

Economic Nexus: Right or Wrong

By Peter L. Faber*

Peter L. Faber discusses whether states can tax an entity that has economic contacts with the state but has no physical presence in the state.

Introduction

The issue addressed by this article is whether states can tax a corporation that has no physical presence in the state if it has economic contacts with the state. The question is whether exploiting a state's market without physical presence in the state is enough to justify that state's taxing the resulting income or imposing a use tax collection responsibility.

There are many ways in which a company can attract customers in a state without being physically present there. This can be done through media advertising, mail order catalogs and, more recently, by the Internet and other electronic means. Although some people have suggested that the problem is a new one that has been presented by the availability of the Internet, it is really an old problem that has, perhaps, become more urgent because of the increased prevalence of the use of cyberspace to transact business.

It is generally agreed that the mere presence of a payor in the taxing state is not enough to justify imposing an income tax on the payee. Otherwise, a state could impose a direct tax on nonresident shareholders of an in-state corporation with respect to dividends received from the corporation. The Supreme Court came close to permitting this in *Int'l Harvester Co. v. Wisconsin Dep't of Tax'n* in allowing a state to withhold income tax on dividends paid by an in-state corporation to nonresident shareholders, but a careful reading of the Court's opinion indicates that the Court (perhaps

incorrectly) regarded the tax as being one that was imposed on the corporation, not on the shareholders.¹ Economic nexus must rest on more than simply the presence of the payor. It should require an effort by the taxpayer to generate income from the customer's state.

The courts have addressed nexus as a constitutional issue, looking at whether the extent of a company's contacts with a state are sufficient to justify the state in taxing it. Given the functions of courts in our system of government, that is an appropriate limitation. Constitutional constraints (at least under the Commerce Clause) should not, however, control the question of whether economic nexus principles should be applied as a matter of tax policy. Congress has virtually unlimited latitude to legislate in this area under the powers granted to it by the Commerce Clause. As long as rather minimal Due Process Clause nexus standards are met, Congress may authorize or prohibit state taxation of interstate commerce. In fact, the Supreme Court in *Quill Corp. v. North Dakota*, in holding that an out-of-state seller that lacked physical presence in a state could not be compelled to collect that state's use tax from in-state customers, specifically invited Congress to legislate in the area if it felt that the result reached by the Court was inappropriate.² The Supreme Court's denial of certiorari in several nexus cases, including cases involving economic nexus principles, in recent years can be taken as an indication that the Court has concluded that it has made its contribution to the development of the law in this area and that the ball should be in Congress' court.

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In recent years, a number of states have aggressively sought to expand the reach of economic nexus principles. This has been done by both administrative practice and legislation. In some cases, the efforts have been general whereas in other cases they have been limited to particular industries. For example, legislation enacted in New York State last year imposes net income taxes on out-of-state banks that have in-state credit card customers.³ The assertion of economic nexus is a way for states to export their tax liability, imposing it on people and companies that have no direct connection with the state (and, a cynic might observe, that do not vote in the state). Last year, just two days after the Supreme Court denied *certiorari* in two cases in which the assertion of economic nexus by states had been upheld by state courts, the New Hampshire legislature amended the state's definition of taxable business activity to include "a substantial economic presence evidenced by a purposeful direction of business to the state."⁴ The Multistate Tax Commission, an organization in which many states participate, has put forth a "factor presence test" under which a company would be "economically present," and hence taxable, in a state if it had sales in that state of at least \$500,000, if the payroll in the state exceeded \$50,000, or if 25 percent of the company's sales, property or payroll were in the state.

Whether Congress will intervene in this area is unclear. The writer has argued elsewhere that it should. There is a need for uniformity in many areas of state taxation, including nexus as well as apportionment formulas and the taxation of nonresidents, and federal legislation is the best way of achieving that uniformity.⁵ The one instance in which Congress has done so involved the enactment of P.L. 86-272 in 1959.⁶ That law provides that a state cannot impose a net income tax on a seller of tangible personal property whose only business activity in the state is the solicitation of orders for sales to be filled by shipment from outside the state. It was a response to the Supreme Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, in which the Court held that the Commerce Clause did not bar a net income tax on a foreign corporation carrying on an exclusively interstate business in the taxing state.⁷ P.L. 86-272 represented an immediate response to a particular stimulus. It did not result from a systematic attempt by Congress to address nexus

issues arising in interstate commerce. Moreover, the law singled out only one area of economic activity—the sale of tangible personal property—for nexus protection. It did not apply to services or to sales of intangible property, nor did it limit taxable nexus in many other situations. The Senate Finance Committee report in connection with P.L. 86-272 said that it was recommending a temporary and incomplete solution to the problem. The report provided that the Committee "recognizes that the problem is a complex one which requires extensive and exhaustive study in arriving at a permanent solution fair alike to the States and to the Nation. Your Committee believes, however, that the bill it has reported will serve as an effective stopgap or temporary solution while further studies are made of the problem."⁸

Residence vs. Source Taxation

It is generally accepted that there are two bases justifying the imposition of a tax: residence and source.⁹ A resident of a state can be taxed by the state on all of its income from all sources, whether within or outside the state.¹⁰ The reason for allowing a resident to be taxed on all of its income without regard to its source is "founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received."¹¹

In contrast, nonresidents can be taxed by a state only on "property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."¹²

The difference may be one of degree. The contacts with a state created by residence are deemed to be so all-encompassing that a resident can be taxed on all of its income even if the income has nothing to do with the taxing state. The contacts of a nonresident with a state are much less sweeping, and, hence, there is a general consensus, backed by law, that a state has no fair claim to tax any income that is not connected with the state.

The issue with respect to economic nexus involves taxation based on source. The question is whether income that is not derived from efforts within the taxing state can be taxed because the recipient of the product of the out-of-state efforts lives or uses the fruits of those efforts in the taxing state. Put another way, the theory of the proponents

of economic nexus is that the market contributes to the income and it is not necessary that that income be generated by efforts of the income earner within the taxing state.

Another way to put the issue, however, would be to say that an out-of-state company is “present” in a state if it is reaching out to residents of that state over the airwaves, in the media, or through cyberspace. One could argue that there are forms of “presence” other than “physical” presence and that these forms should be treated on a par with physical presence in determining the extent to which a company has sufficient contacts with a state to justify taxation.

