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New York’s Unconstitutional Tax on the Internet: Amazon.com v. New York State Department of Taxation & Finance and the Dormant Commerce Clause*

INTRODUCTION

As the current economic downturn continues to ripple through every sector of the economy, state governments from North Carolina to California are struggling to develop innovative tax policies to boost their plummeting revenues.¹ Traditional methods of taxation are no longer sufficient to satisfy State expenditures—either government spending must change drastically² or legislatures must approve new taxes to bolster falling revenues.³ The recent “Amazon tax” passed by the New York State Assembly⁴ is a prime example of the latter. The tax requires out-of-state retailers—such as Amazon.com, Inc. (“Amazon.com” or “Amazon”) and Overstock.com, Inc. (“Overstock.com”)—to collect a use tax⁵ from in-state consumers if

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3. Id.; Conor Dougherty, Falling Tax Revenues Slam States, WALL ST. J., Sept. 30, 2009, at A4 (“State tax revenues in the second quarter plunged 17% from a year earlier as rising unemployment and reduced spending hurt sales- and income-tax collections . . .”).


5. This Recent Development uses the terms “use tax” and “sales tax” interchangeably. While a use tax is “technically levied” on the individual, most states try to force the company to collect and remit the tax since the individual avoids paying sales tax on the item. Adam L. Schwartz, Note, Nexus or Not? Orvis v. New York, SFA Folio v. Tracy and the Persistent Confusion over Quill, 29 CONN. L. REV. 485, 491–92 (1996); see also Megan E. Groves, Note, Where There’s a Will, There’s a Way: State Sales and Use Taxation of Electronic Commerce, 74 IND. L.J. 293, 308 (1998) (“Collection of use taxes serves to prevent sales tax evasion by out-of-state buyers, to adjust between local and
the retailers have marketing affiliates in the state which produce at least $10,000 in sales. 6 No fewer than sixteen other states have considered passing a similar tax. 7 

In Quill Corp. v. North Dakota, 8 however, the United States Supreme Court held that, under the Commerce Clause of the Constitution, 9 a State cannot require an out-of-state retailer to collect and remit a use tax unless the retailer has a "substantial nexus" with the taxing state. 10 The Court invalidated a sales tax imposed by North Dakota on an out-of-state mail-order retailer, which had no offices or employees in the state. 11 By invalidating this tax, the Court reaffirmed the bright-line rule of National Bellas Hess, Inc. v. Department of Revenue of Illinois 12 that "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause;" 13 in other words, some physical presence is required. 14 Attempts by New York and other states to create statutorily this substantial nexus between out-of-state Internet retailers and the taxing state through the retailers' marketing affiliates 15 run afoul of Quill and its bright-line rule.

Part I of this Recent Development examines States' ability to tax out-of-state retailers and the history of New York's Amazon tax. Part II discusses the Supreme Court's decision in Quill and the

6. § 1101(b)(8)(vi). "Affiliate marketing involves entities or individuals that derive income by directing 'traffic' to various Internet Web sites through different marketing methods including e-mail, banner, and pop-up advertising ...." Roger Colaizzi, A Discussion of Internet-Related Trademark Cases and Trademark Fraud, in RECENT TRENDS IN TRADEMARK PROTECTION: A DISCUSSION OF INTERNET-RELATED TRADEMARK CASES AND TRADEMARK FRAUD (2009) 41, 49–50.

7. See infra notes 41–56 and accompanying text.


9. U.S. CONST. art. 1, § 8, cl. 3.

10. Quill, 504 U.S. at 311.

11. Id. at 301–02.


13. Quill, 504 U.S. at 311; see Bellas Hess, 386 U.S. at 758–60.

14. Quill, 504 U.S. at 315 (arguing that "a small sales force, plant, or office" is necessary to satisfy the physical presence requirement).

15. See infra notes 40–56 and accompanying text.
constitutional requirements for taxing out-of-state retailers. In Part III, this Recent Development analyzes the recent New York County Civil Supreme Court\textsuperscript{16} decision, Amazon.com v. New York State Department of Taxation & Finance\textsuperscript{17}, which upholds the constitutionality of the tax. The focus in Part III is on Amazon's dormant Commerce Clause argument and the trial court's application of the Supreme Court's decision in Quill. This Recent Development argues that the New York trial court failed to apply Quill's substantial nexus test properly and exaggerated the role of Amazon's associates.\textsuperscript{18} As a result, the trial court incorrectly held that the tax on Amazon did not violate the Commerce Clause.\textsuperscript{19} When applied correctly, the Quill decision should invalidate New York's tax on Amazon and similar out-of-state Internet retailers. Finally, Part IV of this Recent Development examines the continuing vitality of Quill in today's technologically driven economy and proposes two solutions to the problem of uniformly taxing out-of-state Internet retailers.

I. THE SALES AND USE TAX AND THE COMMERCE CLAUSE

State legislatures have tried for decades to impose sales and use taxes on out-of-state retailers, particularly mail-order companies.\textsuperscript{20} Whether called a sales tax or a use tax, the practical implication of these taxes is the same: out-of-state retailers that sell goods to residents within the taxing state must collect and remit the tax to the taxing state.\textsuperscript{21}

\textsuperscript{16} The New York County Civil Supreme Court is New York's district or trial court. See Quintin Johnstone, New York State Courts: Their Structure, Administration and Reform Possibilities, 43 N.Y.L. SCH. L. REV. 915, 916 (2000).

\textsuperscript{17} 877 N.Y.S.2d 842 (N.Y. Sup. Ct. 2009).

\textsuperscript{18} Id. at 845; see also Brief for Tax Foundation as Amicus Curiae in Support of Plaintiffs-Appellants at 9, Amazon.com v. N.Y. State Dep't of Taxation & Fin., No. 601247/08 (N.Y. App. Div. filed Sept. 9, 2009) (arguing that the trial court "confused elements from the two separate tests for substantial nexus").

\textsuperscript{19} Amazon.com, 877 N.Y.S.2d at 849 ("Amazon's first cause of action for declaratory relief based on violation of the Commerce Clause is therefore dismissed.").


