Cheers! Ending Quill ... What Can Be Learned from the Wine Industry

Alyson Outenreath
Texas Tech University School of Law
INTRODUCTION

In today’s age of technology, does it really matter where we are physically present? A person in rural Montana can buy items online just as if that person were in a brick-and-mortar store in New York City, Dallas, or San Francisco. An Internet business having only one office in Chicago could sell products to customers located in all 50 states. Indeed, in the opening scene to Steve Jobs, a movie detailing his life, a gentleman is seen having a discussion predicting what life will be like with computers in the 21st century.1 The gentleman acknowledges that we will become a computer-dependent society, which could bring about certain disadvantages, but goes on to say this:

[The computer] will also enrich our society because it will make it possible for us to live really anywhere we like. Any businessman and executive could live almost anywhere on Earth and still do his business through a [computer]. And this is a wonderful thing. It means we won’t have to be stuck in cities. We’ll be able to live out in the country or wherever we please.2

The prediction, which seems to have become true, was that computers will allow us to work and do virtually all things we want to do in life, but without being constrained to being physically present at any given location.3

So, if physical presence has become a bygone of the past, then why still talk about it? The answer is the 1992 U.S. Supreme Court decision in Quill Corp. v. North Dakota.4 Quill involved whether an out-of-state office supply company selling products to customers located in North Dakota was required to collect what are called “use taxes” from those customers.5 Quill generated $1,000,000 in sales from approximately 3,000 North Dakota customers for the period at issue, but it did not have any brick-and-mortar stores or other physical presence in North Dakota.6 Instead, all sales were generated through catalog and phone orders,7 the precursor to

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* Professor of Law, Texas Tech University School of Law. Professor Outenreath would like to acknowledge and thank Dean Jack Nowlin and Associate Dean Vickie Sutton for their generous support of this project.

2. Id.
3. See id.
5. Id. at 301–02. Use taxes are discussed in detail in Part I.
6. Id. at 302.
7. Id.
online shopping. In reaching its decision, the Supreme Court held Quill was not required to collect use taxes on the North Dakota sales because it was not physically present in North Dakota.\(^8\) The volume of sales in the state did not matter.\(^9\) The amount of revenues generated in the state did not matter.\(^10\) Quill being the sixth largest office supply company in North Dakota did not matter.\(^11\) All that mattered was whether Quill had a physical presence.\(^12\)

It is probably easy to see the problem created by Quill.\(^13\) It has resulted in large tax revenue losses to the states.\(^14\) This is because many Internet retailers may only have physical presence in one state or a small handful of states. For example, physical presence may exist only in the state where the company maintains its corporate office. Or the company may have physical presence in a small handful of states because it has a corporate office in one state and it also has a warehouse or distribution center in other states. But despite having physical presence in only one state, or just a small handful of states, the company may sell merchandise in many states or perhaps in every state.\(^15\) The effect of Quill is that even though the retailer may be selling merchandise in all these states, it would not be required to collect tax on the sales.\(^16\) Instead, the customer would be required by law to remit the taxes directly to the state, but this usually does not happen, the result being tax revenue losses to the states.\(^17\)

There have been many excellent articles written about why the time has come to “Kill Quill.”\(^18\) In fact, in a 2011 Pepperdine University School of Law

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8. Id. at 317–19.

9. See id.

10. See id.

11. See id.

12. Id. Physical presence includes, but is not limited to, having a brick-and-mortar store, corporate office, or distribution center in the subject state, or having employees or independent contractors in the subject state soliciting sales or attending trade shows. See generally id. at 302. What constitutes physical presence in order for an out-of-state company to be required to collect use taxes has been the subject of much litigation since Quill. See generally WALTER HELLERSTEIN ET AL., STATE AND LOCAL TAXATION 42 (10th ed. 2014).

13. See also discussion infra Part IV.

14. See discussion infra Part II.

15. An example of this latter situation is CafePress, Inc. Founded in 1999, CafePress is a Delaware corporation headquartered in Louisville, Kentucky. CAFEPRESS, http://www.cafepress.com (last visited Mar. 7, 2018). The company’s manufacturing facility, also located in Louisville, serves as the fulfillment hub for the entire United States. Id. CafePress is a retailer of various customized and personalized products, such as t-shirts, drinkware, tote-bags, home goods, and other items. The company’s website states that “CafePress is the world’s best online gift shop.” Id. CafePress makes nationwide sales, but due to Quill’s physical presence standard, it collects sales and use taxes only on orders shipped to California, Connecticut, Kentucky, Nevada, North Carolina, and Washington. Id.