The Supreme Court has framed the issue in terms of whether the taxing state has conferred benefits on a company from which it can reasonably ask a return. As the Court put it in *Wisconsin v. J.C. Penney Co.*, the question is whether the taxing “state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.”¹³

Due Process and Commerce Clause Nexus

There is a difference between the nexus standard under the Due Process Clause of the Constitution and the nexus standard under the Commerce Clause. In general, the Due Process Clause requires only enough minimal contact so that the taxpayer is on notice that it may be taxed and that the state has a legitimate interest in taxing it. The Commerce Clause, in contrast, requires “substantial” nexus. Consequently, “a corporation may have the ‘minimum contacts’ with a taxing State as required by the Due Process Clause and yet lack the ‘substantial nexus’ with that State as required by the *Commerce Clause*.”¹⁴

The Due Process nexus requirement involves notions of basic fairness. Although the courts are sometimes reluctant to express it in these terms, the notion seems to be that a state cannot tax a corporation if the corporation’s contacts with the state are so minimal that most people would find taxing of it by the state to be offensive. As the Supreme Court put it, the Due Process Clause requires the presence of enough contact so that the imposition of state jurisdiction is consistent with “traditional notions of fair play and substantial justice.”¹⁵

The courts have set the bar fairly low for Due Process nexus. The Supreme Court in *Quill Corp. v. North Dakota* said that purposeful solicitation of business directed toward residents of a taxing state can meet Due Process nexus standards. As the Court said, “[i]t matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers; The [sic] requirements of due process are met irrespective of a corporation’s lack of physical presence in the taxing State.”¹⁶ The Court noted that with respect to in personam jurisdiction a corporation subjects itself to a state’s laws if it “purposefully avails itself of the benefits of an economic market in the forum State.”¹⁷

Thus, it is clear that a state may tax an out-of-state corporation lacking a physical presence in the state if it purposefully solicits business in the state without running afoul of the Due Process Clause. Although the *Quill* case involved use tax collection responsibilities, it is generally assumed that the same principle would apply with respect to net income taxes. The intentional exploitation of a market in the state is the critical element. In fact, Professor Hellerstein has suggested that absent such a solicitation a corporation that has a physical presence in a state that is inadvertent and of which it may have been unaware could argue that it had no Due Process nexus with the state because it was not purposefully seeking to do business in the state.¹⁸

Commerce Clause nexus presents different issues. Here, the bar is higher, and the Supreme Court has made it clear that taxation cannot be supported unless a corporation has “substantial” nexus with the taxing state.¹⁹ The Commerce Clause serves a different function than does the Due Process Clause. It is there to protect the flow of interstate commerce from interference by the states. Accordingly, a level of state taxation or regulation that meets the minimum fairness requirement of the Due Process Clause nexus may amount to the kind of interference that is barred by the Commerce Clause.

Although the Commerce Clause may get less attention from the lay public than other better-known provisions of the Constitution, it seems clear that the Commerce Clause was central to the thinking of the Founding Fathers when the Constitution was drafted and adopted. The Constitution’s patrimony is economic. The principal impetus for a new document to replace the Articles of Confederation was the perceived need to establish a national economy.

Although we often think about the Bill of Rights and other significant Constitutional safeguards of personal liberty as being the Constitution's essence, the main reason why the Founding Fathers decided to scrap the Articles of Confederation was that they were not working well economically.²⁰ Alexander Hamilton and others saw that the country would never reach its economic potential if each state behaved as a separate economic unit, imposing tariffs on imports from other states and otherwise discriminating against out-of-state business. Hamilton recognized that a free flow of commerce among the states was essential if the country was to be a real country and not simply a collection of feuding neighbors.

The New Constitution gave Congress the power to regulate interstate commerce. The intent was that Congress would prevent states from erecting barriers that obscured the flow of commerce among them.²¹

Although the Commerce Clause by its terms gives Congress the power to take affirmative actions to regulate interstate commerce, it says nothing about what the states can and cannot do. The Supreme Court over the years has interpreted the Commerce Clause to prohibit state actions that impede the flow of interstate commerce, even though Congress has not passed a law to that effect. This is generally known as the "dormant" Commerce Clause. As the Supreme Court said in *Houston, East and West Texas Railway Co. v. United States*, Congress' power is intended to "protect the national interest by securing the freedom of interstate commercial intercourse from local control."²²

Although the idea of a negative or dormant Commerce Clause seems well enshrined in Supreme Court jurisprudence, the argument that the Commerce Clause by its terms places no limit on the ability of the states to interfere with interstate commerce but only gives Congress the power to prevent such interference if it chooses to do so is not unreasonable. Justice Scalia and Justice Thomas have argued that the concept has no basis in the text of the Constitution and makes little sense.²³

A significant difference between Commerce Clause and Due Process Clause nexus is that Congress has the power to remedy defects in Commerce Clause nexus whereas it has no power to permit a state to tax a company with which it lacks nexus under the Due Process Clause. Thus, assuming that a corporation has enough contacts with a state to justify Due

Process nexus, the question of whether a state can apply economic nexus concepts under the Commerce Clause can be addressed by Congress if it chooses to do so.

The principle of state economic autonomy is embedded in our system. Although Congress clearly has the power under the Commerce Clause to mandate uniform standards of state taxation (e.g., involving apportionment formulas and nexus standards), it has generally not chosen to exercise that power. The states have been free to develop their own tax and economic policies as long as they did not unduly burden interstate commerce in the view of the courts.

Obviously, any state tax or regulation can adversely affect the flow of interstate commerce. The problem that courts and policy makers have had to address is the extent to which this should be allowed.

Court Cases

General

A few general observations about the state of the case law may be in order.

The U.S. Supreme Court has rejected the concept of economic nexus with respect to use tax collection responsibilities,²⁴ but it has not addressed it with respect to Commerce Clause nexus in the income tax context. The current state of constitutional law with respect to physical presence and net income tax cases is unclear. Some cases have accepted the concept and other cases have rejected it.

One can argue that the bar should be higher in a net income tax context because there the taxpayer is itself paying the tax and not merely collecting it from others. On the other hand, as will be seen below, at least one court has come to the opposite conclusion, reasoning that compliance burdens with respect to use tax collection might be greater than with respect to income tax.