\textsuperscript{21} For example, if Delaware imposes a 5% sales and use tax on all out-of-state retailers, any time an out-of-state retailer makes a sale to a Delaware resident, the retailer must collect the 5% sales and use tax from the consumer and remit it to Delaware.
New York was the first state to attempt to satisfy statutorily the substantial nexus requirement of *Quill* with the passage of its Amazon tax. Then-Governor Eliot Spitzer originally proposed the tax in November 2007, but tabled it shortly thereafter—perhaps over fears of legal challenges to the policy. However, the tax was reconsidered in early 2008 and included in the State’s budget, despite Amazon’s intensive lobbying efforts. The New York State Assembly approved the tax on April 9, 2008, and it took effect on June 1, 2008. The new tax expands the definition of a vendor for sales and use tax purposes. Under the new definition,

a person making sales of tangible personal property... 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...


28. Id. For a more detailed explanation of performance-based marketing, see *infra* notes 93–98 and accompanying text.
This expanded definition encompasses Amazon and other out-of-state Internet retailers by attempting to create a substantial nexus with New York based on their marketing affiliates located in the state. As the New York trial court explained: "The Commission-Agreement Provision thus requires collection of New York taxes from New Yorkers by out-of-state sellers that contractually agree to pay commissions to New York residents referring potential customers to them, provided that more than $10,000 was generated from such New York referrals during the preceding four quarterly periods."29 Legislators and business leaders in New York claimed that this tax would put in-state retailers on a level playing field with out-of-state Internet retailers.30

Initially, the Supreme Court's interpretation of the Commerce Clause swept broadly and declared "no State has the right to lay a tax on interstate commerce in any form,"31 thus preventing States from imposing any sales and use taxes on out-of-state retailers. Over time, however, the Supreme Court's Commerce Clause jurisprudence has become more accommodating to States wishing to tax out-of-state retailers.32 In two seminal cases, Bellas Hess and Quill, the Supreme Court held that out-of-state retailers may be subject to a sales and use tax if they have a substantial nexus with the taxing state: "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."33

30. Corbin, supra note 4.
31. Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888); see also Jennifer L. Larsen, Comment, Discrimination in the Dormant Commerce Clause, 49 S.D. L. REV. 844, 845 (2004) ("The negative aspect of the Commerce Clause, the dormant Commerce Clause, 'directly limits the power of the States to discriminate against interstate commerce.' The doctrine thus prevents states from establishing regulations that discriminate or impose an undue burden on interstate commerce." (quoting Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992))).
32. Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992) ("Complete Auto emphasized the importance of looking past 'the formal language of the tax statute [to] its practical effect.'" (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977))); see also Schwartz, supra note 5, at 485 ("A state can require out-of-state companies doing business via mail order to collect and remit a use tax on goods that the company sells into the state."); Carol Schultz Vento, Annotation, Sufficient Nexus for State to Require Foreign Entity to Collect State's Compensating, Sales, or Use Tax—Post-Complete Auto Transit Cases, 71 A.L.R. 5th 671, 671 (1999) ("The validity of a tax imposed by a state on an out-of-state entity is determined by, among other factors, whether the taxpayer's activity has a sufficient nexus or connection with the state.").
33. Quill, 504 U.S. at 311; Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753, 758 (1966), overruled in part by Quill, 504 U.S. 298; see also Schwartz, supra note 5, at 485
Taxing states have had particular trouble establishing a substantial nexus when dealing with Internet retailers. Internet retailers have a huge virtual presence throughout the entire United States, yet their headquarters and workforce typically are located in only one state. Since these Internet retailers have a physical presence in only one or two states, legislatures in the remaining states have had a difficult time creating the requisite substantial nexus to impose a sales and use tax. While States try to enforce a use tax directly on their residents, most citizens fail to self-report their out-of-state purchases. Consequently, States are unable to realize a large amount of tax revenue from Internet transactions.

(“[Bellas Hess and Quill] require some nexus between a company and the taxing state above and beyond the common carrier[s] such as phones, roads, and the mails which provide merely the simple links by which commerce takes place.” (internal quotation marks omitted)).


35. See Carl Bialik, Numbers Show China Beats U.S. in Net Use, but Which Numbers?, WALL ST. J., Mar. 28, 2008, at B1 (specifying that in 2007 the United States had over two hundred million Internet users and “71% of heads of households use[d] the Internet”).


38. See, e.g., N.C. GEN. STAT. §§ 105-164.6(b), 105-164.16(d) (2009).

39. See Groves, supra note 5, at 310; see also John C. Blase & John W. Westmoreland, Quill Has Been Plucked! MTC Sales Are Slowly Eroding the Substantial Nexus Standard,
As a result, States have recently begun to experiment with new ways to satisfy statutorily the substantial nexus requirement and force out-of-state Internet retailers to collect taxes from their customers. New York was the first state in the country to impose a sales and use tax on Internet companies such as Amazon.com and Overstock.com by attempting to create a substantial nexus based on the companies’ marketing affiliates living and working in New York. At present, no fewer than sixteen other states either have considered passing or have passed the so-called Amazon tax: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maryland, Minnesota, Mississippi, New Mexico, North Carolina, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin. Despite these
States' efforts, the constitutionality of the Amazon tax remains contentious.

II. BACKGROUND LAW: _QUILL CORP. V. NORTH DAKOTA_

The constitutionality of taxing out-of-state Internet retailers hinges on the interpretation and application of the Supreme Court's decision in _Quill_.

"Quill was a Delaware corporation with offices and warehouses in Illinois, California, and Georgia." The company solicited business in North Dakota and other states "through catalogs and flyers, advertisements in national periodicals, and telephone calls." Of its nearly $200 million in sales, "almost $1 million [were] made to about 3,000 customers in North Dakota." Before 1987, Quill was not considered a "retailer" under North Dakota's use statute—North Dakota required "'every retailer maintaining a place of business in' the State to collect the tax from the consumer and remit it to the State." In 1987, however, the definition of "retailers" was expanded to include "'every person who engages in regular or systematic solicitation of a consumer market in th[e] state.'" This change forced Quill to collect a use tax on all orders it received from North Dakota residents.

