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INTRODUCTION

Should internet-based companies that operate nationwide be susceptible to a state's taxes without sufficient notice? Should these entities be held responsible for taxes retroactively? A vague taxing standard creates these situations. Picture an internet-based company that makes sales to customers within a state under the impression that it will not be subject to in-state taxes because it lacks a physical presence. Then, years later, the company is retroactively subjected to taxation because a separate in-state counterpart, that does have a physical presence in the state, incidentally and without instruction provided benefits for the internet-based company. In this situation, the internet-based company lacks notice that it might be subjected to state taxes. With notice, internet-based companies can make a decision about whether to sell to customers in a given state. Without notice, however, companies do not have the proper knowledge to plan their activities across the nation.

State courts have continuously pushed the limits of the standard established by the United States Supreme Court, which determines when a state can tax an interstate company. Under the Commerce Clause, a state can tax an interstate company only if that company engages in an activity that has a substantial nexus with the taxing state.[1] A substantial nexus is created when "a vendor . . . has a physical presence in the taxing state."[2] Courts have been increasingly more willing to find a sufficient nexus between interstate entities and the taxing state, and thereby subjecting those entities to state taxes.

The question of what constitutes a substantial nexus to a taxing state is of great interest to internet-based companies who engage in nationwide

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1. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
2. Quill Corp. v. N.D. ex rel. Heitkamp, 504 U.S. 298, 309 (1992).

sales. A vague standard limits a company's right to know whether its current or future activities will subject it to state taxes. Companies have minimal notice when they are told years later that they should have collected taxes before and are now retroactively responsible for them.

New Mexico has adopted an unclear substantial nexus standard. This standard makes it difficult for interstate entities to determine if they will be responsible for New Mexico gross receipts taxes. The New Mexico Supreme Court recently applied a definition of nexus that increases the susceptibility of internet-based companies to gross receipts taxes. In *New Mexico Taxation and Revenue Department v. Barnesandnoble.com LLC*,[3] the New Mexico Supreme Court found that an internet-based company, Barnesandnoble.com ("Taxpayer"), had a substantial nexus to New Mexico through its sister company, Barnes & Noble Booksellers, Inc. ("Booksellers"), which has a brick-and-mortar store located in New Mexico.[4] The court recognized that although any one of Taxpayer's individual activities within the state would not be sufficient to establish a nexus, the totality of the activities created a substantial nexus to New Mexico.[5] The court reasoned that Booksellers provided enough benefit for Taxpayer to create a substantial nexus because it promoted Taxpayer within the state and sold gift cards that endorsed Taxpayer's website.[6] In addition, there were mutual benefits because Taxpayer advertised the brick-and-mortar company and "shared customer data."[7]

The flexible substantial nexus standard applied in *Barnesandnoble.com* required that "activities performed on [Barnesandnoble.com]'s behalf be 'significantly associated with [its] ability to establish and maintain a market' in New Mexico."[8] This standard originated from *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*,[9] where the U.S. Supreme Court held that "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 that state."[10] The Court's standard in *Tyler Pipe* was intentionally broad to give state courts

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3. 2013-NMSC-023, 303 P.3d 824.
4. *Id.* ¶ 17.
5. *See id*.
6. *Id.*
7. *Id.*
8. *Id.* (quoting Tyler Pipe Industries, Inc. v. Washington State Dep't. of Rev., 483 U.S. 232, 250 (1987)).
9. 483 U.S. 232 (1987).
10. *Id.* at 250 (quoting Pipe Indus., Inc. v. State Dep't. of Revenue, 105 Wash. 2d 318, 325, 715 P.2d 123, 126 (1986)).

discretion in defining what constitutes a substantial nexus.[11] This interpretative leeway allows New Mexico courts to develop a lower threshold for establishing a substantial nexus, thereby increasing entities' susceptibility to gross receipts taxes.[12]

Few rules concerning substantial nexus are concrete. For example, a substantial nexus is clearly present when a business has a physical presence in a state, such that it should be subject to that state's taxation.[13] However, physical presence is not always necessary to find a substantial nexus.[14] Courts have found a substantial nexus to a state when agents or sister companies are present in the state.[15] *Barnesandnoble.com* established that it is not necessary for an in-state company and an internet-based company to have a specific relationship in order to find that the internet-based taxpayer had a substantial nexus to the taxing state. For example, it is not necessary to find that one entity is the parent company and the other is a subsidiary or vice versa to subject the interstate company to state taxes. Instead, the court in *Barnesandnoble.com* held that a substantial nexus exists where the interstate taxpayer, such as an internet-based company, benefits from the taxing state, regardless of its relationship to the in-state company.[16]

The New Mexico Supreme Court has recognized that other courts have interpreted nexus differently.[17] However, this issue has never fully been explored. Internet-based companies face a problem when interpretations of substantial nexus vary from state to state: they lack notice about which states will and will not tax them. This creates due process concerns.

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11. *See* Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 307 (1992).

12. *See* St. Tammany Parish Tax Collector v. Barnesandnoble.com, et al., 481 F.Supp.2d 575, 581 (E.D. La. 2007) (imposing a standard that made out-of-state companies less susceptible to in-state taxation because the in-state actor must have "solicited orders" for the benefit of the out-of-state company or specifically produced benefits for it).

13. *Quill Corp.*, 504 U.S. at 315.

14. *See* Scripto, Inc. v. Carson, 362 U.S. 207, 208–09 (1960).

15. *See, e.g.*, Tyler Pipe Indus., Inc. v. Washington State Dep't. of Revenue, 483 U.S. 232, 250 (1987) (holding that even though the out-of-state company did not have property, an office, or employees within the taxing state it was still responsible for the taxes because its sales agents provided benefits for it within the taxing state).

16. *See id.* (stating that the substantial nexus standard is based on the benefits received by the out-of-state company through the activities performed within the state on its behalf, and not on the relationship between the in-state company with the out-of-state company facing taxing).

17. New Mexico Taxation and Revenue Dep't v. Barnesandnoble.com LLC, 2013-NMSC-023, ¶ 16, 303 P.3d 824.

To address these issues, this Note proposes a standard that finds a substantial nexus when there is purposeful availment of the benefits of a state. This standard is narrow enough to provide notice to internet-based companies, but it is also sufficiently broad to provide room for creative argument.