In *Whitney v. Graves*, the Supreme Court held that New York's taxing a nonresident on his gain from the sale of a seat on the New York Stock Exchange did not violate Due Process. The taxpayer had no physical presence in New York and a seat on the Exchange was viewed as intangible personal property. Although ordinarily intangible property is deemed to be located at the residence of the owner, the Court held that this particular property was localized in nature. Its principal attribute was a right to buy and sell securities on the floor of the Exchange and, hence, profits from the sale of

the seat were held to be properly taxable by New York.²⁵ Although it can be argued that *Whitney* stands for the proposition that physical presence is not necessary to tax a nonresident, the nature of the asset undermines such an argument. The Court was simply saying that this type of intangible asset had a presence in the state because of its very nature. Professor Swain has also pointed out that the nature of a membership on the Exchange is similar to that of being a partner in a partnership and, if this analogy is sound, it is clear that the partnership in question did business in New York.²⁶

The Supreme Court has repeatedly denied requests for it to pass on whether physical presence is required for net income tax purposes.²⁷ The denial of *certiorari* in *FIA Card Services* was particularly disappointing to those hoping for clarification of the law in this area. The other cases involving an absence of physical presence that the Supreme Court had refused to hear all involved intangible holding companies, which arguably represented tax shelter schemes with little economic substance. *FIA Card Services*, in contrast, involved a bank that had credit card customers in the taxing state, and there was no suggestion that the arrangement represented a tax avoidance scheme. The West Virginia Supreme Court had held that the company had a “significant economic presence” in the state because of the large number of its customers who lived there. Further, there was a conflict among decisions of different state supreme courts. Nevertheless, the Supreme Court passed on the issue.

U.S. Supreme Court Cases

Although the Supreme Court has addressed the economic nexus issue in the context of use tax collection responsibilities, it has failed to do so with respect to net income taxes.

In *Miller Brothers Co. v. Maryland*, the Court held that the Due Process Clause prohibited a state from requiring a company that had no physical presence in the state to collect use tax.²⁸ The taxpayer’s advertising in Delaware newspapers and radio stations “though not especially directed to Maryland inhabitants, reached, and was known to reach, their notice.”²⁹ The Court held, however, that the “incidental effects of general advertising” were not enough to create nexus because there was no deliberate exploitation of the consumer market in Maryland.³⁰ The Court in effect said that the fact that some of the taxpayer’s customers (and the source of

some of its sale proceeds) lived in Maryland did not give Maryland enough connection with the taxpayer to require it to collect tax. The Court said that “due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”³¹

In *Scripto, Inc. v. Carson*, a Georgia company was required to collect use tax by Florida because it used independent contractors to solicit sales in Florida.³² The taxpayer argued that *Miller Brothers* was controlling, but the Court disagreed, pointing out that Miller had no solicitors in Maryland and was not exploiting Maryland’s consumer market, in contrast to the facts in *Scripto*. Although in *Miller Brothers* Maryland residents went to Delaware to make purchases, Miller did not go to Maryland to solicit sales and, in fact, it was impossible for Miller to know whether goods sold for cash to a customer at its store in Delaware were later to be used in Maryland.³³

The Supreme Court held that physical presence was required to impose a use tax collection responsibility in *National Bellas Hess, Inc. v. Dep’t of Revenue*.³⁴ The taxpayer was based in Missouri and operated by mail order. It had no people or property in Illinois and did not advertise its goods for sale in newspapers, on billboards, or by radio or television in Illinois. Twice a year it mailed catalogs to its customers throughout the country, including Illinois. The Court held that the company could not be required to collect use tax with respect to sales to Illinois customers. The Court described the impact that a use tax collection responsibility would have on the conduct of the taxpayer’s interstate business:

And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National’s interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose “a fair share of the cost of local government.”³⁵

Justice Fortas, in dissent, said that the “large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market” established enough nexus to justify requiring the company to collect use tax. He also pointed out that the company relied on the state’s banking and credit institutions in extending credit to Illinois costumers.³⁶

The Court was clearly focusing on the Commerce Clause, but it also cited Due Process cases like *Miller Brothers*, leaving some doubt as to whether the Illinois taxing scheme ran afoul of the Due Process Clause as well as the Commerce Clause.

The Court revisited the issue that had been presented in *National Bellas Hess* 25 years later in *Quill Corp. v. North Dakota*.³⁷ In doing so, it eliminated any uncertainty as to which Clause of the Constitution was involved.

In the years following *National Bellas Hess*, many people came to the conclusion that the issue should be reexamined, in part because there had been a significant expansion of companies that solicited sales in states by methods other than physical contacts and some people believed that shielding them from use tax gave them an unfair advantage over “bricks and mortar” stores that had previously comprised all of the retail community. Other people felt that focusing on physical presence was archaic in view of technological developments in the business world. Several states attempted to impose a use tax collection obligation on out-of-state sellers with no physical presence in the state, and Quill Corporation went to court to resist North Dakota’s attempt to do the same.

The Supreme Court reaffirmed its earlier decision in *National Bellas Hess*, holding that physical presence was still required to compel use tax collection. It suggested that it might have reached a different conclusion had it been writing on a clean slate, but it pointed out that expectations had been built up based on the *National Bellas Hess* case and that disturbing these expectations might itself interfere with interstate commerce. Without saying how it might have decided the case if it were one of first impression, it noted that “contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today.”³⁸ Some commentators have viewed *Quill* as being principally based on *stare decisis*,³⁹ but *Quill* cannot be dismissed as being merely a *stare decisis* case. The Court listed a number of ways in which taxation without physical presence would adversely

affect interstate commerce, and while it hinted that the outcome *might* be different if the case were one of first impression, it did not say that it would. The Court mentioned that if North Dakota could require *Quill* to collect use tax similar obligations might be imposed by the nation’s 6,000-plus taxing jurisdictions. This could result in burdensome administrative and record-keeping requirements.

The Court in *Quill* also discussed the advantages of having a bright-line rule. While it conceded that any bright line rule might be “artificial at its edges,” it said that the “artificiality, however, is more than offset by the benefits of a clear rule.”⁴⁰

The Court noted that it had not extended the physical presence requirement to taxes other than use tax collections, making clear that it was not addressing the question of whether physical presence would be required for imposing a net income tax on a company.⁴¹

Although the Court held that requiring the collection of use tax without physical presence would violate the Commerce Clause, it said in dictum that doing so would not violate the Due Process Clause, thereby clearing up the ambiguity as to the source of the physical presence doctrine that had been created by the Court’s language in *National Bellas Hess*. Referring to cases involving in personam jurisdiction, the Court said that Due Process was satisfied “if a foreign corporation purposefully avails itself of the benefits of an economic market in the foreign state.” It said that a corporation with continuous extensive contacts with a state has “fair warning that its activities may be subjected to the jurisdiction of [that state].”⁴² Thus, Due Process was not violated.