16. See discussion infra Part II and accompanying text.

17. See discussion infra Part II and accompanying text.

Symposium, Quill was nominated as being one of the most “maligned Supreme Court tax decisions.”19

This article seeks to provide additional support to the “Kill Quill” movement by looking to the wine industry and the aftereffects of the U.S. Supreme Court’s decision in Granholm v. Heald,20 a case involving wineries and their ability to ship wine directly to customers located in other states.21

Parts I and II provide an overview of sales and use taxes, along with a discussion about how the taxes are collected. Part III gives a history of Quill’s physical presence standard. Part IV discusses the aftermath of Quill. Part V sets forth observations gleaned from the aftereffects of Granholm and how these aftereffects help support the movement to overturn Quill. Part VI provides a brief conclusion.

As mentioned above, it is important to note that overturning Quill would not create a new tax.22 The media sometimes inaccurately reports this.23 What many consumers may not realize is that they are already responsible for paying, directly to the state, any taxes not collected by out-of-state retailers.24 The only reason consumers might think a reversal of Quill would create a new tax is because they are not aware of their already existing responsibility to directly remit uncollected taxes.25 This is a critical point in understanding the debate concerning Quill: overturning Quill would not create a new tax, it would only create a better way to collect the tax.26

76 STATE TAX NOTES 531 (2015); Billy Hamilton, Goodbye, Quill—One Way or the Other, 84 STATE TAX NOTES 379 (2017) (“It’s long past time to say goodbye to Quill, which was issued not just in another century but almost another world.”); John A. Swain, Quexit: The Time Has Come, 81 STATE TAX NOTES 695 (2016); Julie P. Magee, The Supreme Court Should Fix the Problem (Quill) It Created, TAX NOTES (Oct. 24, 2016), http://www.taxnotes.com/state-tax-today/nexus/supreme-court-should-fix-problem-quill-it-created/2016/10/24/2gk0.

19. Paul L. Caron, Pepperdine Hosts Symposium on The Most Maligned Supreme Court Decisions, TAX PROF BLOG (Apr. 1, 2011), http://taxprof.typepad.com/taxprof_blog/2011/04/supreme-mistakes.html (providing this quote by well-known state and local tax scholar John Swain: “The case requires out-of-state sellers to have an in-state physical presence before they can be required to collect sales tax from their in-state customers. As a result, mail-order and internet sellers enjoy a de facto sales tax exemption that gives them an unfair competitive advantage over brick-and-mortar retailers and states are losing billions of dollars of revenue. In today’s world, the notion that physical presence is a reasonable proxy for determining the level of a seller’s compliance burdens is absurd, and decades before the Quill decision the Court had rejected the physical presence test with respect to other types of jurisdictional questions, such as personal jurisdiction and state (non-tax) regulatory jurisdiction.”); see also David Gamage & Devin J. Heckman, A Better Way Forward for State Taxation of E-Commerce, 92 B.U. L. REV. 483, 485 (2012) (citing the aforementioned Pepperdine School of Law symposium).


21. Id.

22. See discussion infra Part II.


24. See, e.g., HELLERSTEIN, supra note 12, at 44.

25. See id.

26. See id.
I. SALES AND USE TAXES

Most of us are familiar with sales taxes.27 We see sales taxes imposed and reflected on our receipts when we dine at restaurants or shop at stores at the local mall.28 But consumers likely are not as familiar with use taxes.29

States that impose sales taxes also impose use taxes.30 Use taxes function the same as sales taxes in that they are imposed on the purchase of the same items.31 The difference between the two has to do with where the sale taxes place.32 If a sale takes place within a state’s taxing jurisdiction, such as when an individual makes a purchase at the local mall, then the state’s sales tax applies.33 On the other hand, if a sale takes place outside of a state’s taxing jurisdiction, such as when a Pennsylvania resident purchases a coat in Delaware (a state that happens not to have a sales and use tax system) and then takes the coat back to Pennsylvania (a state having a sales and use tax system), then Pennsylvania’s use tax applies.34

Use taxes are imposed on the use, storage, or other consumption of taxable items in the state where sales tax was not paid at the time of purchase.35 In the above example involving the Pennsylvania resident, when the resident returns home and wears the coat (i.e., uses the item), Pennsylvania use tax would become due.36 The amount of use tax the Pennsylvania resident must pay is the same amount of sales tax that would have been paid had the sale occurred in Pennsylvania.37 But instead of the tax being collected by the retailer at the time of purchase, the Pennsylvania resident would be required to remit the taxes directly to the state within a certain number of days after purchase.38 The collection of sales versus use taxes is discussed more in Part II.