This Note critically examines the ambiguity of the varying interpretations of what constitutes a substantial nexus, the differences between these interpretations, and their implications on notice to internet-based companies. Part I will briefly describe the origin of taxation, why the federal government imposes taxes, and how states can constitutionally tax interstate companies. Part I goes on to describe the New Mexico Supreme Court case, *New Mexico Taxation and Revenue Department v. Barnesandnoble.com*, which is the origin of this discussion. The facts and procedural history of this case are explained before the New Mexico Supreme Court decision is analyzed. Parts II and III discuss issues that result from a vague substantial nexus standard and illustrate the implications of failing to address these problems. A narrower standard is proposed, which is based on U.S. Supreme Court cases and other federal cases that have applied a similar rule. This proposed standard is then applied to the facts of *Barnesandnoble.com*. Parts IV and V address counter-arguments and examples of how a broad nexus standard can affect other areas. Finally, this Note suggests that New Mexico courts and the legislature should develop and interpret the nexus standard more narrowly. However, since it is in states' interest to interpret the nexus standard broadly, the U.S. Supreme Court is the ideal forum to establish a clear nexus standard for state taxation of internet-based companies.

I. BACKGROUND

The U.S. Constitution gives Congress "the power to lay and collect taxes."[18] Taxation raises revenue for states and the federal government.[19] The amount of taxes collected determines how much the government can put into services that affect people nationwide.[20]

Whether states should be able to tax interstate companies, such as those that are internet-based, is an issue that has its origins in the trade

18. U.S. CONST. amend. XVI, § 8, cl. 1.

19. *Writing and Enacting Tax Legislation*, U.S. DEP'T OF THE TREASURY (Dec. 5, 2010, 10:28 AM), http://www.treasury.gov/resource-center/faqs/Taxes/Pages/writing.aspx.

20. *Id.*

wars between states during the times of the Articles of Confederation.[21] Thereafter, the U.S. Constitution prohibited states from taxing interstate companies. The duty to tax interstate companies was left to the federal government.[22] States were permitted to begin taxing interstate companies after they complained that interstate businesses benefitting from the state were not paying their dues like the in-state businesses were. The Supreme Court allowed states to tax an interstate company so long as it had a physical presence in the state.[23]

Now, states impose different types of taxes. New Mexico imposes gross receipts taxes.[24] Gross receipts are the total benefit received from selling property, leasing or licensing property in the state, granting a right to use a franchise employed in the state, performing services inside the state, and production inside the state created from selling research and development services performed outside the state.[25] These taxes are imposed for the "privilege" of conducting business.[26] This tax holds businesses legally responsible, but it can be passed down to consumers in the price of goods and services.[27] Because the tax varies throughout the state, the location of the business determines the amount of the tax.[28] If a company does not have a location in New Mexico, then the location for tax purposes is the location of a resident salesperson if one exists.[29] This tax is paid to the state, and then the state distributes a portion to the municipalities and counties where the business is located.[30] The issue in the case of *Barnesandnoble.com* was whether the internet-based company benefitted from New Mexico such that it should be subjected to gross receipts taxes.

The New Mexico Taxation and Revenue Department ("Department") audited Taxpayer for gross receipts taxes and interest, which in total amounted to $534, 563.11 for the period between January 31, 1998 and July 31, 2005.[31] The Department believed Taxpayer was benefitting from New Mexico through its sister company, Booksellers, who has a

21. *Commerce Clause*, LEGAL INFO.INST., http://www.law.cornell.edu/wex/commerce_clause (last visited Mar. 20, 2015).

22. *Id.*

23. *See* Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 315 (1992).

24. NMSA 1978, § 7-9-2 (2007).

25. *Gross Receipts Overview*, NM TAXATION AND REVENUE DEP'T, http://www.tax.newmexico.gov/Businesses/gross-receipts.aspx (last visited Mar. 20, 2015).

26. *Who Must File?*, NM TAXATION AND REVENUE DEP'T, http://www.tax.newmexico.gov/Businesses/who-must-file-.aspx (last visited Mar. 20, 2015).

27. *Gross Receipts Overview*, *supra* note 25. *See* NMSA 1978, § 7-9-3.5 (2007).

28. *Gross Receipts Overview*, *supra* note 25.

29. *Id.*

30. *Id.*

31. *In re* Barnesandnoble.com LLC, 2012-NMCA-063, ¶ 1, 283 P.3d 298.

physical presence in the state.[32] Taxpayer did not agree that it should be susceptible to New Mexico gross receipts taxes, and therefore contested the results of the audit through an administrative proceeding at the New Mexico Taxation and Revenue Department.[33] The administrative hearing resulted in releasing Taxpayer from any obligations to pay New Mexico gross receipts taxes.[34] The case was appealed to the New Mexico Court of Appeals, which reversed.[35] Taxpayer then appealed the case to the New Mexico Supreme Court, where the court of appeals' decision was upheld.[36]

A. The Facts

1. Taxpayer's Business

Taxpayer was formed under the laws of Delaware, and is headquartered in New York.[37] It is a major Internet retailer.[38] Taxpayer's facilities are located outside of New Mexico.[39] Taxpayer did not have a building in New Mexico during the time for which it was audited;[40] it did not own any type of property in New Mexico.[41] In addition, it did not have any employees in New Mexico.[42] It sold its products through the Internet in

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32. The taxable net sales made by Taxpayer to New Mexico customers from October 1998 to October 2005 are the following:

10/01/98-12/31/98	$ 343,781
01/01/99-12/31/99	$ 964,000
01/01/00-12/31/00	$ 1,523,976
01/01/01-12/31/01	$ 1,832,420
01/01/02-12/31/02	$ 1,993,229
01/01/03-12/31/03	$ 1,847,570
01/01/04-12/31/04	$ 1,770,168
01/01/05-12/31/05	$ 1,357,980

Decision and Order on Department's Motion for Summary Judgment and Barnesandnoble.com LLC Cross Motion for Summary Judgment, No. 11-10, Letter ID No. #L1806543104, at 15 (Taxation and Revenue Dep't Apr. 11, 2011) [hereinafter Decision].

33. *See* Brief for Petitioner at 4, New Mexico Taxation and Revenue Dep't v. Barnesandnoble.com LLC, 2013-NMSC-023, 303 P.3d 824 (No. 33, 627).