The Court pointed out that the nexus requirement of the Due Process Clause and the substantial nexus requirement of the Commerce Clause “are animated by different constitutional concerns and policies.” Due Process involves whether it is fundamentally fair to apply the reach of government to a company whereas the Commerce Clause is driven “by structural concerns about the effect of state regulation on the national economy.”⁴³

The Court in *Quill* held that some physical presence was required for a state to impose use tax collection responsibilities but, since it held on the facts before it that there was no physical presence, it did not say how much physical presence would be required. The Court suggested that there was a *de minimis* standard, because *Quill* in fact had “a few floppy disks” in

North Dakota. Wherever the line should be drawn, the Court felt that this minimal presence was not enough to establish Commerce Clause nexus.⁴⁴

One case that, at first blush, seems to support economic nexus principles in the income tax context is *Int'l Harvester Co. v. Wisconsin Dep't of Tax'n*, but a close reading of the case suggests that that was not what the Court had in mind.⁴⁵ The Court held that a state could require a corporation to withhold tax on dividends paid to shareholders to the extent that the income was derived from Wisconsin based on standard apportionment principles. The corporation had to withhold the tax from the dividends paid to both resident and nonresident shareholders. The taxpayer argued that the dividends were declared in Illinois and received by nonresidents so Wisconsin could not require tax to be withheld by the corporation. The Court held that the tax was based on the corporation's income that was properly apportioned to Wisconsin and that this was constitutional. The fact that the tax was imposed upon the distribution of that income to the shareholders was not a problem.

The Court in *Int'l Harvester* seemed confused about the difference between a tax on the corporation and a tax on the shareholders. Although the tax was imposed on dividends paid to the shareholders, the Court emphasized that the income had been earned by activities in Wisconsin and that those activities had been entitled to the state's protections and benefits.⁴⁶ Economically, however, a withholding tax on dividends is really paid by the shareholders and not by the corporation. If a corporation pays a dividend of \$100 to a shareholder and withholds \$10 of tax, the corporation will be out \$100 regardless of whether it pays all of it to the shareholder or only 90 percent of it with the other 10 percent going to the state. The person who bears the economic burden of the tax is the shareholder, who, instead of receiving the \$100 dividend that the corporation had declared, receives only \$90 of it.

Professor Swain has pointed out that *Int'l Harvester* does not provide firm support for economic nexus. The opinion does not state that Wisconsin had jurisdiction over the shareholders and the case focuses on the withholding of tax by a company that was admittedly present in the state. Moreover, the Court seemed to be focusing on the Due Process Clause and, as the Court later explained in *Quill*, Due Process nexus does not establish Commerce Clause nexus. Professor Hellerstein indicates that *Int'l Harvester* could support an

argument that a state can tax nonresidents when the income is derived from activities conducted in the state even if the nonresident has no physical presence in the state, but he makes clear that this would not necessarily give the state jurisdiction over the nonresident.⁴⁷

The dissent in *Int'l Harvester* argued that an implication of the Court's decision was that a state could tax a nonresident shareholder directly on dividends paid by a resident corporation. It pointed out that the Wisconsin Supreme Court, in rejecting the tax, had said that the withholding tax was, in effect, a tax on the nonresident shareholders, which was not permitted under the Wisconsin Constitution.⁴⁸

While *Int'l Harvester* may provide some comfort for the proponents of economic nexus, it falls short of a clear holding that economic nexus is permissible.

Lower Court Cases

Several cases involving intangible holding companies have appeared to apply economic nexus principles in an income tax context. The use of an intangible holding company has been a common state tax planning strategy in which an operating company owning trademarks or patents that it used in its business would transfer them to a newly-formed wholly owned subsidiary that would license them back to the operating company. The subsidiary was located in Delaware, which does not tax a company all of the income of which comes from royalties or other passive investments, or in a state in which the operating company filed combined returns with subsidiaries having a unitary business relationship with it so that the royalty income did not increase the state tax burden of the operating company's family of affiliates. The operating company deducted the royalties in the states in which it did business, so the net effect of the arrangement could be significant state tax savings.

The strategy was widely marketed by promoters and many companies used it. Although in the writer's view the strategy should work if the holding company has real economic substance (*i.e.*, real office, real employees) and licenses are on arm's-length terms, many intangible holding companies that were established were little more than paper shams. This strategy was widely viewed by state tax administrators as being an abusive tax shelter. State revenue departments used a number of theories to attack intangible holding companies, including denying the royalty deductions as not being

proper business expenses, requiring them to file combined returns with the operating company, and arguing that the arrangement was a sham without economic substance or a nontax business purpose. Several states attacked the arrangement by arguing that the holding company was taxable in states in which the operating company used the intangible property under the license agreement.

The South Carolina Supreme Court in *Geoffrey, Inc. v. South Carolina Tax Commission* held that an intangible holding company could be taxed by a state in which the operating company used the intangible property. It said that “[t]he real source of Geoffrey’s income is not a paper agreement, but South Carolina’s Toys R Us customers. [citations omitted] By providing an orderly society in which Toys R Us conducts business, South Carolina has made it possible for Geoffrey to earn income pursuant to the royalty agreement. [citations omitted] That Geoffrey has received protection, benefits, and opportunities from South Carolina is manifested by the fact that it earns income in the state.”⁴⁹ The court’s discussion indicates that it believed that the mere presence of customers in the state showed that the company was deriving benefits and protections from the state.

Although the taxpayer in *Geoffrey* had no physical presence in South Carolina, it had intangible property there and one could argue that the case did not present pure economic nexus issues. On the other hand, the court’s language certainly suggested that it was thinking in economic nexus terms.

In *Lanco, Inc. v. Director, Division of Taxation*, the New Jersey Supreme Court held that an intangible holding company was taxable by New Jersey notwithstanding the lack of physical presence. The court said that *Quill* did not apply to income taxes. It said that holding intangible property in the state was sufficient to establish nexus. Thus, the court’s approach could be viewed as not being based on economic nexus.⁵⁰ The same analysis appears in *A&F Trademark, Inc. v. Tolson*.⁵¹

The intangible holding company cases stand for the proposition that physical presence is not required for nexus, although, as indicated, some of them could be viewed as being based on the presence of intangible property in the state and not on economic nexus principles. Further, although the views expressed by the courts in those cases could apply to active business situations that were not motivated by tax avoidance, a concern with what

the courts viewed as inappropriate tax strategies permeates the opinions.

Another group of cases involves active businesses. The issue has been whether a bank that has credit card customers in a state but no other contacts can be subjected by the state to income taxes, based on economic nexus principles. Here, the state courts have divided.

In *J.C. Penney Nat’l Bank v. Johnson*, the court held that a bank could not be subject to a net income tax by a state just because it had many state residents as credit card customers. The court rejected economic nexus arguments. It acknowledged that the Due Process test for nexus was satisfied, but it said that the substantial nexus required by the Commerce Clause was not present.⁵² Although the taxpayer technically owned the credit cards, the court held that this was not sufficient to establish taxable presence.