As a result, the difference between sales taxes versus use taxes has been described as one of jurisdiction.39 If a state has jurisdiction to tax the sale, then sales

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27. See id. at 647.
28. See id.
29. See discussion infra Part II.
30. See, e.g., HELLERSTEIN, supra note 12, at 785–86.
31. See id. ("Compensating use taxes are functionally equivalent to sales taxes. They are typically levied upon the use, storage, or other consumption in the state of tangible personal property that has not been subjected to a sales tax. The use tax imposes an exaction equal in amount to the sales tax that would have been imposed on the sale of the property in question if the sale had occurred within the state’s taxing jurisdiction.")
32. See id.
33. See id.
34. See id.
35. See id.
36. See id.
37. See id. ("The use tax imposes an exaction equal in amount to the sales tax that would have been imposed on the sale of the property in question if the sale had occurred within the state’s taxing jurisdiction. The state overcomes the constitutional hurdle of taxing an out-of-state or interstate sale by imposing the tax on a subject within its taxing power—the use, storage, or consumption of property within the state.").
38. Alternatively, states with personal income tax systems sometimes allow residents to remit the taxes on the same tax form and at the same time with the remittance of income taxes. See discussion infra Part II.
39. See, e.g., HELLERSTEIN, supra note 12, at 785–86.
tax is due.\textsuperscript{40} If the sale instead occurs outside the state’s jurisdiction, but the purchased item is then used in the state (such as wearing the coat in the above example), then use tax is due.\textsuperscript{41} Because use taxes essentially “pick up where sales taxes leave off,”\textsuperscript{42} use taxes are oftentimes statutorily titled with the name “complimentary use taxes” or “compensating use taxes.”\textsuperscript{43} The terms “complimentary” or “compensating” mean that use taxes compliment sales tax systems by compensating where sales taxes are not collected.\textsuperscript{44} As seen in the Delaware/Pennsylvania example, in-state residents do not benefit from a tax perspective by traveling to states not having sales tax systems to purchase items because the consumer ultimately is liable for the payment of use taxes when he/she returns home.\textsuperscript{45} A similar result arises with Internet purchases, which is discussed in Part II.\textsuperscript{46}

Today, 45 states and the District of Columbia have sales and use tax systems (no state has a sales tax system, but not a use tax system).\textsuperscript{47} The only states not having sales and use tax systems are Alaska, Delaware, Montana, New Hampshire, and Oregon.\textsuperscript{48}

Sales and use taxes account for a large portion of state government tax revenue.\textsuperscript{49} For example, in 2016, sales and use taxes accounted for approximately 30\% of total state tax collections.\textsuperscript{50} In both 2015 and 2014, the number also was approximately 30\%.\textsuperscript{51} In some states, the percentage was even higher.\textsuperscript{52} For example, 

\begin{itemize}
  \item \textsuperscript{40} See id.
  \item \textsuperscript{41} See id.
  \item \textsuperscript{42} See id.
  \item \textsuperscript{43} See id. The need for complementary and compensating use taxes dates back to the 1930’s. See id. This excerpt from a leading state and local tax casebook gives an excellent summary of the history behind use taxes:
  \begin{quote}
  When states first adopted sales taxes during the 1930’s, they encountered a troublesome gap in the sales tax structure attributable to the constitutional strictures prohibiting them from taxing sales consummated outside their borders or in interstate commerce. The gap created two concerns. First, states feared the loss of business that local merchants would suffer when prospective customers made out-of-state or interstate purchases to avoid local sales tax liability. Second, states feared the loss of revenue they would incur as a result of the diversion of sales tax to nontax states. . . . To deal with this potential loss of business revenue, states enacted ‘complementary’ or ‘compensating’ use taxes.
  \end{quote}
  See id. at 785.
  \item \textsuperscript{44} See, e.g., id.
  \item \textsuperscript{45} See supra notes 35–38 and accompanying text.
  \item \textsuperscript{46} See discussion infra Part II.
  \item \textsuperscript{47} See, e.g., HELLERSTEIN, supra note 12, at 651, 785–86.
  \item \textsuperscript{48} See id. at 651.
  \item \textsuperscript{49} See infra notes 50–57 and accompanying text.
  \item \textsuperscript{52} See infra notes 53–54 and accompanying text; see also Susan Pace Hamill, The Vast Injustice Perpetuated by State and Local Tax Policy, 37 HOFSTRA L. REV. 117, 131 (2008); Sara Schoenfield, Much
in 2014, the following states were over the 50% mark: Florida (60%); Nevada (53%); South Dakota (56%); Tennessee (52%); Texas (58%); Washington (60%). And other states were approaching the 50% mark: Arizona (47%); Hawaii (46%); Indiana (41%); Kansas (40%); Mississippi (43%). These statistics are for state tax collections only. Local governments (e.g., cities and counties) also rely on sales and use tax revenues. Of the 45 states that levy sales and use taxes at the state level, approximately two-thirds also levy the taxes at the local level.