34. Decision, *supra* note 32, at 29.

35. *In re Barnesandnoble.com LLC*, 2012-NMCA-063, ¶ 39.

36. New Mexico Taxation and Revenue Dep't v. Barnesandnoble.com LLC, 2013-NMSC-023, ¶ 18, 303 P.3d 824.

37. Decision, *supra* note 32, at 2.

38. *Id.*

39. *Id.*

40. *Id.* at 3.

41. *Id.* at 5.

42. *Id.*

many locations throughout the United States.[43] These products included books, music, and movies, which were delivered by the U.S. Postal Service from outside of the state.[44] It communicated with its customers through email from outside the state.[45]

Booksellers has brick and mortar stores across the country, and in New Mexico it has three retail stores.[46] During the audit period, Booksellers and Taxpayer did not have ownership interest in each other, nor did they have a role in each other's businesses or decision-making.[47] Booksellers and Taxpayer had separate facilities and computer and communication systems.[48] Their assets were maintained separate from each other.[49] Taxpayer could not access Booksellers' customer and sales information.[50] Taxpayer also did not have access to Booksellers' pricing strategies, and the two entities did not share employees.[51] However, Taxpayer entered into contracts with the parent company, which allowed any subsidiaries to fulfill the terms of the agreements, including Booksellers.[52] In addition, Taxpayer and Booksellers shared directors at times.[53]

2. Corporate Relationship

Today, Booksellers is a separate entity from Taxpayer, and both are subsidiaries of the same parent company, Barnes & Noble, Inc. ("Parent Company").Therefore, Booksellers and Taxpayer are sister companies.

As of October 31, 1998, Taxpayer's business was handled by another subsidiary of the Parent Company.[54] After that time, the Parent Company and Bertelsmann AG ("Bertelsmann") both owned 50% of Taxpayer.[55] By May 25, 1999, the Parent Company and Bertelsmann had reduced their ownership interest in Taxpayer by 20% through a public offering of the stock.[56] For the majority of the audit period, Bertelsmann and the

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43. *Id.* at 3.
44. Brief for Petitioner, *supra* note 33, at 5.
45. *Id.* at 6.
46. Decision, *supra* note 32, at 6.
47. *Id.* at 7.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. Brief for Respondent at 3, New Mexico Taxation and Revenue Dep't v. Barnesandnoble.com LLC, 2013-NMSC-023, 303 P.3d 824 (No. 33, 627).
53. Decision, *supra* note 32, at 5.
54. *Id.* at 3.
55. Brief for Petitioner, *supra* note 33, at 7.
56. Decision, *supra* note 32, at 4.

Parent Company owned 80% of Taxpayer, with 20% held publicly.[57] This was the arrangement from May 25, 1999, through September 15, 2003.[58] After this period, the Parent Company gained the 40% Bertelsmann owned.[59] Therefore, the Parent Company held an 80% ownership interest in Taxpayer, and 20% remained publicly traded.[60] From May 25, 2004, through the end of the audit period, the Parent Company owned 100% of Taxpayer through a holding company after acquiring the stock that was publicly traded.[61]

B. Precedent Cases

The Commerce Clause allows a state to tax an interstate company if the tax is "[1] . . . applied to an activity with a substantial nexus with the taxing state; [2] . . . fairly apportioned; [3] [non-discriminatory] against interstate commerce; and [4] . . . fairly related to the services provided by the State."[62] Only the first requirement, whether there was a substantial nexus, was at issue in *Barnesandnoble.com*.

The parties in *Barnesandnoble.com* relied on several U.S. Supreme Court cases to support their arguments. *Quill Corp. v. North Dakota*[63] was controlling in determining whether Taxpayer had a substantial nexus to New Mexico, which would make it liable for gross receipts taxes.[64] In *Quill Corp.*, the U.S. Supreme Court held that the vendor did not have a substantial nexus to the state and thus should not be subjected to state taxes.[65] The Court relied heavily on the fact that the vendor did not have a physical presence in the taxing state.[66] It sold its products by mail, and it had no offices, employees, or substantial property within the state.[67] *Quill Corp.* also held that doing business through common carriers does not establish a substantial nexus to a state, nor does having a "[slight] presence" in a state.[68] Taxpayer used *Quill Corp.* to argue that it should not be subjected to New Mexico gross receipts taxes because, as an internet-

57. Brief for Petitioner, *supra* note 33, at 7.
58. *Id.*
59. *Id.*
60. *Id.*
61. Decision, *supra* note 32, at 5.
62. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
63. 504 U.S. 298 (1992).
64. Decision, *supra* note 32, at 16.
65. *Quill Corp.*, 504 U.S. at 302.
66. *Id.*
67. *Id.*
68. *Id.* at 311.

based company, it does not have a physical presence in New Mexico, and it only does business in the state through common carriers.[69]

Taxpayer also relied on *Scripto, Inc. v. Carson*,[70] which the Court in *Quill Corp.* described as the greatest extension of a state's interstate entity taxing power.[71] In *Scripto, Inc.*, an Atlanta company employed agents in Florida, which increased its sales of mechanical pencils in that state.[72] The Supreme Court applied a "flexible balancing analysis" and held that having agents in a state could establish a substantial nexus.[73] Taxpayer argued that it did not have any agents in the state who were working for its benefit; therefore, finding a substantial nexus would be beyond the reach permitted in *Scripto, Inc.*[74]

However, the Department identified that the Court in *Quill Corp.* also stated that, building on *International Shoe Co. v. Washington*,[75] it wanted to move beyond formalistic standards and towards flexible standards. The Court in *Quill Corp.* explained that if an interstate company purposefully avails itself of the benefit of a state, then it has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign."[76]

The Department compared Barnesandnoble.com with Tyler Pipe Industries, Inc. In *Tyler Pipe*, the interstate company had full-time independent sales representatives in the state that conducted business on its behalf, and therefore the Court held that there was a substantial nexus.[77] *Tyler Pipe* developed the standard that to have substantial nexus to a state, the in-state company must establish and maintain a market for the interstate company.[78]

Similarly, the Department relied on *Standard Pressed Steel Co. v. Washington Department of Revenue*,[79]where the Court found a substantial nexus because the taxpayer had hired a full-time employee within the taxing state to provide services to its customer, Boeing Aircraft Company.[80] The Department also relied on *Borders Online LLC v. State*

69. Brief for Petitioner, *supra* note 33, at 12.
70. 362 U.S. 207 (1960).
71. Decision, *supra* note 32, at 19.
72. 362 U.S. at 211.
73. *Id.*
74. *See* Brief for Petitioner, *supra* note 33, at 16.
75. 326 U.S. 310 (1945).
76. 504 U.S. 298, 308 (1992) (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977)).
77. 483 U.S. 232, 249 (1987).
78. *Id.*
79. 419 U.S. 560 (1975).
80. *See id.* at 564.