The court in *J.C. Penney* rejected arguments by the state that taxable nexus was established because of agency relationships. An affiliate conducted retail operations in the state, but the court said that they were not related to the taxpayer’s credit card operations. Although the taxpayer used an independent contractor to collect on credit card receivables, this was not sufficient to establish nexus. Presumably, under *Scripto* the use of an independent contractor to make sales would establish nexus, but using an independent contractor to collect on receivables that had already been accrued in income was not viewed as a market-creating or market-enhancing activity. The fact that the state’s legal infrastructure supported collection activities did not establish nexus. The Department of Revenue argued that *Quill* should not apply for income taxes. The court said that the Department had offered no precedent or reasons to treat the two taxes differently.

The court in *J.C. Penney* did not expressly say that physical presence was required to establish nexus. It just said that the Department of Revenue had failed to offer authority as to when nexus should be present when there was no physical presence and the type of presence mentioned by the Department was not sufficient to establish nexus.

The same court in *America Online, Inc. v. Johnson* remanded a case for further discovery involving the taxpayer’s contacts with the state. In doing so, it said that it had not created a physical presence test for nexus in *J.C. Penney* but had merely said that the contacts with the state that existed in *J.C. Penney* were

not sufficient to establish nexus. The court did say, however, that nexus would not exist if a company's only contacts with the state were by Internet, mail and common carrier.⁵³

The opposite result was reached by the West Virginia Supreme Court in *FIA Card Services, N.A. f/k/a MBNA America Bank, N.A. v. West Virginia*.⁵⁴ The court held that a bank could be subjected to a net income tax by West Virginia because of the presence of credit card customers in the state. The court said that *Quill* did not apply for net income tax purposes. It said that the test for substantial nexus was based on "the frequency, quantity, and systematic nature of a taxpayer's economic contacts with the state." It concluded that the taxpayer systematically and continuously solicited business by direct mail and telephone, noting that it had gross receipts from the state of over \$8 million in 1998 and over \$10 million in 1999.

Although most of the court's discussion focused on the extent of income derived by the taxpayer from West Virginia, it said, in discussing *Quill*, that the compliance burden with respect to a net income tax was not as great as with respect to a use tax collection responsibility because income taxes are paid less often and to fewer jurisdictions. Nevertheless, most of the discussion seems to focus on Due Process considerations rather than on the effect of imposing a tax on interstate commerce. Justice Benjamin, in dissent, said that the court failed to analyze the effects of the imposition of the tax on interstate commerce and argued that undue compliance burdens and the need for a bright-line standard were as valid for income taxes as they were for use taxes.

Unlike the intangible holding company cases, *FIA Card Services* was a pure economic nexus case. The taxpayer had no property, tangible or intangible, in West Virginia (its technical "ownership" of the credit cards was held to be of no account) and the court's holding was based entirely on it having a "significant economic presence" because of the income that it derived from the state's market.

The Indiana Tax Court, in a case involving the same taxpayer, held that the bank could be subjected to net income tax by Indiana. Without extensive analysis, the court said that it found the West Virginia court's reasoning in *FIA Card Services* more persuasive than the Tennessee court's reasoning in *J.C. Penney*.⁵⁵

In *Capital Bank and Capital One FSB v. Commissioner of Revenue*, the Massachusetts Appellate Tax Board held that two credit card banks with no

physical presence in the state were subject to the financial institutions excise tax. The statute imposed tax if a corporation had more than \$500,000 in receipts attributable to Massachusetts services and did business with 100 or more Massachusetts residents. The Board held that *Quill* did not apply to income taxes. The Board noted that the taxpayers targeted their credit card businesses to Massachusetts residents, using the Massachusetts courts and the attorney general's office to resolve disputes and using a network including Visa and MasterCard and Massachusetts banks. Here, too, the Board seems to have focused on Due Process nexus principles and did not consider the effect of taxation on the flow of interstate commerce.

In affirming the Board's decision, the Supreme Judicial Court found that the extent of the taxpayer's activities met the substantial nexus test. It referred to soliciting business and said that in effect the taxpayer was "providing valuable financial services to Massachusetts consumers." It addressed customer complaints with the assistance of the Massachusetts Attorney General's office and used the courts to recover delinquent accounts. As with respect to the Board, the court did not focus on the effects of taxation on interstate commerce [453 Mass. 1 (2009)]. In a striking extension of the economic nexus concept, the court in *Bridges v. AutoZone Properties, Inc.* held that a Nevada corporation that received dividends from a real estate investment trust that received rental income from retail stores owned by the taxpayer's subsidiary, some of which were located in Louisiana, was taxable by Louisiana. The court said that the state had provided protections and benefits to the stores that had generated the rental income that was passed through to the taxpayer in the form of dividends from the REIT.⁵⁶ The court considered only the Due Process Clause, indicating that Commerce Clause issues had not been raised on the appeal and, hence, had been waived by the taxpayer. The court's reasoning could permit the taxation of a nonresident shareholder on dividends from a public corporation that did business in the taxing state. The court may have been influenced by the fact that the taxpayer, the REIT, and the retail stores were all part of the same economic family and that the REIT had obviously been used as a tax-planning strategy to avoid taxes that otherwise would have been payable by converting taxable real estate rental income into non-taxable dividend income.

In *Rylander v. Bandag Licensing Corp.*, the Texas Comptroller of Public Accounts held that a taxpayer had substantial nexus because it had taken out a certificate of authority to do business and had received royalties. The Texas Court of Appeals rejected this position, holding that the lack of physical presence prevented taxation.⁵⁷

In *Wascana Energy Marketing (US), Inc.*, an Administrative Law Judge of the New York State Division of Tax Appeals held that a foreign corporation that sold oil and natural gas products to customers in New York State was not taxable by the state because it had no physical presence there. Title to the oil and gas passed to the buyer at the Canadian border. The Judge held that *Quill* applied to income taxes and required physical presence.⁵⁸

Arguments for Economic Nexus

Proponents of economic nexus argue that physical presence is obsolete in a world in which so much business is conducted electronically or through the Internet.⁵⁹ They argue that it is not at all self-evident that a state should be able to tax only income that is earned by efforts or property located within its borders. Through the presence of customers, the state is a source of the payments that constitute income. Proponents point out that the market has traditionally been regarded as a source of income. Many states apportion income of a multi-state corporation by a three-factor formula based on property, payroll and receipts. The receipts factor represents a recognition that the market is an element in determining where income should be sourced. Indeed, many states in recent years have emphasized the role of the market and some have gone so far as to base apportionment on receipts only, although this has generally been assumed to reflect economic job development policy and not an economic analysis of the source of income (the theory being that such a formula encourages corporations to locate business facilities in the state because they will not pay a higher tax as a result of having property and payroll there).