Quill challenged North Dakota's use tax on both Due Process Clause and Commerce Clause grounds, relying heavily on the Supreme Court's decision in _Bellas Hess_. Before analyzing the validity of these claims, the _Quill_ Court made clear that the "nexus"
analyses under the Due Process Clause and Commerce Clause are distinct. The two clauses concern different values and governmental interests:

Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis. In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy.

First, the Court considered the Due Process Clause nexus requirement. In order for a state to tax out-of-state companies, the "Due Process Clause requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax ... and that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." Building on its landmark decision in *International Shoe Co. v. Washington*, the Court's analysis shifted from an examination of physical presence of the company within the state to "a more flexible inquiry," which examines whether an out-of-state company has "purposefully avail[ed] itself of the benefits of an economic market in the forum State." As a result of the evolving Due Process Clause jurisprudence, the *Quill* Court overruled the portion of the *Bellas Hess* decision that held such physical presence was required to establish minimum contacts under the Due Process

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66. *Quill*, 504 U.S. at 305-07 ("Thus, although we have not always been precise in distinguishing between the two, the Due Process Clause and the Commerce Clause are analytically distinct.").
67. *Id.* at 312.
68. *Id.* at 306 (citations and quotations omitted).
69. 326 U.S. 310 (1945). In *International Shoe*, the Court explained that due process requires that a defendant have minimum contacts with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).
70. *Quill*, 504 U.S. at 307.
71. *Id.; see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").
Furthermore, the Court found that Quill purposefully availed itself of North Dakota’s market and thus satisfied the minimum contacts requirement under the Due Process Clause.\textsuperscript{72}

Second, the Court addressed the separate “nexus” inquiry under the dormant Commerce Clause. Applying the four-part test from Complete Auto Transit, Inc. v. Brady,\textsuperscript{74} the Quill Court held that courts should sustain a tax against a Commerce Clause challenge so long as the “tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.”\textsuperscript{75}

The Court’s decision in Complete Auto “emphasized the importance of looking past ‘the formal language of the tax statute [to] its practical effect,’”\textsuperscript{76} and overruled prior cases that attempted to distinguish between “direct” and “indirect” taxes.\textsuperscript{77} Bellas Hess concerned the first prong of the Complete Auto test and “stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.”\textsuperscript{78} In other words, the dormant Commerce Clause substantial nexus test requires some physical presence in the taxing state before the state can require an out-of-state retailer to collect taxes.\textsuperscript{79}

\textsuperscript{72} Quill, 504 U.S. at 319 (Scalia, J., concurring in part and concurring in the judgment) (“I agree with the Court that the Due Process Clause holding of Bellas Hess should be overruled.”); see also id. at 307 (majority opinion) (“[T]he Court suggested that such [physical] presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary.”).

\textsuperscript{73} Id. at 308 (majority opinion).

\textsuperscript{74} 430 U.S. 274 (1977).

\textsuperscript{75} Quill, 504 U.S. at 311 (alteration in original) (quoting Complete Auto, 430 U.S. at 279).

\textsuperscript{76} Id. at 310 (quoting Complete Auto, 430 U.S. at 279).

\textsuperscript{77} Id. at 309–11 (specifying that Complete Auto overruled Freeman v. Hewitt, 329 U.S. 249 (1946), and its progeny).

\textsuperscript{78} Id. at 311. Furthermore, “the substantial nexus requirement is not, like due process' minimum contacts requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce.” Id. at 313 (quotations omitted). Indeed, “the ‘substantial nexus’ requirement has evolved into more than a mere proxy for notice, like the due process ‘minimum contacts’ requirement, and now acts as a sword against states seeking to gratuitously impose their taxes on interstate commerce.” McGinnis, supra note 34, at 165.

\textsuperscript{79} Quill, 504 U.S. at 315 (“Whether or not a State may compel a vendor to collect a sales or use tax may turn on the ‘presence in the taxing State of a small sales force, plant, or office.’”).
Despite the push for pragmatism over formalism in Commerce Clause jurisprudence, the Quill Court maintained the bright-line rule articulated in Bellas Hess. Accordingly, the Court found that the North Dakota tax imposed on Quill was unconstitutional because Quill did "no more than communicate with customers in the State by mail or common carrier as part of a general interstate business."

As a result of the Supreme Court's decisions in Bellas Hess and Quill, courts must analyze taxes on out-of-state corporations under both the Due Process Clause and the Commerce Clause. While most out-of-state corporations will satisfy the weakened Due Process Clause requirement of purposeful availment, it remains difficult for states to establish the sufficient nexus between itself and the out-of-state corporation necessary to satisfy the Commerce Clause requirement. These difficulties led to the passage of New York's Amazon tax, which attempts to ease the process and statutorily create the requisite substantial nexus.

III. Amazon.com v. New York State Department of Taxation & Finance

Since it is difficult for states to establish a substantial nexus with out-of-state corporations, New York attempted to create statutorily the necessary nexus with the passage of its Amazon tax. As this Recent Development argues, however, New York's attempt fails to satisfy the requirements of Quill.

80. Id. at 314–15. Many legal scholars have denounced the formalistic approach of Quill because "the nexus tests in Quill are vulnerable to manipulation by a seller engaging in an electronic commerce transation." Trahan, supra note 37, at 112. For example, the physical presence test can be avoided with entity isolation or by manipulating relationships with telecommunications providers. Id. at 113–17; see also John A. Swain, Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?, 75 S. CAL. L. REV. 419, 473 (2002) ("[S]ales tax equity can be fully achieved only if Quill's anachronistic physical presence test is either judicially or legislatively overruled.").

81. Quill, 504 U.S. at 311–12, 314. Justice White, however, dissented from this portion of the Court's opinion. Id. at 333 (White, J., concurring in part and dissenting in part).