Board of Equalization.[81] In *Borders Online LLC*, the brick and mortar, in-state store and the internet-based company shared a product return policy. The brick and mortar store also engaged in cross-promotion activities on behalf of the internet-based company. The court held there was a sufficient connection between the interstate company and the state.[82] The Department argued the same analysis should apply in *Barnesandnoble.com*.[83]

To counter the Department's argument, Taxpayer relied on a district court case. In *St. Tammany Parish Tax Collector v. Barnesandnoble.com*,[84] the in-state entity and the internet-based taxpayer shared product return systems and a multi-retailer gift card and loyalty program, which created cross-promotions.[85] The court held that there was no substantial nexus.[86] It reasoned that the in-state entity did not act on behalf of the internet-based company.[87] Taxpayer argued that because the facts in the present case are similar to those in *St. Tammany Parish Tax Collector* the same holding should follow.[88]

Both parties relied on a New Mexico case, *Dell Catalog Sales, L.P. v. Taxation and Revenue Department of the State of New Mexico*.[89] In that case, the New Mexico Court of Appeals found a substantial nexus with less connection to the state than was present in *Scripto, Inc.* and *Tyler Pipe*.[90] Dell had no physical presence in New Mexico. However, the court held that there was a substantial nexus to the state because Dell customers had access to a third-party repair service provider in the state. The service provider had an agreement with Dell that required it to repair Dell customers' computers at their homes. The repair service was allowed to use only parts provided by Dell to make its repairs, and if there was a problem that an agent from the service provider could not resolve, Dell was to be contacted. If a customer had an issue with the service provider, it was reported to Dell. Dell and the service provider did not have any type of ownership stake in each other. Further, the service provider made no sales in New Mexico. The court determined that Dell was the service

81. 29 Cal. Rptr. 3d 176 (Cal. App. Ct. 2005).
82. *Id.* at 191.
83. Brief for Respondent, *supra* note 52, at 16.
84. 481 F.Supp.2d 575 (E.D. La. 2007).
85. *See id.* at 579.
86. *Id.* at 581.
87. *Id.*
88. *See* Brief for Petitioner, *supra* note 33, at 18.
89. 2009-NMCA-001, 145 N.M. 419.
90. *Id.* ¶¶ 47–48

provider's agent, and therefore it found a substantial nexus under the analysis in *Tyler Pipe* and *Scripto, Inc.*[91]

Another significant New Mexico case is *Kmart Properties, Inc. v. Taxation and Revenue Department of the State of New Mexico*.[92] In that case, the New Mexico Court of Appeals held that the activities of the interstate entity inside of the state were sufficient to establish a substantial nexus.[93] The court reasoned that the interstate entity had employees within the state that promoted its trademarks, which created goodwill.[94]

Relying on these precedents, the Department argued that Taxpayer had a substantial nexus because of the activities performed by Booksellers.[95] These activities included a "close corporate relationship and common ownership, cross marketing, the return policy, the gift cards policy, loyalty program, the reader's advantage card program and [the program that allowed Booksellers to source products it did not have in its inventory from Taxpayer]."[96] Taxpayer maintained that the Department violated the Commerce Clause because it imposed gross receipts taxes on an internet-based, interstate company that did not have sufficient contacts or a substantial nexus to New Mexico.[97]

C. New Mexico Taxation and Revenue Department Hearing

During the hearing, the hearing officer held that Taxpayer did not have a substantial nexus to New Mexico. In reaching that decision, the hearing officer found that Booksellers did not establish and maintain a market for Taxpayer, and that Taxpayer did not gain an "economic advantage" from New Mexico.[98] The hearing officer further reasoned that there was no evidence to prove that Booksellers acted on behalf of Taxpayer, like the service provider did for Dell in *Dell Catalog Sales, L.P.*[99] *Borders Online LLC* was distinguished at the hearing. In that case, the return policy permitted only Borders Online products to be returned at the physical store. This was not the case here because Taxpayer products and products from other retailers could be returned at Booksellers. In addition, in *Borders Online LLC* the brick and mortar store sourced products it was missing in its inventory from Borders Online. Here,

91. *See id.* ¶ 13.
92. 2006-NMCA-026, 139 N.M. 177.
93. *Id.* ¶ 39.
94. *Id.*
95. Decision, *supra* note 32, at 16.
96. *Id.*
97. *Id.* at 18.
98. *Id.* at 22.
99. *Id.*

Booksellers could source products into its inventory from not only Taxpayer, but also from other distributors.

Furthermore, the hearing officer concluded that using the same logo and trademark did not create a substantial nexus.[100] Based on these findings, the hearing officer entered summary judgment in favor of Taxpayer.

The Department appealed the hearing officer's decision to the New Mexico Court of Appeals.[101] The court used a two-part analysis to determine if gross receipts taxes could be properly imposed.[102] The analysis included determining whether the "Legislature intended to tax those receipts under the [gross receipts tax], [and if so] . . . whether the tax violates the Commerce Clause . . . ."[103] The parties agreed that Taxpayer benefitted from New Mexico and that the first part of the test was therefore satisfied. As a result, the only issue was whether Taxpayer had a substantial nexus to the taxing state.[104]

D. New Mexico Court of Appeals Analysis

The New Mexico Court of Appeals held that Taxpayer had a substantial nexus because of its use of Barnes & Noble trademarks and its cross-marketing activities with Booksellers.[105] To find a substantial nexus, the court of appeals used the *Tyler Pipe* physical presence requirement, which is met when "activities performed in [the] state on behalf of a taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in the taxing state for the sales."[106] The court determined that it was not difficult to establish physical presence.[107] The court held that much like in *Kmart Properties, Inc.*, the fact that Taxpayer shared a trademark with Booksellers established a substantial nexus. Taxpayer gained goodwill, and customers were led to believe that both entities were one because trademarks are "the functional equivalent of physical presence."[108] Simply put, the court reasoned that Booksellers promoted Taxpayer enough to provide a benefit for it.[109] According to the court, that was enough to establish a market in New Mexico for Taxpayer.