Proponents of economic nexus argue that a corporation selling into a state receives the benefits of a viable marketplace there and, hence, derives benefits from the state that justify taxing it. It also may use the resources of the state in enforcing its legal rights, including the courts and collection facilities. Professor Swain argues that “an economic presence

test promotes equity by ensuring that all corporations that benefit from a state’s market are subject to tax on their income from that market.”⁶⁰

In rebutting the argument that a remote seller gets no benefit from the state, Professor Swain argues that “a remote seller could not do business in a lawless society.” A seller needs the laws of the state to enforce its rights, whether those involve contracts with other parties or claims against customers.

Proponents of economic nexus also argue that the economic nexus concept does not impede interstate commerce in an unconstitutional way. The purpose of the Commerce Clause was to encourage the free flow of commerce among the states, unfettered by tariffs and other obstacles imposed by the states for their own fiscal and social purposes. Any tax or regulatory restriction on interstate commerce arguably has an adverse effect on that commerce, but that does not necessarily make it unconstitutional. Professor Swain describes the “undue burden” analysis of the Supreme Court in *Quill* as “thin” and notes that the Court was concerned primarily with the administrative costs and inconvenience of compliance with the tax laws and not with the claim that the taxes themselves were burdensome.

One argument for economic nexus is that a physical presence test puts in-state companies at a competitive disadvantage relative to remote companies. Another way of expressing this is that companies that choose to do business by the Internet or mail order have an unfair advantage over companies that do business through “bricks and mortar” stores in a physical presence world.

Countering the argument advanced by opponents of economic nexus (and by the Supreme Court in *Quill*) that a physical presence test provides an easily administrable bright line, proponents of economic nexus point out that the line is not so bright because there necessarily will be a *de minimis* level of physical contact that will not result in taxable nexus even under a physical presence regime. Under a physical presence test, there will be questions as to where the *de minimis* line must be drawn and as to what kinds of contacts create physical presence.

Arguments Against Economic Nexus

The principal arguments against economic nexus concepts are economic and administrative.⁶¹

Opponents argue that income should be taxed only by states in which the taxpayer's efforts to generate that income occur. If a salesman in New York calls a customer in Wyoming to solicit a sale, the income is earned in New York and only New York should be able to tax it. If one assumes that income is generated by labor and capital, they believe that only a state in which a company's labor and capital are located should be able to tax its income.

Opponents also stress the administrative burdens of an economic nexus regime. The concerns that the Supreme Court expressed in *National Bellas Hess* about the burdens of filing in multiple jurisdictions apply as much today as they did in 1967. In fact, the problem may be worse because, with modern advertising and electronic commerce techniques, corporations are more likely to reach customers everywhere now than they were then. In describing the burdens of being subjected to tax in many jurisdictions, the House Judiciary Committee in connection with Public Law 86-272 said:

These business are concerned not only with the costs of taxation, but also with the inescapable fact that compliance with the diverse tax laws of every jurisdiction in which income is produced will require the maintenance of records for each jurisdiction and the retention of legal counsel and accountants who are familiar with the tax practice of each jurisdiction. This will mean increases in overhead charges, in some cases to an extent that will make it uneconomical for a small business to sell at all in areas where volume is small.⁶²

Economic nexus could result in companies being taxed just about everywhere. Advertisements placed on national television or in a national magazine are not directed at any one state, but the taxpayer knows that they will be seen by prospective buyers in all states (and in many foreign countries). Such advertisements are presumably intended to develop a market throughout the country. This was held not to meet Due Process nexus standards in *Miller Brothers Co. v. Maryland*,⁶³ but the economic nexus argument inevitably leads to the conclusion that such an advertisement could make a corporation subject to net income taxes in all states and cities imposing such taxes and subject to a requirement

to collect use taxes in thousands of jurisdictions around the country. This could place a significant burden on taxpayers seeking to conduct an interstate business, particularly small companies. In view of the expansion of electronic commerce, an economic nexus approach is more likely now to affect small companies that are less capable of dealing with the complexity of filing in thousands of jurisdictions than it would have in 1967, or, for that matter, 1992, when *National Bellas Hess* and *Quill* were decided.

Opponents of economic nexus also argue that a physical presence test creates a bright line that is easily administrable. The Court in *Quill* mentioned this as an advantage of a physical presence test.

In addressing the "viable marketplace" argument, opponents of economic nexus argue that, to the extent that a state creates such a marketplace, it does so for the benefit of its own residents to enable them to buy needed goods and services and not for the benefit of out-of-state sellers.⁶⁴

Opponents of economic nexus argue that a corporation whose only contact with a state is the presence of customers that it solicits is not receiving enough services from the state to justify taxation under the fourth prong of *Complete Auto Transit, Inc. v. Brady*.⁶⁵ It does not benefit from the state's provision of police and fire protection, education for its employees and their children, or any other major services. Although an out-of-state company may use the state's courts or legal infrastructure to collect receivables, this simply enables the company to collect the income that it has previously accrued and not to increase its income.

While conceding that local stores may be at a competitive disadvantage if out-of-state vendors are not required to collect use tax or pay income tax, opponents of economic nexus point out that this should make no difference with respect to income taxes because out-of-state sellers will presumably pay full state taxes on an apportioned basis in states in which they are physically present. The use tax disadvantage can be eliminated if states develop more sophisticated methods of collecting use taxes from the people who owe them - the in-state buyers.

One problem with economic nexus involves determining the location of the buyer where the buyer is a business. If a multi-state corporation buys legal services from a law firm, it may use those services in many states. What if a company based in Minne-

sota hires a law firm to try a case in Mississippi and the law firm's bill is sent to corporate headquarters in Minnesota? Why should that give Minnesota the right to tax the firm when the firm's services were performed entirely in Mississippi and used by the client only in Mississippi?

Other conceptual problems can be presented by an economic nexus regime. What if a person buys goods from a store in Massachusetts and, before payment is made, moves to Connecticut? Should Connecticut have a right to tax the seller merely because the buyer lives in Connecticut when payment is made? If the seller had never solicited sales in Connecticut, this presumably would not be a problem because *Miller Brothers* would bar taxation, but what if the corporation had unsuccessfully solicited sales in Connecticut during the same year? Does it become taxable in Connecticut merely because someone who bought goods in another state moves into Connecticut and makes payment from Connecticut?

Analysis

Those on each side of the debate make appealing arguments but in the writer's view an analysis of the policy and legal considerations leads to the conclusion that the physical presence standard is the right answer.

Net income taxes are imposed on the person who receives the income. States generally tax nonresident individuals only on income earned by efforts expended or property located in the state. Income is produced by labor and capital and only states in which labor and capital are employed and that protect labor and capital should have the right to tax the resulting income. The mere presence of customers in the state does not justify taxation. The Supreme Court so held under the Due Process Clause in the *Miller Brothers* case and that principle remains valid today. The fact that customers result from a solicitation directed toward them should not make a difference.