82. Id. at 301-02 (majority opinion). The Court went to great lengths to explain why Bellas Hess and its bright-line rule remain good law. While the Court agreed with much of the North Dakota Supreme Court's decision, it ultimately determined that a bright-line rule in this area is beneficial. Id. at 312-18. Justices Scalia, Kennedy, and Thomas, on the other hand, would declare the North Dakota tax unconstitutional on stare decisis grounds and not "revisit the merits of [the Bellas Hess] holding." Id. at 320 (Scalia, J., concurring in part and concurring in the judgment).

83. Id. at 311 (majority opinion).

84. N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney Supp. 2010).
A. The Amazon Tax and Amazon’s Associates

Less than a month after New York’s Amazon tax was passed, Amazon filed suit challenging its constitutionality. Amazon argued, inter alia, that the tax—on its face and as applied—violated the dormant Commerce Clause. The New York trial court, relying heavily on *Scripto, Inc. v. Carson* and *Orvis Co. v. Tax Appeals Tribunal of New York* and marginalizing *Quill*, ruled in favor of New York and upheld the Amazon tax.

Before analyzing the trial court’s decision, it is important to understand fully the agreement between Amazon and its associates and the role these associates play for Amazon. While *Quill* dealt with traditional mail-order companies, Amazon is the quintessential twenty-first century mail-order company. Amazon’s Web site reaches millions of Internet users every day both in New York and around the world. These consumers purchase items from Amazon’s Internet “catalog,” and Amazon in turn ships these items by mail or common carrier to the consumers. Amazon has no employees or property located in New York.

Amazon Associates are part of a new wave of online advertising called the performance marketing approach (“PMA”). The PMA is based on the business model first employed by catalog retailers who used print advertising to communicate with potential customers and then took and shipped orders from a central location. The Internet-based PMA is based on two steps: (1) “the retailer [i.e., Amazon]...
signs a standardized agreement with various entities that run websites, known in the industry as ‘affiliates,’ to publish and display an electronic advertisement for the retailer on their websites,95 and then (2) “the visitor to the affiliate’s website ... may, without any involvement by or notice to the affiliate, view the advertiser’s electronic ad and decide to click through to the advertiser’s website.”96 Other than placing the advertisement on its Web site, the affiliate has no “direct involvement” in the transaction between the customer and the Internet retailer.97 Thus, unlike independent contractors, the role played by affiliates is minimal.98

More specifically, Amazon’s Associate Program “allows participants ... to maintain links to Amazon.com on their own websites and compensates them by paying a percentage of the proceeds of the sale.”99 Before approving an associate application, Amazon reviews the applicant’s Web site to ensure that it does not promote sexually explicit materials, violence, illegal activities, or the like.100 Web site owners who are accepted are granted “a revocable, non-exclusive, worldwide, royalty-free license ... solely for purposes of facilitating referrals from [their site] to the Amazon Site”101 and enter into an “independent contractor” relationship with Amazon.102 Associates receive a referral fee of varying percentages based on the

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95. Id.
96. Id. at 5.
97. Id. at 6. For example, the affiliate “functions exclusively as a publisher of an electronic advertisement” and does not (1) “directly sell any product to any Web User and does not have a sales force that affirmatively solicits potential customers for the retailer,” (2) “receive payment from the Web Users who purchase an advertiser’s products or services,” (3) “deliver a product or service to any person,” (4) “know the identity of the visitors to its website, if any, who click through from its website to that of the retailer and whether those visitors ultimately purchase a product from the advertiser,” and (5) have “involvement in the final sales transaction between the Web User and the retailer through the retailer's website.” Id.
98. Id.
100. OPERATING AGREEMENT, supra note 99, ¶ 1. A typical Amazon Associate Web site might be a Web site that reviews GPS devices. Interested buyers would then be directed to GPS devices for sale on Amazon by clicking on a link on the GPS-reviewing Web site. Amazon “authorizes Associates to place different types of links from their websites to its own.” Amazon.com, 877 N.Y.S.2d at 845.
type of product sold on Amazon.com or its affiliate Web sites. New York argued that Amazon's Operating Agreement ("Operating Agreement") created a substantial nexus between Amazon and New York. The New York trial court conducted its dormant Commerce Clause analysis and agreed that the Operating Agreement created the requisite nexus between Amazon and New York.

B. The Complete Auto Test and the Substantial Nexus Prong

The New York trial court began its dormant Commerce Clause analysis by laying out the four-part Complete Auto test and recognized that the decision in Amazon.com hinged on the interpretation of the first prong—whether a substantial nexus exists between New York and Amazon. The trial court's legal analysis under the substantial nexus prong, however, is flawed in several respects.

Under Quill, the Supreme Court held that a substantial nexus does not exist between a retailer and a state when the retailer's only connection with the state is by mail or common carrier. The Quill Court was clear: physical presence, in the form of "a small sales force, plant or office" is required. By requiring this substantial nexus, the Quill Court was "limiting state burdens on interstate commerce" and helping to foster economic growth in interstate commerce.

Instead of relying on Quill, however, the New York trial court followed two prior New York state court decisions, Scripto and Orvis, and maintained that even the slightest physical presence is

104. See Reply Memorandum of Law in Further Support of Defendants' Motions to Dismiss and in Opposition to Plaintiffs' Cross-Motions for Summary Judgment at 10–13, Amazon.com, 877 N.Y.S.2d 842 (No. 601247/08).
105. See Amazon.com, 877 N.Y.S.2d at 849.
106. Id. at 847 (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).
107. Id.
109. Id. at 315.
110. See McGinnis, supra note 34, at 199. For a summary of the current state of the law related to substantial nexus and physical presence, see In re Appeal of Intercard, Inc., 14 P.3d 1111, 1122 (Kan. 2000).
111. Quill, 504 U.S. at 313.
112. Id. at 316.
113. As one author has argued, "Courts, like the Orvis Court, have ignored the root physical presence requirement that is the foundation of the establishment of nexus for taxation purposes." McGinnis, supra note 34, at 199–200. Instead, state courts, like the
enough to create a substantial nexus. According to the trial court, this physical presence requirement “can be actual or imputed based on the in-state solicitation of sales by an employee, agent, or independent contractor of the retailer on its behalf.” The trial court failed to address Amazon’s argument that while its associates were labeled “independent contractors” in the Operating Agreement their role is more akin to that of an advertiser, and instead concluded that the substantial nexus prong had been satisfied primarily because Amazon did not discourage its New York associates from soliciting within the state. As this Recent Development argues, the trial court failed to analyze properly the role an Amazon Associate plays for Amazon—that of an advertiser and not of an independent contractor.