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100. *Id.* at 26.
101. *See In re* Barnesandnoble.com LLC, 2012-NMCA-063, ¶ 1, 283 P.3d 298.
102. *Id.* ¶ 13.
103. *Id.* (quoting Kmart Corp. v. Taxation and Revenue Dep't of the State of New Mexico, 2006-NMSC-006, ¶ 11, 139 N.M. 172).
104. *In re Barnesandnoble.com LLC*, 2012-NMCA-063, ¶ 13.
105. *Id.* ¶¶ 34–35.
106. *Id.* ¶ 14.
107. *Id.* ¶ 15.
108. *Id.* ¶ 35.
109. *Id.* ¶ 15.

E. New Mexico Supreme Court Analysis

The New Mexico Supreme Court conducted a similar analysis.[110] The court stated that the issue in the case was "whether Booksellers performed activities on behalf of [Taxpayer] that are significantly associated with [Taxpayer]'s ability to establish and maintain a market for its sales in New Mexico."[111] This standard was adopted from the U.S. Supreme Court case, *Tyler Pipe*, which stated, "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."[112]

1. New Mexico Supreme Court Rationale

The totality of several factors established a substantial nexus for Taxpayer. Among these factors was the fact that Booksellers had a non-discriminatory return policy where products from other companies could be returned, including products purchased with Taxpayer.[113] Under this policy, products from other stores could also be returned.[114] Another factor was that both Taxpayer and Booksellers participated in a multi-retailer gift card program where customers could purchase gift cards from participating retailers, and they could use these cards with any participants.[115] Both Booksellers and Taxpayer participated in a multi-retailer loyalty program where a customer could pay a fee and then receive discounts from all of the participating retailers.[116] In addition, Booksellers and Taxpayer shared a name and logo, which allowed them to build goodwill with customers.

a. Return Policy

Booksellers accepted returns of products from other retailers such as Amazon, Borders, and Taxpayer in exchange for in-store credit and gift cards that were only redeemable with Booksellers.[117] Taxpayer's website mentioned Booksellers' return policy, but it had no impact on how the policy actually worked.[118] If a Taxpayer customer returned a product

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110. New Mexico Taxation and Revenue Dep't v. Barnesandnoble.com LLC, 2013-NMSC-023, ¶¶ 8–10, 303 P.3d 824.

111. *Id.* ¶ 8.

112. 483 U.S. 232, 250 (1987).

113. Brief for Petitioner, *supra* note 33, at 9.

114. *Id.*

115. *Id.* at 10.

116. *Id.* at 11.

117. Decision, *supra* note 32, at 7.

118. *Id.* at 8.

to Booksellers, Taxpayer would likely not be aware of it.[119] There also was never an exchange of payment or products between Booksellers and Taxpayer as a result of this return policy.[120] Taxpayer never asked for an agreement with Booksellers or any other entity in New Mexico for the return of its products.[121]

b. Gift Cards

Booksellers also began to promote and sell gift cards that included the Barnesandnoble.com name.[122] These cards could be used both online at Barnesandnoble.com, Taxpayer's website, and at Booksellers' stores.[123] The gift cards could also be purchased from other retailers, but the cards were redeemable with Taxpayer and Booksellers.[124] Taxpayer's information was available to other program participants because of this gift card program; therefore, others promoted its products even though Taxpayer did not expressly encourage the endorsements.[125] Likewise, the gift cards purchased from Taxpayer online could be used at Booksellers' stores.[126] When the gift cards were used with Booksellers, Taxpayers did not receive any proceeds.[127]

c. Loyalty Program

Both Taxpayer and Booksellers participated in the Parent Company's customer loyalty program.[128] This program gave customer discounts and offers for products from the retail participants, including products from Booksellers and Taxpayer.[129] This loyalty program was advertised both by Booksellers and Taxpayer.[130] The Parent Company obtained the loyalty program proceeds from the participating retailers.[131] The Parent Company contracted a third-party to manage the loyalty program, but it was not located in New Mexico.[132] The proceeds Taxpayer and Booksellers received from the loyalty program depended on their

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 9.
123. *Id.*
124. *Id.*
125. *Id.* at 10.
126. *Id.* at 9.
127. *Id.*
128. *Id.* at 10.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*

respective sales.[133] Taxpayer did not encourage other participants in the loyalty program, including Bookseller, to promote its participation in the program.[134] However, when customers signed up for this loyalty program at a Booksellers retail store, they gave their email addresses and Taxpayer could then access them.[135] Taxpayer would then be able to use those email addresses to send promotional emails.[136]

d. Barnes&Noble Trademarks

Taxpayer and Booksellers used Barnes & Noble trademarks,[137] which increased name recognition.[138] Customers saw Booksellers and Taxpayer as one entity, and therefore Taxpayer benefitted from any customer loyalty developed by Booksellers.[139]

The New Mexico Supreme Court found that all of the factors mentioned above were significant enough to establish a substantial nexus to the state. The broad standard from *Tyler Pipe* was applied.[140] Ultimately the court used a case-by-case analysis based on the totality of facts.

II. ARGUMENT

Against this backdrop, Part II argues that the New Mexico Legislature should develop clear standards to determine what constitutes a substantial nexus in order to place businesses, like the internet-based company, Barnesandnoble.com, on notice. In the alternative, New Mexico Courts should, following federal precedent, find a substantial nexus only when the in-state entity acts directly and purposefully on behalf of the interstate entity.