The Supreme Court in *Miller Brothers* held that general advertising that was known to reach customers in the state but that was not directed toward them was not enough of a connection to establish Due Process Clause nexus. It would be hard to draw a line between that kind of advertising and advertising that was directed specifically toward people in a particular state. Obviously, an

advertisement placed in a newspaper with only local circulation would be aimed at prospective customers living in that area. The problem comes with respect to advertising directed toward a wider audience. A commercial airing during a broadcast of the Super Bowl is obviously intended to create or enhance a market throughout the world. Does that mean that a company that pays for such a commercial becomes taxable in every jurisdiction where the commercial is aired? It is hard to distinguish a local advertisement from a Super Bowl commercial in principle. Both are aimed at developing a market over a certain area and there is no reason in principle why economic nexus concepts should distinguish between them.

The administrative burdens arising from economic nexus also seem to be substantial. Tax systems impact companies in different ways. The actual taxes that a company must pay is part of the burden, but another part of the burden is the cost and inconvenience of complying with the tax system, or systems in the case of multi-jurisdictional companies. An income tax that applied different rates to sales depending on the height of the buyer might well produce a tax bill that was not by itself burdensome, but the inconvenience of requiring a multi-state company to contact each buyer to determine his or her height would obviously be so great as to constitute a major disruption of its business. The burdens imposed by an economic nexus test include the increased number of jurisdictions with which a company must file tax returns and pay or collect tax and any difficulties involved in determining the taxable jurisdictions and in applying their laws. Large companies may be able to set up, or pay for the use of, computer systems that can track multi-jurisdictional sales precisely, but small companies may have more trouble doing this. Computer services exist for assisting companies to comply with multi-jurisdictional sales and use tax collection responsibilities, but they can be very expensive and, while many large companies use them, many small companies have found the cost to be prohibitive. The Court in *Quill* recognized that small businesses in particular had difficulties in complying with multi-jurisdictional taxation.⁶⁶ It should not be necessary that a tax burden prevent interstate commerce for it to be unconstitutional. Opponents of economic nexus need not establish that companies would not sell over the Internet if taxation resulted from such sales. It should only be necessary that they establish that subjecting Internet

sales to tax would create an inappropriate burden on the conduct of their interstate business.

The argument that everyone is part of an electronic world and that physical presence should not be a factor is flawed. The point is not whether a company needs to be physically present in a state to sell to customers in that state. Companies' ability to do so was established through the mail order business decades before anyone ever imagined such a thing as the Internet. The issue is whether a company whose only presence in the state is customers from which it solicits business should be taxable by that state, and the fact that it is easier to attract such customers now than it was 40 or 50 years ago should be irrelevant. If the presence of electronic commerce has eroded the tax base, states can deal with this as they have with other erosions of the base. They can raise their rates on the people and companies that are taxable, or they can tax other things besides interstate sales.

Opponents of economic nexus also have the better of the argument with respect to the receipt of benefits from the taxing state (the fourth prong of *Complete Auto Transit*). Out-of-state companies do not benefit from the major services (e.g., fire and police protection, education, sanitation). The taxpayers in *Miller Brothers* and *Quill* presumably could have used the taxing states' collection infrastructures and courts. That possibility was not sufficient to establish nexus. It is true that state courts may help people who do business with customers in the state, but this is typically minimal and the state courts are normally used in connec-

tion with collections, which do not produce new income but merely enable the collection of old income previously accrued.

Michael Fatale points out that a state can tax nonresident individuals on income derived from property located in the state or business conducted in the state, even when the individual is not physically present there, but this begs the question. Individuals have typically been taxable on business income from a state only when they actively conduct business in the state or are partners in partnerships that conduct business in the state, in which case the partnership's activities are attributed to them.

No approach is perfect. Whatever test is applied, there will always be *de minimis* and interpretive issues.

Who is best suited to make the law in the area of nexus? The courts are constrained by the limitations imposed on them by the case system. In deciding a particular case, they address only the facts of that case, and their consideration is framed (and, perhaps, constrained) by the ways in which the parties present their arguments. In deciding particular cases, courts often use language that is overly broad or overly narrow.

In the writer's view, only Congress has the resources to conduct a systematic study of nexus issues. It is better equipped than the courts to deal with these issues comprehensively, and, whichever side prevails, economic nexus should be either accepted or rejected by Congress; its fate should not be left to the vicissitudes of litigation.

ENDNOTES

* The author's law firm, McDermott Will & Emery LLP, represents a coalition of companies that has been advocating the enactment of federal legislation that would require physical presence for the imposition of taxes on business activities. The views expressed in this article are the author's own and are not necessary those of his firm or of any of his firm's clients. The author's firm has represented the taxpayer in a number of cases discussed in this article, including *Quill*, *FIA Card Services* and *Wascana Energy*.

¹ *Int'l Harvester Co. v. Wisconsin Dep't of Tax'n*, 322 U.S. 435 (1944). Justice Jackson, in dissent, argued that the tax was really imposed on the shareholders and that it should be held to be unconstitutional for that reason.

² *Quill Corp. v. N.D.*, 504 U.S. 298 (1992).

³ N.Y.S. TAX LAW §1451(C)(1).

⁴ NEW HAMPSHIRE REV. STATS. ANN. §77-A:1(XII).

⁵ Peter L. Faber, *Should the States Determine Their Own Tax Destinies? Federalism in the 21st Century*, STATE TAX NOTES, Apr. 10, 2006, at 111.

⁶ 15 USC §381(a).

⁷ *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

⁸ S. REP. NO. 658, 86th Cong., 1st Sess. (1959), at 4-5. For a history of the enactment of P.L. 86-272, see Michael T. Fatale, *Federalism and State Business Activity Tax Nexus; Revisiting Public Law 86-272*, 21 VA. TAX REV. 435 (2002).

⁹ WALTER HELLERSTEIN, STATE TAXATION ¶6.03 (3d Ed. 1998).

¹⁰ *Shaffer v. Carter*, 252 U.S. 37, 57 (1920).

¹¹ *Lawrence v. State Tax Commission of Mis-*

issippi, 286 U.S. 276, 281 (1932).

¹² *Shaffer v. Carter*, 252 U.S. 37, 57 (1920).

¹³ *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

¹⁴ *Quill Corp. v. N.D.*, 504 U.S. 298, 313 (1992).

¹⁵ *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

¹⁶ *Quill Corp. v. N.D.*, 504 U.S. 298, 308 (1992).

¹⁷ *Id.*, at 307.