Sales and use taxes are generally imposed on the retail purchase of what is commonly called tangible personal property. Tangible personal property means items that can be seen, weighed, measured, felt, or touched or that are perceptible to the senses. Most states also impose sales and use taxes on the retail purchase of certain services, but the imposition of tax on services continues to remain an exception rather than a general rule.

II. COLLECTION OF SALES AND USE TAXES

Sales and use taxes are typically paid by the end-user consumer. Consider this simple example for sales taxes. Individual goes to a local bicycle shop down the street, ABC Bicycle Shop, and purchases a bicycle. Sales taxes resulting from the sale are imposed on and paid by Individual. Nevertheless, even though sales taxes are paid by Individual, it is ABC Bicycle Shop’s responsibility, as the retailer, to collect the taxes and remit them to the state. We all experience this phenomenon in our everyday lives when we see the line item on our receipts showing the sales taxes we paid, but instead of us paying the taxes directly to the taxing agency (like


53. See, e.g., Jared Walczak, Unpacking the State and Local Tax Toolkit: Sources of State and Local Tax Collections, TAX FOUNDATION (June 20, 2017), https://taxfoundation.org/toolkit-sources-state-local-tax-collections/. These cited percentages have incorporated figures for taxes levied on the purchase of goods and services as well as special taxes levied on gross receipts. See id. (“While economists generally draw sharp delineations among general sales taxes, excise taxes, and gross receipts taxes, the U.S. Census Bureau does not distinguish between taxes levied on sales and those imposed on gross receipts. Due to these data limitations, this category includes both general sales taxes and certain gross receipts taxes, though excise taxes are considered separately.”).

54. Id.
55. Id.
56. HELLERSTEIN, supra note 12, at 652.
57. See id.
58. See id. at 658.
59. Texas has a typical statute. It defines “tangible personal property” to mean: “personal property that can be seen, weighted, measured, felt, or touched or that is perceptible to the senses in any other manner. . . .” 151 TEX. TAX CODE ANN. § 151.009 (West).
60. HELLERSTEIN, supra note 12, at 658.
61. See id. at 649–50.
62. See discussion supra Part I for the difference between sales taxes and use taxes.
63. See id.
64. See, e.g., HELLERSTEIN, supra note 12, at 780–81. States then transfer the local portion of the collected taxes to the various local jurisdictions, such as cities and counties.
we do with federal income taxes, for example), the retailer collects the taxes from us as a collection agent and remits the taxes to the taxing agency on our behalf.\(^65\)

The collection of use taxes is different.\(^66\) Assume Individual in the above example buys the bicycle on the Internet. For purposes of this example, assume the Internet company is located in California and Individual lives in Florida. The Internet company would be required to act as the collection agent for collecting use taxes due on the purchase only if it has what is known as “physical presence” in Florida.\(^67\) For this purpose, physical presence means situations including, but not limited to, the company having a brick-and-mortar store or distribution center in Florida.\(^68\) In contrast, if the company does not have a physical presence in the buyer’s state so as to cause the “collection agent” responsibility to kick in, then the buyer is required to remit the use taxes due directly to the state taxing authority.\(^69\) So in the above example, Individual would be responsible for paying use taxes due on the purchase of the bicycle directly to the Florida Department of Revenue.\(^70\) This is generally accomplished by filing a “Use Tax Return.”\(^71\) An example Use Tax Return for Texas is reproduced below:

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65. See id.
66. See discussion infra Part III.
67. See id.
68. See id.
69. See id.
70. See id.
71. Some states allow reporting and payment of use taxes in other ways. For example, some allow use taxes to be reported and paid via state personal income tax returns. See, e.g., NORTH CAROLINA DEPARTMENT OF REVENUE, http://www.dor.state.nc.us/taxes.sales/use.html (stating “An individual required to file Form D-400, North Carolina Individual Income Tax Return, must report the use tax liability on non-business purchases of taxable items, other than a boat, an aircraft, and food subject to the reduced rate of tax, on the individual’s income tax return.”) (last visited Mar. 9, 2018).
Notably, the instructions to the Texas Use Tax Return do an admirable job describing what the use tax is and what it is imposed on:

[The use tax is a] tax, complementary to the sales tax, imposed on taxable goods and services that are purchased, leased or rented for personal or business use, storage or consumption in Texas on which Texas sales or use tax has not previously been paid. Texas use tax is due regardless if another state’s sales or use tax has been paid.
Examples of items subject to use tax include purchases made over the Internet or the telephone from an out-of-state seller who does not collect tax and items purchased while visiting another state or country.72

This dichotomy where a retailer is required to collect use taxes only when it has physical presence in the customer’s state is a result of two U.S. Supreme Court cases: National Bellas Hess v. Department of Revenue73 and Quill Corp. v. North Dakota.74 These cases are discussed in Part III.

As already mentioned, consumers likely are not as familiar with use taxes as they are with sales taxes.75 In an NPR Planet Money segment from 2013, it was reported that in the 45 states having sales and use tax systems, only approximately 1.6% of taxpayers in those states actually pay use tax.76 Many simply do not know about the tax.77 Another problem is enforcement.78 It would simply cost too much for state taxing agencies to audit individuals to see what they purchased online or otherwise without paying use tax.79

State and local government tax revenue loss from uncollected use taxes is large.80 The lost revenue means state and local governments have fewer resources to spend on necessary services such as public education, police protection, and road repairs.81 Or it may mean the revenue loss is offset by enacting new taxes, increasing existing tax rates, or broadening the tax base of existing taxes. Due to the prevalence of online shopping, a large portion of revenue losses likely comes from e-commerce transactions.82

The precise amount of losses from unreported use taxes is unknown.83 In 2010, it was reported that state and local governments were losing more than $7

75. See infra notes 76–79 and accompanying text.
77. Joffe-Walt, supra note 76.
78. See, e.g., HELLERSTEIN, supra note 12, at 785.
80. See infra notes 83–97 and accompanying text.
82. See, e.g., HELLERSTEIN, supra note 12, at 814 (“The most significant problem of evasion of use taxes is the states’ inability to collect taxes on out-of-state mail-order and Internet sales.”).
83. See, e.g., Helmes, supra note 81.
According to a more recent study by the University of Tennessee and the National Conference of State Legislatures, the estimated amount of revenue loss nationwide from e-commerce alone was $11.39 billion in 2012, and this figure rose to $23.26 billion when all transactions (meaning e-commerce and otherwise) were taken into account. In the four largest states by population, the estimated loss figures were as follows:

<table>
<thead>
<tr>
<th>State</th>
<th>Estimated Annual State and Local Government Revenue Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>E-Commerce: $1,904,500,000</td>
</tr>
<tr>
<td></td>
<td>All Transactions: $4,159,667,947</td>
</tr>
<tr>
<td>Texas</td>
<td>E-Commerce: $870,400,000</td>
</tr>
<tr>
<td></td>
<td>All Transactions: $1,777,090,593</td>
</tr>
<tr>
<td>Florida</td>
<td>E-Commerce: $803,800,000</td>
</tr>
<tr>
<td></td>
<td>All Transactions: $1,483,690,010</td>
</tr>
<tr>
<td>New York</td>
<td>E-Commerce: $865,500,000</td>
</tr>
<tr>
<td></td>
<td>All Transactions: $1,766,968,251</td>
</tr>
</tbody>
</table>

It should be noted that the Tennessee study has been criticized for allegedly over-exaggerating losses. Although, another study conducted by the National Conference of State Legislatures and the International Council of Shopping Centers had similar findings in a report released in March 2017. The study found that in 2015 states lost approximately $26 billion in uncollected taxes from online or remote sellers.

But even if tax revenue losses may not be as high as reported in these studies, it is clear that state and local governments have lost tax revenue. Further
adding fuel to the fire is the projection by the non-partisan organization, National Association of State Budget Officers, that nearly half the states are projected to have budget shortfalls for the 2018 fiscal year.92

States view this problem as requiring immediate attention.93 As stated by Julie Magee, former Commissioner for the Alabama Department of Revenue:

The reason we are frustrated and feel a sense of urgency is because our sales tax base has eroded ... [Alabama is] now collecting one-third of the economy in our sales tax world, where in the 70s we were collecting two-thirds of the economy.94

Revenue losses are most significant in states that do not levy state-level personal income taxes and, therefore, rely more on sales tax collections.95 Texas is one of these states, with it being estimated for the 2016-2017 budget cycle that 53% of Texas’s $108 billion estimated revenue will come from sales and use taxes.96 In 2014, Texas estimated a reversal of Quill would produce an additional $800 million for the state and an additional $200 million for local governments.97