The Commerce Clause of the U.S. Constitution requires that taxpayers have sufficient contacts with a state to be taxed there.[141] The U.S. Supreme Court has enumerated a four-part test that allows a state to tax an interstate company.[142] The tax must be "[1] . . . applied to an activity with a substantial nexus with the taxing state; [2] . . . fairly apportioned; [3] [non-discriminatory] against interstate commerce; and [4] . . . fairly

133. *Id.*
134. *Id.* at 11.
135. Brief for Petitioner, *supra* note 33, at 10.
136. *Id.*
137. Decision, *supra* note 32, at 15.
138. Brief for Respondent, *supra* note 52, at 4.
139. New Mexico Taxation and Revenue Dep't v. Barnesandnoble.com LLC, 2013-NMSC-023, ¶ 10, 303 P.3d 824.
140. *Id.* ¶ 8.
141. U.S. CONST. art. I, § 8, cl. 3.
142. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

related to the services provided by the State."[143] Only the first element of this test surfaced in *Barnesandnoble.com*.

The substantial nexus requirement is meant to be broad.[144] In *Quill Corp.* the U.S. Supreme Court stated that the substantial nexus standard was flexible.[145] The Court provided, generally, that state taxation is justified if "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."[146]

In *Quill Corp.*, the U.S. Supreme Court analogized the standard of a substantial nexus to personal jurisdiction.[147] The Court purposely kept the standard of substantial nexus malleable, much like personal jurisdiction. As with personal jurisdiction, companies that purposefully avail themselves of the benefits of a state are on notice that they may be liable there.

The power to tax, and specifically to determine whom to tax, is generally left to the states due to each state's intimate awareness of the needs of its citizenry. Therefore, the substantial nexus standard has been interpreted in favor of leaving discretion to the state courts. Different courts have interpreted the standard in varying ways.

A. Policy Behind a Broad Standard for Gross-Receipts Tax

In enacting the Gross Receipts and Compensating Tax Act the New Mexico Legislature noted,

> [t]he purpose of the . . . Act is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax.[148]

Taxing entities that benefit from the state of New Mexico is good policy. An equal playing field is created when the taxes levied on out-of-state entities are the same as those imposed on in-state "mom and pop shops." Taxes, levied in this way, can bring revenue into New Mexico, and prevent out-of-state companies from reaping the rewards of operating in the

143. Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 311 (1992).
144. *Id.* at 307.
145. *Id.* at 314.
146. Tyler Pipe Indus., Inc. v. Washington State Dep't. of Revenue, 483 U.S. 232, 250 (1987).
147. *See* 504 U.S. at 311.
148. *See* NMSA 1978, § 7-9-2 (2007).

state without the same or similar requirements of in-state entities. This is the policy behind the decision in *Barnesandnoble.com, LLC*. The New Mexico Supreme Court found that the sales made in New Mexico showed that Taxpayer was benefitting from the state.[149] It is only reasonable to hold the company accountable for the same taxes that New Mexico businesses are required to pay simply by virtue of their existence within the state's borders.[150] However, issues can arise if a tax policy is vague and is applied retroactively, especially with respect to companies based online.

B. The Problem with a Broad Standard

Gross receipts taxes are neutral. These taxes are imposed on all entities that benefit from the state. However, a broad standard can quickly become complex due to varying interpretations. Transparency and retroactivity become problems when companies must pay taxes they can no longer pass on to consumers. There can be no stability when such broad standards, such as the "totality of activities" standard, subject internet-based companies to state taxes.

Nexus standards are interpreted differently throughout the states. The U.S. Supreme Court recognized the existence of a "safe harbor" for businesses whose only connection to a taxing state is the business it conducts through mail or a common carrier.[151] If the safe harbor principle were applied in *Barnesandnoble.com*, there would not be a substantial nexus to New Mexico sufficient to impose taxes on Taxpayer. The company's sales to New Mexicans were made via mail or other common carriers. In *Tyler Pipe*, the Supreme Court took a "functional approach" to the substantial nexus inquiry.[152] New Mexico courts appear even more willing to find a substantial nexus for out-of-state companies. The New Mexico Court of Appeals heard *Dell Catalog Sales, L.P.*, a case very similar to *Tyler Pipe*. However, the court of appeals' analysis did not include the safe harbor principle. The court found a substantial nexus despite the fact that the company's sales to New Mexico residents were only through mail orders.[153] In *Dell Catalog Sales, L.P.*, the court of appeals applied the

149. New Mexico Taxation and Revenue Dep't v. Barnesandnoble.com LLC, 2013-NMSC-023, ¶ 17, 303 P.3d 824.

150. *See Gross Receipts Overview*, *supra* note 25.

151. *See* Tyler Pipe Indus., Inc. v. Washington State Dep't. of Revenue, 483 U.S. 232, 250 (1987).

152. *See* Scripto, Inc. v. Carson, 362 U.S. 207, 209 (1960) (reasoning that there was a substantial nexus even though the company had no property or employees in the state because the company did have agents in the state whose "nature and extent" of work sufficed to meet the standard).

153. Dell Catalog Sales LP v. New Mexico Taxation & Revenue Dep't, 2009-NMCA-001, ¶ 30, 145 N.M. 419.

"destination principle."[154] Under the destination principle, a business is susceptible to a state's taxes if the destination of the good being sold is the taxing state, and the good indeed is ultimately consumed within the taxing state.[155] However, had this principle been applied in *Barnesandnoble.com*, the holding would have remained the same because even though its sales were online and delivered to customers through the mail, the destination and ultimate consumption of the good were both in New Mexico.

Nevertheless, there are very important differences between the facts in *Dell Catalog Sales, L.P.* and *Barnesandnoble.com*. In *Dell Catalog Sales, L.P.*, the in-state entity was providing services for Dell's customers, therefore helping Dell sell its products to customers in New Mexico. In *Barnesandnoble.com*, Booksellers was incidentally providing benefits for Taxpayer, but it was not providing services solely for Taxpayer's online customers. Further, Taxpayer was not soliciting sales from New Mexico directly or indirectly. The Department argued that Taxpayer and Booksellers shared the Barnes&Noble trademark; however, sharing a trademark was not sufficient to find a substantial nexus in *SFA Folio Collections, Inc. v. Bannon*,[156] a case in which the doctrine of an "affiliate nexus" was analyzed.[157] These examples demonstrate that the *Barnesandnoble.com* holding could have been very different if the court applied the various interpretations of the substantial nexus standard. However, one notable commonality in a line of cases finding a substantial nexus is that the in-state entity performed on behalf of the interstate entity, therefore creating and sustaining a market for the interstate entity.