The failure of the New York trial court to examine properly the activities of Amazon’s associates enabled the court to uphold the tax. Examining the actual functions performed by the associates should have led the trial court to determine that Amazon’s associates are merely advertisers and not “independent contractors”—despite the boilerplate language in the Amazon Operating Agreement. This

Orvis court, have relied on a company’s economic presence in the taxing state. Id. at 200. This can likely be explained by the desire to uphold the large revenue sources these taxes produce. See id. ("Although Orvis was but one example of the blatant disregard of Supreme Court jurisprudence, state courts have found it to be a fruitful revenue source and frequently rely upon its faulty reasoning."); see also Borders Online, LLC v. Cal. Bd. of Equalization, 29 Cal. Rptr. 3d 176, 190 (Cal. Ct. App. 2005) (following the approach taken by the New York court in Orvis).

114. Amazon.com v. N.Y. State Dep’t of Taxation & Fin., 877 N.Y.S.2d 842, 847 (N.Y. Sup. Ct. 2009). Although state courts have reinterpreted this physical presence requirement to include a “slightest physical presence,” manifested by economic activities within the taxing state, this interpretation misstates the core requirement of Quill. See McGinnis, supra note 34, at 201 ("[I]t is also established that a slightest presence will also not create nexus. States, not surprisingly, have sought to impose the tax when a business has little more than a slightest presence. Rather, to comply with Quill, the physical presence requirement should hinge on the presence with[in] the taxing state of a small sales force, plant, or office." (quotations omitted)); see also In re Appeal of Intercard, 14 P.3d at 1119 ("The Orvis court ignores the Quill holding that sufficient physical presence is a necessary element of the nexus required for a state to impose a use tax collection duty. Economic presence cannot negate this requirement.").

115. Amazon.com, 877 N.Y.S.2d at 847.
116. Id. at 848–49.
117. While it is unclear why the New York trial court did not examine more closely the actual functions performed by Amazon’s associates, it is important to note that many state courts have attempted to ignore Quill and its substantial nexus requirement, in order to uphold the ability of states to tax out-of-state retailers. See McGinnis, supra note 34, at 199–200. Compare Magnetek, Inc. v. Treasury Dep’t, 562 N.W.2d 219, 223 (Mich. Ct. App. 1997) (following the broad interpretation of “physical presence” from Orvis), with Fla. Dep’t of Revenue v. Share Int’l, Inc., 675 So. 2d 1362, 1363 (Fla. 1996) (following the more demanding interpretation of “physical presence” from Quill).
would have allowed the trial court to rely on *Quill*, rather than *Scripto* and *Orvis*, and hold that a substantial nexus does not exist between Amazon and New York.118 Furthermore, had the New York trial court examined more fully the role of Amazon's associates, it would have found that Amazon does not substantially rely on the advertising its associates provide to establish and maintain a market in New York.119 The "crucial factor governing nexus is whether the activities performed [in the taxing state] on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state for the sales."120 This is not the case for Amazon and its associates. Amazon's advertising activity in New York through the use of marketing affiliates is not equivalent to the Internet retailer maintaining a sales force, office, or plant in the state. As a result, Amazon's connection with New York does not satisfy the substantial nexus prong.

C. Application of *Quill* Is Proper in Amazon.com

The New York trial court held that Amazon's associates were independent contractors soliciting orders on behalf of Amazon,121 but this holding misconstrues the role the associates played. As articulated in more detail above,122 the associates are "independent third parties ... only in the business of generating their own content and displaying it on their own websites, while also publishing electronic advertisements for Amazon and other Internet retailers."123 After an Internet viewer clicks on an Amazon link, "the [associate] has no further connection with or knowledge of the communications between the potential customer and Amazon concerning a transaction or its fulfillment .... The [associate] also has no ability to insert itself in the sales transaction and influence the customer to make a purchase."124 Amazon and the consumer enter into a transaction; Amazon receives payment from the consumer; Amazon

120. *Id.* at 250. "[D]e minimis local activities or proof that the local activities do not generate any significant proportion of local sales" will not satisfy the substantial nexus requirement. *Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176, 191 (Cal. Ct. App. 2005). This is a question of fact determined by the court. *Id.*
121. *Amazon.com*, 877 N.Y.S.2d at 845.
122. *See supra* Part III.A.
124. *Id.* As the Performance Marketing Alliance Amicus Brief illustrates, it is more beneficial to examine what the affiliates cannot do. *Id.* at 16–17.
ships the product to the consumer—it is only after the transaction is completed that the associate receives payment for the "click through." This is not the role of an independent contractor but rather an advertiser.

Furthermore, by upholding the constitutionality of the Amazon tax, the New York trial court implied that there is a distinction between an in-state versus an out-of-state Web site owner. As a result, New York is able to impose a sales and use tax on the happenstance that some of Amazon's marketing associates live in New York. The residency of the associates, however, should have no bearing on the substantial nexus between New York and Amazon. There should be no constitutional distinction based on the fact that one Web site owner lives in New York, while another lives just across the border in Pennsylvania. The location of a server or Web site owner is irrelevant to the average Internet user. The focus must be

125. Id. at 12.
126. Imagine, for example, a Web site that discusses the many places to hike in the Adirondack Mountains. This particular Web site owner is an Amazon Associate and has Amazon.com links on his site that visitors can click on if they are interested in buying hiking boots or camping equipment. The Web site will undoubtedly attract visitors who live in New York. Under the New York trial court's reasoning, if the Web site owner happens to live in New York, then a substantial nexus has been created between New York and Amazon. See Amazon.com, 877 N.Y.S.2d at 847. But it is just as likely that this Web site owner will live in Pennsylvania, New Jersey, or Delaware. If that is the case, no substantial nexus will be created between New York and Amazon, even though the Web site is still attracting New York residents and resulting in sales on Amazon.com from New York residents. Such logic simply does not make sense.