III. HISTORY OF PHYSICAL PRESENCE NEXUS STANDARD FOR USE TAX COLLECTION

Opening remarks by Representative Lamar Smith from a 2012 House Judiciary Committee assembly where witnesses testified on the physical presence nexus standard for use tax collection serves as a useful introduction:

In the 1992 case, Quill v. North Dakota, the Supreme Court held that under the dormant commerce clause a state may not compel a retailer to collect and remit the state sales tax if the retailer lacks a physical presence in the state. In the Supreme Court’s view, to force a retailer to collect and remit taxes to more than 9,000 state, county, and local taxing jurisdictions throughout the country places a serious burden on the retailer’s ability to sell in interstate commerce. Quill’s bright-line physical presence rule for tax collection makes sense for small businesses that cannot afford to

only 7.3 percent of total retail sales. Excluding items not normally bought online, such as fuel and automobiles, e-commerce accounted for more than 10 percent of retail sales, leaving a lot of room for growth. And that seems to be the direction the trend is headed. Online sales are growing far more rapidly than sales at bricks-and-mortar stores, rising 14.6 percent in 2015 compared with total retail sales growth of 1.5 percent. Online sales accounted for 60.4 percent of total sales growth.”).94

94. Id.
95. Id.
97. Id.
track and comply with 9,000 different tax codes as a cost of doing business throughout the country. The constitution does not allow one state to reach into the pockets of another state’s retailers to exact taxation without representation. But brick-and-mortar retailers claim that the physical presence rule creates an un-level playing field between them and their online retailer counterparts. Online retailers, who maintain a very limited physical presence and use common carriers to fill orders, enjoy and competitive advantage over traditional retailers. This is because most states cannot compel the online retailer to collect and remit its sales tax and neighborhood brick-and-mortar stores, meanwhile, must collect and remit taxes on all purchases. Moreover, state and local governments view the taxes they cannot collect on most online sales as lost revenue. It is true that online consumers owe a use tax to the state in which they reside. But data shows that use taxes are easily avoided, rarely paid, and difficult to enforce. The Court’s decision in Quill was based on the observation that compliance with numerous taxing jurisdiction’s laws would be burdensome and confusing. The Constitution does not require a physical presence standard as a tax collection criterion. Congress may pass legislation that uses a different standard under its power to regulate interstate commerce.98

While these opening remarks reference the U.S. Supreme Court’s 1992 decision in Quill, the history of the physical presence nexus standard for use tax collection actually goes back to 1967 with the U.S. Supreme Court’s decision in National Bellas Hess v. Dept. of Revenue.99 These two cases are discussed separately below.

a. National Bellas Hess

National Bellas Hess (“Bellas Hess”) was a mail order company having its principal place of business in Missouri.100 It was also licensed to do business in Delaware.101 The state at issue was Illinois.102 Bellas Hess did not have offices or any other physical presence in Illinois.103 Bellas Hess’s connection to Illinois consisted of bi-annually mailing catalogues to its active, past, and potential Illinois customers.104 These mailings were supplemented with advertising flyers.105 Illinois customers desiring to purchase merchandise submitted order forms by mail that

100. Id. at 753–54.
101. Id. at 754.
102. Id.
103. Id.
104. Id. at 754–55.
105. Id.
Bellas Hess accepted at its Missouri office. The merchandise was delivered either by mail or common carrier.

The Illinois Department of Revenue ("Illinois DOR") determined Bellas Hess was a "retailer" for Illinois sales and use tax purposes, which in turn required Bellas Hess to collect and remit Illinois use taxes on sales to Illinois customers. The Illinois DOR based this determination on a statute that declared the following as an activity creating retailer status: "Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." Bellas Hess brought suit claiming the statute was unconstitutional and it did not have sufficient nexus with Illinois to be subject to the use tax collection requirement under Due Process and Commerce Clause grounds. The Illinois Supreme Court held in favor of the Illinois DOR. The U.S. Supreme Court later reversed, holding in favor of Bellas Hess, finding that an out-of-state retailer cannot be held responsible for collecting use taxes unless the retailer has a "physical presence" in the state.

