaluate Internet retailer cases in the twenty-first century. Moreover, economic presence, as determined by a retailer's economic activity within a state and the benefits and opportunities a retailer receives by conducting business within the state, is a proper way to analyze a state's tax jurisdiction over state substantive and enforcement jurisdiction. Under this approach, corporate relationships with in-state entities may create a substantial nexus if there is direct affiliation through the use of common trademarks and business policies. Furthermore, a cross-marketing strategy, which provides an Internet retailer with a competitive advantage over its counterparts, also indicates a substantial nexus with the state. Also, any systematic solicitation and exploitation of a state's market could give rise to a substantial nexus. In addition, if Internet retailers have affiliate agreements with in-state residents that aid the retailer in establishing and maintaining a market in a state, the retailers would have a substantial nexus and would be exposed to state taxes. In short, the economic presence test should be adopted. It better enhances tax policy goals and addresses the e-commerce realities of the Digital Age.

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