128. See generally McGinnis, supra note 34 (arguing that substantial nexus requires a small workforce, plant, or office). Advertisers who happen to live in the taxing state will not satisfy this physical presence requirement. Id. at 197–203.

129. In fact, many Web sites are stored on multiple servers in multiple locations; thus, the average Internet user likely does not know where the Web site he is viewing is actually located. See 1-800 Contacts, Inc. v. WhenU.com, 309 F. Supp. 2d 467, 475 n.14 (S.D.N.Y. 2003) ("Given that a single website contains text and information located on multiple servers, when a user's computer accesses a single website, the computer may be receiving information from several different servers."); see also Brief of Amicus Curiae Performance Marketing Alliance in Support of Plaintiffs-Appellants, supra note 93, at 26 ("The state of incorporation or physical location of a website's server is irrelevant to the Web User's decision whether to visit a website."). If this were the case, Amazon simply could screen Web site applications and reject those Web site owners who lived in New York. This would not hurt Amazon's ability to advertise in New York or receive "click throughs" from New York residents—it would only hurt the potential associates denied from the program. Brief of Amicus Curiae Performance Marketing Alliance in Support of Plaintiffs-Appellants, supra note 93, at 26.
on Amazon and its physical presence within New York—does Amazon have “a small sales force, plant, or office” located in the state?\textsuperscript{130} The associates and their advertising activities in New York are not enough to create a physical presence for Amazon in New York.\textsuperscript{131} Thus, Amazon has not satisfied the substantial nexus prong.

The role Amazon’s associates play is more similar to the role “the publishers of the ‘national periodicals’ that contained print advertisements played in the catalog marketing program that was held in Quill not to create a ‘substantial nexus’ with the taxing state.”\textsuperscript{132} The associates passively display advertisements for Amazon on their Web sites and nothing more. The PMA is an innovative new advertising tool, which allows companies to reach potential customers more effectively and help small Internet companies develop their own Web sites more quickly\textsuperscript{133}—but it is simply advertising. The Amazon tax “improperly singles out and discriminates against advertisers that use the performance marketing channel, as opposed to other, more traditional forms of advertising.”\textsuperscript{134} Thus, the New York trial court exaggerated and misinterpreted the role played by Amazon’s associates and their advertising function.

Even assuming that a court could find that Amazon’s associates created a “physical presence” for Amazon in New York, the trial court failed to examine the importance of these associates to Amazon’s overall ability to operate in New York.\textsuperscript{135} The court concluded that the associates are independent contractors\textsuperscript{136} without

\begin{itemize}
\item \textsuperscript{130} Quill Corp. v. North Dakota, 504 U.S. 298, 315 (1992).
\item \textsuperscript{131} See Brief of Amicus Curiae Performance Marketing Alliance in Support of Plaintiffs-Appellants, supra note 93, at 16–18 (analyzing the activities of Amazon’s affiliates and stating that they do not, “under Quill, create a ‘physical presence’ in New York”); McGinnis, supra note 34, at 199–200.
\item \textsuperscript{132} Brief of Amicus Curiae Performance Marketing Alliance in Support of Plaintiffs-Appellants, supra note 93, at 18 (citing Quill, 504 U.S. at 302).
\item \textsuperscript{133} Id. at 2; see also Am. Library Ass’n v. United States, 201 F. Supp. 2d 401, 416 (E.D. Pa. 2002) (“Unlike television, cable, radio, newspapers, magazines or books, the Internet provides an opportunity for those with access to it to communicate with a worldwide audience at little cost.”).
\item \textsuperscript{134} Brief of Amicus Curiae Performance Marketing Alliance in Support of Plaintiffs-Appellants, supra note 93, at 2. “Affiliates are content providers whose principal mission is to attract users to their own websites to review the information and content that they create and display. They do not drum up business for Amazon or other companies.” Id. at 17.
\item \textsuperscript{135} See Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue, 483 U.S. 232, 250 (1987).
\item \textsuperscript{136} Amazon.com v. N.Y. State Dep’t of Taxation & Fin., 877 N.Y.S.2d 842, 845 (N.Y. Sup. Ct. 2009). The court reached this conclusion based on the fact that Amazon’s Operating Agreement with associates defines the relationship between Amazon and the
\end{itemize}
also examining whether "the activities performed in [New York] on behalf of [Amazon] are significantly associated with [Amazon]'s ability to establish and maintain a market in [New York] for the sales." Because of the court's reliance on the phrase "independent contractor" from Amazon's Operating Agreement, the court was able to marginalize the decision in *Quill* and place its reliance, instead, on *Scripto* and *Orvis*. Such reliance, however, is improper because in both cases the independent contractors were essential to the companies' ability to maintain a market in the taxing state. This is not the case for Amazon and its associates.

In *Scripto*, the Supreme Court upheld the constitutionality of a Florida sales and use tax on *Scripto*, a Georgia corporation. *Scripto* established an "advertising specialty division trading under the name of Adgif Company," which employed ten salesmen in Florida that marketed and sold *Scripto*'s products in the state. In each written contract with the salesmen, *Scripto* made clear that the relationship between the parties was that of "independent contractors;" however, each salesman "actively engaged in Florida as a representative 'of *Scripto* for the purpose of attracting, soliciting and obtaining Florida customers.'"

Reliance on *Scripto* is inapt for several reasons. As a threshold matter, *Scripto* arguably was not decided under the dormant associates as one of "independent contractors." *Operating Agreement*, supra note 99, ¶ 14.