In reaching its decision, the Court first summarized what the Due Process and Commerce Clauses require and observed that it had previously upheld the power of a state to impose a use tax collection responsibility in a variety of circumstances. But it further observed that it had not previously upheld a use tax collection responsibility where the out-of-state company’s connection with the subject state was only by common carrier or mail (i.e., no physical presence). The Court cited Nelson v. Sears Roebuck & Montgomery Ward & Co. as an example where this latter type of fact pattern had been differentiated from those where the seller had local retail stores in the subject state (i.e., physical presence). Ultimately holding in favor of Bellas Hess, the Court cited to Miller Bros. Co. v. State of Maryland, a case where the Court previously struck down a use tax collection responsibility even though the out-of-state company delivered merchandise in its own company trucks driven by employee drivers instead of delivering merchandise by common carrier.

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106. Id.
107. Id. at 755.
108. Id.
109. Id.; see also ILL. REV. STAT. c. 120 § 439.2 (1965). The statute has since been amended to remove the quoted definition. See 35 ILL. COMP. STAT. 105/2 (1992).
111. Id. at 754.
112. Id. at 758–60. When an out-of-state company has sufficient physical presence in a state to be required to collect use taxes, it is oftentimes referred to as the out-of-state company having sufficient "nexus" in the state.
113. Id. at 757. Noted circumstances included were: (i) sales were arranged by local agents in the subject state; (ii) a mail order business had local retail stores in the subject state; and (iii) an out-of-state business had 10 wholesalers, jobbers, or salesmen in the subject state who conducted continuous local solicitation. Id. at 757–58.
114. Id. at 758.
115. Id. (citing Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941)).
116. Id. at 758–60 (citing Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954)). Query whether delivery in the company vehicles was occasional or not. See, e.g., Richard D. Pomp, Revisiting Miller Brothers, Bellas Hess, and Quill, 65 AM. U. L. REV. 1115, 1135 (2016) (“Not surprisingly, Miller Brothers played a prominent role in the briefing and oral argument of Bellas Hess. Taxpayers had few Supreme Court victories upholding their right not to collect the use tax, so even if Miller Brothers was hardly a model of
The analysis being: if a use tax collection responsibility was not imposed in *Miller Brothers*, then how could logic dictate the imposition under the facts of *Bellas Hess*?\(^{117}\)

The Court also cited concerns with administrative burdens:

[If the power of Illinois to impose use tax burdens upon [Bellas Hess] 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 Bellas Hess’ 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 the local government.’\(^{118}\)

The analysis in *Bellas Hess* is somewhat difficult to follow, especially because the Court never explained why *Miller Brothers* was correctly decided.\(^{119}\) Indeed, in his article *Revisiting Miller Brothers, Bellas Hess, and Quill*, Professor Richard D. Pomp described the majority’s opinion in *Bellas Hess* as “unimaginative and hardly intellectually bold.”\(^{120}\)

Additionally, the Court’s analysis of the administrative burden rationale seemed incomplete as it did not explain how a company’s physical presence in a state would magically and suddenly make any administrative burdens disappear.\(^{121}\) As Professor Pomp further observed in *Revisiting*, “[h]ow this [administrative] burden would be reduced if there were ten part-time independent solicitors in the state was unaddressed.”\(^{122}\)

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119. See *supra* notes 99–118 and accompanying text.
121. See *supra* notes 99–118 and accompanying text.
b. Quill Corp. v. North Dakota

Approximately 25 years after Bellas Hess, the U.S. Supreme Court took up the physical presence issue again in Quill, having to decide whether a use tax collection responsibility could be imposed on an out-of-state (also known as remote) office supply catalog retailer.123

Quill involved a Delaware corporation that had offices and warehouses in California, Georgia, and Illinois.124 It did not have any employees who worked or resided in North Dakota.125 It did not own real property in North Dakota and its ownership of tangible property in North Dakota was either insignificant or nonexistent.126 Quill sold office supplies and equipment, soliciting business through catalogs, flyers, advertisements in national periodicals, and telephone calls.127 It delivered merchandise to North Dakota customers by mail or common carrier.128 At the time of the case, Quill was the sixth largest office supply vendor in North Dakota.129 Its annual national sales surpassed $200,000,000, out of which approximately $1,000,000 were made to roughly 3,000 North Dakota customers.130

In 1987, North Dakota amended its Tax Code to require “every person who engages in regular or systematic solicitation of a consumer market in th[e] state” to collect sales and use taxes.131 The term “regular or systematic solicitation” was defined to mean three or more advertisements within a 12- month period.132 Consequently, Quill became required to collect and remit use taxes on sales to North Dakota customers.133