C. Reasoning Behind the Proposed Standard

In *Dell Catalog Sales, L.P.*, there was a clear basis for finding a substantial nexus between the interstate company, Dell, and New Mexico through the in-state computer repair company. The computer repair company was purposefully working for Dell, and its work was to provide Dell with the benefits of the state. Dell instructed the computer repair company to promote Dell by way of its services, resulting in a larger customer base for Dell in New Mexico. New Mexico customers were encouraged to purchase Dell products because doing so put the computer-repair service conveniently at their disposal. The court's approach in *Dell Catalog Sales, L.P.*, though not explicit, laid out a standard of purposeful availment. If

154. *Id.*

155. *Id.* ¶ 28 (quoting JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 18.02[1] (3d ed. 2002).

156. 585 A.2d 666, 673–74 (Conn. 1991).

157. *See id.*

the in-state company is working specifically, not incidentally, for the benefit of the interstate company, then a substantial nexus is clear and the interstate company should be susceptible to state taxes. This rule has been seen in many cases where courts have made a substantial nexus inquiry.[158] For example, in *Tyler Pipe* the U.S. Supreme Court applied this standard.[159] In *Tyler Pipe*, "sales representatives acted on behalf of Tyler Pipe [by] calling on its customers and soliciting orders."[160] The sales representatives were in the taxing state to gain business for the interstate entity, Tyler Pipe.[161]

D. A Standard of Purposeful Availment

An interstate company should be susceptible to a state's taxes if it purposefully directs an in-state entity to work for its benefit. If this standard is applied to the substantial nexus inquiry in New Mexico, judges, advocates, and interstate companies will understand the limitations placed on the activities of interstate companies in New Mexico. This standard is sufficiently restrictive to provide a starting point for advocates to argue on behalf of their clients. However, because courts are hesitant to establish bright-line rules, this proposed standard is adequately broad to allow advocates to develop creative arguments. The reasoning in *Dell Catalog Sales, L.P.* inspired the proposed standard.[162] In *Dell Catalog Sales, L.P.* it was clear that the in-state company was working solely for the benefit of and under the direction of Dell, the interstate entity. Therefore, if New Mexico followed the analysis in *Dell Catalog Sales, L.P.*, in-

158. Scripto, Inc. v. Carson, 362 U.S. 207 (1960) (holding there was a substantial nexus because there were numerous agents in the state soliciting business on behalf of the interstate company); Tyler Pipe v. Washington Dep't of Revenue, 483 U.S. 232 (1987) (holding there was a substantial nexus due to the sales representatives' contribution to the interstate company's business through their sales inside of the state); Standard Pressed Steel Co. v. Washington Dep't of Revenue, 419 U.S. 560 (1975) (holding state taxing was constitutional because there was a full-time employee in the state providing service to a major customer); State of Louisiana and Secretary of the Dep't of Revenue and Taxation v. Dell Int'l, Inc., 922 So. 2d 1257 (La. Ct. App. 2006) (holding the state could tax the interstate company because the in-state entity acted on behalf of Dell); *but see* St. Tammany Parish Tax Collector v. Barnesandnoble.com, et al., 481 F.Supp.2d 575 (E.D. La. 2007) (holding products return program, multi-retailer gift card, loyalty programs, and cross-promotions was not working on behalf of the interstate company and therefore the interstate company could not be susceptible to state taxes).

159. 483 U.S. 232, 250 (1987).

160. *Id.* at 249.

161. *See id.*

162. Dell Catalog Sales, L.P. v. Taxation and Revenue Dep't of the State of New Mexico, 2009-NMCA-001, ¶ 30, 145 N.M. 419.

terstate companies would have a clear context within which to determine the extent of their business in the state. Interstate companies will know that commanding an in-state entity to perform on its behalf will ensure state taxation.

The proposed standard is also an adaptation of a decisive factor in the *Tyler Pipe* opinion. In *Tyler Pipe*, the Court determined that the "crucial factor governing nexus is whether the activities performed in [the] state on behalf of the [interstate entity] are significantly associated with the [interstate entity's] ability to establish and maintain a market in [the] state for the sales."[163] The standard proposed in this Note narrows the *Tyler Pipe* inquiry to only activities in the state that are made on behalf of the interstate company, and are made for the direct and purposeful benefit of the interstate company. This standard excludes incidental benefits that would be included in the *Tyler Pipe* standard.

New Mexico can provide the stability needed. The state's taxation system is unique. Unlike other states, New Mexico imposes a gross receipts tax for the benefit of conducting business in the state.[164] This unique system provides an opportunity to develop an independent standard and clarify the U.S. Supreme Court's standard as stated in *Tyler Pipe*. Developing a clear standard would provide guidance for future cases.

III. IMPLICATIONS

Increasingly, courts nationwide are finding a substantial nexus. Thus, the standard that the U.S. Supreme Court established in *Tyler Pipe* is continuously expanding and changing depending on the jurisdiction, which creates ambiguity.

The U.S. Supreme Court did not restrict the substantial nexus standard further so that states could have could have room for interpretation. State courts will continue to push the limits of the substantial nexus standard if state legislatures fail to impose boundaries. Interstate businesses, particularly those based online, can become susceptible to taxes in states in which they have little, if any real connection. This can lead to due process problems because interstate companies do not receive sufficient notice as to whether they will be taxed.

Some states have come together to create a uniform system of taxation in an attempt to quell the issues arising under vague standards. The Streamlined Sales Tax Agreement reflects an effort by many states across

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163. *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted).
164. *See* NMSA 1978, § 7-9-3.5 (2007).

the nation to facilitate the imposition of sales taxes and use taxes.[165] New Mexico has not been a part of this effort. If it were, it could benefit from proposing that other states not tax businesses that are headquartered in New Mexico and it also would not tax businesses that are headquartered in another state. However, due to the distinctive nature of New Mexico's taxation system, it need not be a part of such effort. The state is in a position where it can develop its own clear standards to provide uniformity throughout the state. New Mexico courts can develop a clear rule to ensure that when businesses look to New Mexico, they are not confronted with uncertainty. The easier solution, however, is to wait for the legislature to provide guidance because it has an interest in providing its citizens with products interstate companies can offer.[166]

IV. COUNTER-ARGUMENTS

Why does clear notice matter? Many legal standards are applied on a case-by-case basis, such as the minimum contacts, fairness, and justice standard for personal jurisdiction. Granted, some standards must be vague to ensure that substantially variable facts are taken into account. However, vague taxation standards deprive interstate companies of their right to sufficient notice of liability.