¹⁸ WALTER HELLERSTEIN, STATE TAXATION, ¶6.02 [2] (3d Ed. 1998).

¹⁹ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

²⁰ Adam D. Thierer, *The Delicate Balance: Federalism, Interstate Commerce and Economic Freedom in the Technological Age* 17 (Heritage Foundation 1998).

²¹ The Federalist Papers No. 42 (James Madi-

- son) at 263–65.
- ²² *Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342, 350–51 (1914).
- ²³ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (dissenting opinion).
- ²⁴ *Quill Corp. v. N.D.*, 504 U.S. 298 (1992).
- ²⁵ *New York ex rel. Whitney v. Graves*, 299 U.S. 366 (1937).
- ²⁶ John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM & MARY L. REV. 319 (2003).
- ²⁷ Certiorari was denied in *Geoffrey, Inc. v. South Carolina State Tax Commission*, 313 S.C. 15 (1993), *cert. denied*, 510 U.S. 992 (1993); *A & F Trademark, Inc. v. North Carolina*, 167 N.C. App. 150, 605 S.E.2d 187 (2004), *cert. denied*, 546 U.S. 821 (2005); *Lanco, Inc. v. Director, Division of Taxation*, 188 N.J. 380 (2006), *cert. denied*, 127 S.Ct. 2974 (2007); *FIA Card Services v. West Virginia*, 220 W. Va. 163 (2006), *cert. denied*, 127 S.Ct. 2997 (2007).
- ²⁸ *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954).
- ²⁹ *Id.*, at 341–42.
- ³⁰ *Id.*, at 347.
- ³¹ *Id.*, at 344–45.
- ³² *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).
- ³³ *Id.*, at 212.
- ³⁴ *National Bellas Hess v. Dep't of Revenue*, 386 U.S. 753 (1967).
- ³⁵ *Id.*, at 759–60 (1967).
- ³⁶ *Id.*, at 761–62.
- ³⁷ *Quill Corp. v. N.D.*, 504 U.S. 298 (1992).
- ³⁸ *Id.*, at 311.
- ³⁹ See, e.g., JEROME R. HELLERSTEIN AND WALTER HELLERSTEIN, *STATE TAXATION* ¶ 6.07, 6.11 (3d Ed. 1998 and 2002 supplement). Richard D. Pomp and Michael J. McIntyre, *State Taxation of Mail-orders Sales of Computers After Quill; and evaluation of MTC bulletin 95-1*, STATE TAX NOTES, July 15, 1996, at 177. Charles Rothfield, *Quill: Confusing the Commerce Clause*, STATE TAX NOTES, July 27, 1992, at 111.
- ⁴⁰ *Quill Corp. v. N.D.*, 504 U.S. 298, at 315.
- ⁴¹ *Id.*, at 314.
- ⁴² *Id.*, at 308.
- ⁴³ *Id.*, at 312.
- ⁴⁴ See, e.g., *Orvis Company, Inc. v. Tax Appeal Tribunal*, 86 N.Y. 2d 165, *cert. denied*, 516 U.S. 989 (1995) (12 visits over a three-year period established nexus); *Department of Revenue v. Share International Inc.*, 676 So. 2d 1362 (Fl. 1996), *cert. denied* 117 S.Ct. 685 (1997). (No nexus when representatives where sent into the taxing state each year to attend a three-day seminar at which it set up a booth and arranged for what amounted to five percent of its in-state sales; 84 percent of the people at the seminar were from outside of Florida and many others were long-time customers who bought the taxpayer's products by mail, anyway).
- ⁴⁵ *Int'l Harvester Co. v. Wisconsin Dep't of Tax'n*, 322 U.S. 435 (1944).
- ⁴⁶ *Id.*, at 442.
- ⁴⁷ WALTER HELLERSTEIN, *STATE TAXATION* ¶ 6.04[1] (3d Ed. 1998).
- ⁴⁸ *Int'l Harvester Co. v. Dep't of Tax'n*, 243 Wis. 198, at 204–06 (1943).
- ⁴⁹ *Geoffrey, Inc. v. S.C. Tax Comm'n*, 313 S.C. 15, at 18 (1993), *cert. denied*, 510 U.S. 992 (1993).
- ⁵⁰ *Lanco, Inc. v. Director, Div. of Tax'n*, 188 N.J. 380 (2006), *cert. denied*, 127 S.Ct. 2974 (2007).
- ⁵¹ *Trademark, Inc. v. Tolson*, 605 S. E. 2d 186 (N.C. Court of Appeals 2004), *cert. denied*, 126 S.Ct. 353 (2005).
- ⁵² *J.C. Penney National Bank v. Johnson*, 19 S.W. 3d 831 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2005).
- ⁵³ *America Online, Inc. v. Johnson*, 2002 Tenn. App. LEXIS (Tenn. Ct. App. 2002).
- ⁵⁴ *FIA Card Services, N.A. f/k/a MBNA America Bank, N.A. v. West Virginia*, 220 W. Va. 163 (2006), *cert. denied*, 127 S.Ct. 2997 (2007).
- ⁵⁵ *MBNA America Bank, N.A. v. Indiana Department of State Revenue*, Cause No. 49T10-0506-TA-53 (Indiana Tax Court, Oct. 20, 2008).
- ⁵⁶ *Bridges v. AutoZone Properties, Inc.*, 900 So. 2d 784 (La. 2005).
- ⁵⁷ *Rylander v. Bandag Licensing Corp.*, Texas Appeals Court, No. 03-99-004217-cv (2000).
- ⁵⁸ *Wascana Energy Marketing (US), Inc.*, NYS Division of Tax Appeals (2002). Under New York law, Administrative Law Judge decisions are not precedent and cannot be cited in other cases.
- ⁵⁹ See, e.g., Michael T. Fatale, *State Tax Jurisdiction and the Mythical 'Physical Presence' Constitutional Standard* 54 TAX LAW. 105 (2000); John A. Swain, *State Tax Jurisdiction; a Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319 (2003).
- ⁶⁰ *Id.*
- ⁶¹ See, e.g., Scott D. Smith and Sharley Amitay, *Economic Nexus: an Unworkable Standard for Jurisdiction*, STATE TAX NOTES, Sept. 9, 2002, at 787.
- ⁶² H. REP. NO. 936, 86th Cong., First Sess. (1959), at 2.
- ⁶³ *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954).
- ⁶⁴ See the amicus brief of the Greater Philadelphia Chamber of Commerce and the Chamber of Commerce of Southern NJ filed in support of Lanco, Inc.'s petition for certiorari to the United States Supreme Court.
- ⁶⁵ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).
- ⁶⁶ *Quill Corp. v. N.D.*, 504 U.S. 298, at 315.

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