137. *Tyler Pipe*, 483 U.S. at 250 (quoting *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 715 P.2d 123, 126 (Wash. 1986), vacated, 483 U.S. 232 (1987)); see also *Scripto*, Inc. v. *Carson*, 362 U.S. 207, 211 (1960) ("The formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida."). Brief of the Tax Foundation as Amicus Curiae in Support of Plaintiffs-Appellants, supra note 18, at 9 ("The trial court ... did not conduct any evaluation in regard to whether [Amazon's] 'local function' [was] significantly associated with maintenance or establishment of [their] sales market in New York."); *Sam Zaprzalka*, Note, *New York's Amazon Tax Not Out of the Forest Yet: The Battle over Affiliate Nexus*, 33 SEATTLE U. L. REV. 527, 539 (2010) ("The Court held that whether or not a salesperson was classified as an independent contractor was not determinative for nexus purposes.").

138. *Scripto* is an example of attributional nexus, which "takes the physical presence of an in-state entity and attributes that presence to the out-of-state retailer in order to subject the remote retailer to taxation." Andrew W. Swain & Nathaniel T. Trelease, *Taxing Time for the Internet?*, BUS. L. TODAY, Nov.-Dec. 2005, at 11, 13.

140. *Id.* at 208.
141. *Id.* at 209.
142. *Id.*
143. *Id.* (emphasis added) (citation omitted in original).
Commerce Clause. While the *Scripto* Court relied on cases dealing with the Commerce Clause,\textsuperscript{144} the *Quill* Court—in clarifying the distinction between the Due Process and Commerce Clause “nexus” tests—classified *Scripto* as a Due Process Clause case.\textsuperscript{145}

Even if *Scripto* could be classified as a dormant Commerce Clause case, a substantial nexus linked Florida and Scripto because Scripto relied on its salesmen to maintain a market in Florida.\textsuperscript{146} This was not the case in *Amazon.com*. The salesmen in *Scripto* were actively involved in soliciting sales for the company—they received “catalogs, samples, and advertising material” and the “[o]rders for such products [were] sent by these salesmen directly to the Atlanta office for acceptance or refusal.”\textsuperscript{147} Amazon’s associates, on the other hand, are not involved in the actual sale between Amazon and its customers. Rather, the associates are similar to advertisers who essentially act as electronic billboards, passively displaying links on their Web sites that point customers to items they may wish to purchase from Amazon. Thus, the facts in *Amazon.com* are substantially different from those in *Scripto*. It appears that the New York trial court placed constitutional significance on the magic words “independent contractors” and determined that these words created a substantial nexus between New York and Amazon. The trial court should not have relied on the way these associates were characterized, but rather on the practical significance of their activities vis-à-vis Amazon.

The New York trial court’s dependence on *Orvis* is misguided for these same reasons. In *Orvis*, the court found that both Orvis and Vermont Information Processing (“VIP”) had a substantial nexus with New York because both companies’ activities in New York

\textsuperscript{144} See id. at 212 (stating that *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944), served as the basis for the holding).

\textsuperscript{145} *Quill Corp. v. North Dakota*, 504 U.S. 298, 306-07 (1992) (“These cases all involved some sort of physical presence within the State, and in *Bellas Hess* the Court suggested that such presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary.”). While the Court went on briefly to discuss *Scripto* under its dormant Commerce Clause analysis, the Court viewed *Scripto* as an extension of its Due Process Clause jurisprudence. *Id.* It is, therefore, improper to rely on *Scripto* after *Quill* as anything other than a Due Process Clause case.

\textsuperscript{146} See *Scripto*, 362 U.S. at 210–12; *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 250 (1987) (emphasizing the importance of the relationship between the behavior in question and the maintenance of a sales market in the state).

\textsuperscript{147} *Scripto*, 362 U.S. at 207.
"were an essential part of [their] ability to do business in the state." Orvis's salesmen made systematic visits "to all of its as many as 19 wholesale customers on the average of four times a year," while VIP's "visits to New York vendees and its assurances to prospective customers that it would make such visits enhanced sales and significantly contributed to VIP's ability to establish and maintain a market for the computer hardware and software it sold in New York." Without Orvis's and VIP's salesmen visiting customers in New York, neither company would have been able to maintain a market in the state. That was not the case in Amazon.com because "click-through" advertising was not necessary for Amazon to maintain a market in New York. Thus, the facts in Amazon.com are substantially different from those in Orvis.

If the New York trial court had properly relied on Quill's substantial nexus bright-line rule, the court would have held the New York tax unconstitutional. Invalidating the New York tax would have confirmed that the "settled expectations" applicable to mail-order companies also applied to Internet retailers. Instead, the trial court has opened the door to thousands of new taxes levied on these Internet retailers. As one court has aptly noted, "[w]ithout the limitation's [sic] imposed by the Commerce Clause, ... inconsistent regulatory schemes could paralyze the development of the Internet altogether." If other courts adopt the Amazon.com reasoning, the "freedom" of the Internet will be further reduced.

After receiving the decision from the New York trial court, Amazon appealed the ruling on July 13, 2009, to the New York Supreme Court Appellate Division, First Judicial Department. A five-judge panel of the Appellate Division, First Judicial Department heard oral arguments for the appeal on October 29, 2009. Several

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150. See Henchman, supra note 56 (noting that the referrals from Amazon's New York affiliates contribute to "only 1.5 percent of Amazon.com's sales in New York").
trade groups filed amicus briefs supporting Amazon's position.\(^{155}\) A decision is expected sometime in 2010.

IV. THE FUTURE OF QUILL AND THE SUBSTANTIAL NEXUS REQUIREMENT

The Amazon.com decision raises new questions as to the continuing vitality of Quill and its bright-line substantial nexus rule. The Quill Court argued that "a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals."\(^{156}\) For over fifteen years, Internet retailers have relied on Quill and its bright-line rule.\(^{157}\) The decision in Amazon.com, however,\(^{158}\) blurs the rule and further jeopardizes the expectations of Internet retailers. Other states—and perhaps even local jurisdictions, such as counties and towns—will begin experimenting with and implementing new sales and use taxes, and Internet retailers will be forced to divert time and resources away from business operations to lobby against these taxes and argue their constitutionality in court.\(^{159}\) Furthermore, judicial resources (limited as they are) will be expended adjudicating these cases, since simple reliance on Quill is no longer possible.\(^{160}\)

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155. See, e.g., Brief of the Tax Foundation as Amicus Curiae in Support of Plaintiffs-Appellants, supra note 18; Brief of Amicus Curiae Performance Marketing Alliance in Support of Plaintiffs-Appellants, supra note 93.