Nevertheless, a counter-argument is that even if the proposed standard had applied in *Barnesandnoble.com* the holding would have remained the same. Following this logic, even if New Mexico adopted stronger taxing standards, a court could still have found that Taxpayer had a substantial nexus to New Mexico because Booksellers created a market for Taxpayer. However, the proposed standard would have found a substantial nexus if there was purposeful benefit from the state.

Another counter-argument is that the proposed standard does not fix the issue. It is still too broad. However, the proposed standard is broad enough to remain open to interpretation and variability depending on the facts of a given case. A purposeful availment standard provides clarity, but also remains malleable to accommodate to different situations. The proposed standard provides the guidelines needed.

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165. *About Us*, STREAMLINES SALES TAX, http://www.streamlinedsalestax.org/index.php?page=about-Us (last visited Mar. 20, 2015).

166. Joseph Henchman, *States Shouldn't Collect Online Sales Tax*, U.S. NEWS (Dec. 10, 2012, 3:40 PM), http://www.usnews.com/opinion/articles/2012/12/10/states-shouldnt-collect-online-sales-tax.

V. EXAMPLES

Internet-based companies like Taxpayer transact business with customers in many different states. Therefore, there is an incentive to maintain taxation standards that encourage companies to enter one state instead of another.[167] Interstate companies are less likely to transact business in states with vague substantial nexus standards due to the uncertainty of liability. These states lose out on taxes they could have collected if interstate companies choose to go elsewhere. Thus, ultimately these vague standards affect a state's economy. Before making sales in a state, companies want to know whether they will be placed on the same playing field as local businesses. If interstate companies are not placed on the same playing field as in-state companies, they will have an advantage over the in-state companies because they will not have to pay the same taxes. As a result, they could offer lower prices for in-state consumers.

As suggested above, vague standards have the effect of imposing a retroactive duty and after- the- fact notice. This situation prevents companies from limiting their activities in a state before they become susceptible to gross receipts taxes. If companies are put on notice before even entering a state, they can make informed decisions about where and how to conduct business. Therefore, vague substantial nexus standards deprive companies of the right to notice before making the decision of where and how to conduct business. At that point, the imposition of taxes without notice becomes a constitutional issue.

CONCLUSION

Picture an interstate company that is deciding where and how it will conduct business. An important factor the company must consider is taxes. If, in a given state, gross receipts taxes are imposed on the company in order to place it on a level playing field with local companies, the company will weigh the costs and advantages of conducting business in the state. On the one hand, it will not be at a disadvantage as compared to the in-state companies because its taxes are the same. However, the interstate company will also not offer price advantages to its customers because its prices will reflect the gross receipts taxes it has to pay. If an interstate company does not have a price advantage in a state, then it can

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167. *See* Cameron Graham, *Why Amazon Fights State Sales Tax, But Supports It Nationally*, TECHNOLOGY ADVICE (Nov. 1, 2013), http://technologyadvice.com/news/blog/why-amazon-fights-state-sales-tax-but-supports-it-nationally/.

be discouraged from conducting business there.[168] A vague taxing standard strips interstate companies of the opportunity to weigh the costs and benefits of conducting business in a state because it is unclear whether the company will be subject to taxation.

In *Barnesandnoble.com*, Taxpayer was ultimately responsible to pay New Mexico's gross receipts taxes for the company's sales for the period of January 31, 1998 through July 31, 2005. The decision, made in 2012, made it impossible for Taxpayer to pass on those costs to the customers it sold to from 1998 through 2005. Companies are not provided with notice when the standard for determining a substantial nexus does not give interstate companies a fair warning of their possible susceptibility. In addition, a retroactively imposed tax does not allow companies to direct the taxation burden to those who will ultimately carry it, which are the customers.

Companies should not benefit from business within a state without paying its fair share in taxes. When an interstate company benefits from a state, like Taxpayer did, it is only fair to subject the company to the same taxes that in-state companies are required to pay. However, to provide adequate notice to interstate companies, New Mexico must establish a clear standard for determining whether a substantial nexus exists. If courts apply the standard proposed in this article, that is subjecting interstate companies to gross receipt taxes when an in-state company directly and purposefully acts for the benefit of the interstate company, all parties involved will have guidance as to permissible conduct and consequences. The word "benefit" will remain vague, providing room for varying interpretations and case-by-case analysis. State legislatures can incorporate this standard into statutes or state courts can apply the rule when necessary. If states do not establish a clear standard, then it is left to the U.S. Supreme Court to provide some uniformity and guidance. The Supreme Court is in a unique position to be impartial since the state interests at stake are much different than that of the Court.

Ultimately, the burden of gross receipts taxes is passed on to the consumer. Therefore, most interstate businesses do not protest having to pay these taxes. Interstate companies will have the necessary notice to make business decisions if New Mexico provides a clear standard. Therefore, New Mexico has an interest in providing businesses with adequate notice to provide certainty in the market and attract businesses. In-state entities that facilitate the connection of interstate companies to states will benefit from a clear standard in determining what constitutes a substan-

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168. *See* Michael E. Porter, *Strategy and the Internet*, HARV. BUS. REV., Mar. 2001, at 63.

tial nexus as well. After all, interstate companies that want to directly and purposefully benefit from a state will have to create a presence in the state through a brick and mortar store, like in *Barnesandnoble.com* or through sales representatives that act as agents for the interstate company in the state like in *Scripto, Inc.* and *Tyler Pipe*. Regardless of the manner in which the interstate companies create a presence in the state, the state benefits through the creation of jobs. In summary, simple and coherent taxing standards will attract interstate companies to New Mexico. Clear taxing standards allow companies to decide whether they are willing to pay gross receipts taxes. This clarity and transparency will build trust with companies who will be encouraged to establish strong connections within the state and create jobs for New Mexicans. Therefore, a clear standard for what constitutes a substantial nexus can only benefit New Mexico. The courts, legislature and business communities should be actively working towards this goal.