156. Quill, 504 U.S. at 316. But see id. at 329–31 (White, J., concurring in part and dissenting in part) (arguing that the majority's bright-line rule will not achieve its goal of reducing litigation and criticizing the majority for imposing its own economic preference under the guise of encouraging settled business expectations).

157. See Baudier, supra note 127, \(\S\) 9 ("After Quill, the law appeared settled, but new technological developments along with the Internet boom have posed new questions for courts relying on the Quill decision."). Nevertheless, state courts continue to chip away at the "brightness" of Quill's holding and make the area of Internet taxation all the more murky. See McGinnis, supra note 34, at 199–200 ("[State courts] have ignored the root physical presence requirement that is the foundation of the establishment of nexus for taxation purposes." (citing In re Appeal of Intercard, Inc., 14 P.3d 1111, 1119 (Kan. 2000))).

158. See In re Appeal of Intercard, Inc., 14 P.3d 1111, 1119 (Kan. 2000) ("The Orvis court ignores the Quill holding that sufficient physical presence is a necessary element of the nexus required for a state to impose a use tax collection duty.").

159. See Le, supra note 20, at 423. Le also argues that it is "time for Congress . . . [to] take a permanent stance on Internet taxation and provide clear guidance to states and e-commerce businesses." Id.

160. Despite Quill's arguably clear holding, the application of Quill has varied widely among state courts. See In re Appeal of Intercard, 14 P.3d at 1118–23 (summarizing various state courts' analyses of Quill). The Amazon.com decision allows for more cutting away at the bright-line rule. Furthermore, courts are not well-suited to deal with dormant Commerce Clause issues. See McGinnis, supra note 34, at 201 (explaining that courts only have the power to invalidate laws which violate the Commerce Clause).
Development proposes two alternative solutions to help truly settle the business expectations of Internet retailers: (1) if the Supreme Court has an opportunity to grant certiorari in *Amazon.com* or a similar case, it should do so and reaffirm *Quill's* bright-line rule with the caveat that Congress is free to regulate in this area, or (2) Congress should pass uniform, national legislation governing the imposition of sales and use taxes on Internet retailers.

While it is possible the Supreme Court would grant certiorari in a case addressing the continued strength of *Quill*, the *Quill* Court itself believed that interstate taxation of mail-order companies (or Internet retailers) was a matter better resolved in the halls of Congress. Under dormant Commerce Clause jurisprudence, Congress always remains free to disagree with the Court and “overrule” cases by passing national legislation. This Recent Development nevertheless proposes that the Supreme Court should reaffirm *Quill’s* bright-line test if it has the opportunity to do so, albeit with the caveat that Congress is free to regulate in this area. This would allow Congress

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161. The Supreme Court appears reluctant to address again the issue of Internet taxation. See Joseph Henchman, *Why the Quill Physical Presence Rule Shouldn’t Go the Way of Personal Jurisdiction*, 46 ST. TAX NOTES 387, 394 (2007) (“The Supreme Court’s decision not to accept the MBNA [America Bank N.A. v. Tax Commissioner of the State of West Virginia] appeal [in June 2007] suggests that the Court prefers that Congress give the next word on the physical presence rule after *Quill.*”).

162. For an examination of two possible congressional solutions, see Baudier, *supra* note 127, ¶¶ 22–28. The first proposal is for a “single nationwide flat tax on sales collectible by the state where the goods are used.” Id. ¶ 22. The second proposal would leave the taxation power in the hands of the individual states. Id. ¶ 24. The states could participate in the Streamlined Sales Tax Project, which “is endeavoring to develop computer software which would automatically calculate taxes for any given jurisdiction, thereby eliminating much of the burden on retailers’ crossing multiple states’ boundaries.” Id.

163. *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (“This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.”).


165. See Henchman, *supra* note 161, at 392, 395 (noting that Congress is the final authority over issues of interstate commerce). Several of the Justices, while they likely would uphold the *Quill* decision, are hesitant in extending the Court’s dormant Commerce Clause jurisprudence. Thus, it would be wiser for Congress to deal with the situation than to rely on the Supreme Court changing the decision. See United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 348 (2007) (Scalia, J., concurring in
to pass legislation, in order to settle officially the expectations of out-of-state Internet retailers. Ultimately, whether Internet retailers are allowed to operate freely without paying sales and use taxes or are forced to collect a national Internet sales tax is a decision better left to Congress, where retailers and interest groups are free to lobby congressional leaders.

**Conclusion**

The New York trial court’s decision in *Amazon.com* exaggerated the passive role Amazon’s associates play in New York and failed to give necessary weight to the Supreme Court’s decision in *Quill*. As a result, Internet retailers across the country now face an uncertain future. Amazon and other Internet retailers represent the modernization of the mail-order business in today’s technologically driven society. Thus, the question remains: what rules should courts apply to these modern day mail-order retailers? The *Amazon.com* court, similar to the North Dakota Supreme Court when it upheld the tax on *Quill*, decided that *Quill’s* bright-line rule should not be applied in today’s modern society. However, the rationales articulated by the Supreme Court in *Quill* for maintaining such a bright-line rule apply with equal force to today’s Internet retailers.
It is thus crucial either for the Supreme Court to reaffirm that its bright-line rule, first articulated in *Bellas Hess* and reaffirmed in *Quill*, remains good law and applies to Internet retailers, or for Congress to pass uniform, national legislation regulating taxation of Internet retailers. Without such assurance, the area of Internet taxation will remain complicated and unclear.

**Daniel Tyler Cowan**

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