Quill brought suit arguing North Dakota did not have the power to compel it to collect use taxes because it did not have nexus with North Dakota under the Due Process Clause or Commerce Clause.134 Quill won at the trial court level on the basis that the case was indistinguishable from Bellas Hess.135 The North Dakota Supreme Court, however, found in favor of the State concluding that “wholesale changes” in the law and economy made it inappropriate for Bellas Hess to continue to be followed.136 The observed economic change was “the remarkable growth of the mail order business from a relatively inconsequential market niche in 1967 to a goliath with annual sales that reached the staggering figure of $183.3 billion in 1989.”137 Furthermore, the North Dakota Supreme Court felt “advances in computer technology greatly eased the burden of compliance with a welter of complicated

124. Id. at 302.
125. Id.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id.
131. Id. at 302–03.
132. Id. at 303.
133. Id.
134. Id. at 302–04.
135. Id. at 303.
136. Id.
137. Id.
obligations imposed by state and local taxing authorities.”

The North Dakota Supreme Court ultimately concluded Quill’s “economic presence” in North Dakota made it appropriate to impose a use tax collection responsibility.

The U.S. Supreme Court, however, reversed the North Dakota Supreme and found in favor of Quill. In reaching its decision, the Court first discussed the relationship between the Due Process and Commerce Clauses in the context of the nexus requirement and concluded each clause requires separate analysis. With respect to the Due Process Clause nexus requirement, the Court observed that it “requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax” and that the “income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.” The Court stated it was “concerned primarily with the first of these requirements.” The Court observed that previous cases touching on this requirement involved facts where some sort of physical presence existed in the subject state and, indeed, Bellas Hess appeared to require this. However, the Court went on to note that Due Process Clause jurisprudence had substantially evolved since Bellas Hess, and based on those developments in the area of judicial jurisdiction, “we have abandoned more formalistic tests that focused on a defendant’s ‘presence’ within a State in favor of a more flexible inquiry into whether a defendant’s contacts with the forum made it reasonable in the context of our federal system of government, to require it to defend the suit in that State” and “have held that if a foreign corporation purposely avails itself of the benefits of an economic market in the forum State, it may subject itself to the State’s in personam jurisdiction even if it has no physical presence in the State.” The Court noted that due process analysis involves “notice” or “fair warning” and that “at the most general level, the due process nexus analysis requires that we ask whether an individual’s connections with a State are substantial enough to legitimate the State’s exercise of power over him.” Applying this due process nexus standard to Quill, the Court concluded it had nexus in North Dakota for Due Process Clause purposes.

138. Id.
139. Id. at 304.
140. Id. at 319.
141. Id. at 305 (“The two constitutional requirements differ fundamentally in several ways . . . Thus, although we have not always been precise in distinguishing between the two, the Due Process Clause and the Commerce Clause are analytically distinct.”); see also Hellerstein, supra note 12, at 41 (“Prior to Quill, the Court had considered the nexus requirement as an element of both its Due Process and Commerce Clause doctrines, and it had never indicated that there was any distinction in the meaning of the nexus requirement under either clause. Indeed, it had suggested precisely the opposite. . . .”).
142. Quill Corp., 504 U.S. at 306.
143. Id.
144. Id.
145. Id. at 306–07 (“These cases all involved some sort of physical presence within the State, and in Bellas Hess the Court suggested that such presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary.”).
146. Id. at 307.
147. Id. at 312.
148. Id. at 308.
The Court then turned to analyzing the nexus requirement under the Commerce Clause, which “prohibits certain state actions that interfere with interstate commerce.” In describing the difference between the nexus requirement for Due Process Clause and Commerce Clause purposes, the Court stated that the Commerce Clause nexus requirement was not concerned with notice or fair warning, but instead with “structural concerns about the effects of state regulation on the national economy” and that it “prohibits discrimination against interstate commerce, and bars state regulations that unduly burden interstate commerce.”

The Court also addressed the suggestion by the North Dakota Supreme Court that the Court’s 1977 decision in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) had rendered Bellas Hess obsolete for Commerce Clause purposes and that the physical presence standard was no longer required in order for a State to impose a use tax collection responsibility. The Court disagreed with this analysis holding Bellas Hess remained good law.

By declaring that Bellas Hess remained good law as to the Commerce Clause nexus requirement, this then led the way for the Court to conclude that physical presence continued to be the appropriate standard for determining whether an out-of-state seller would be held responsible for the collection of use taxes. The Court summarized its holding as follows:

In sum, although in our cases subsequent to Bellas Hess and concerning other types of taxes we have not adopted a similar bright-line physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that Bellas Hess established in the area of sales and use taxes. To the contrary, the continuing value of a bright-line rule in this area and the doctrine and principles of stare decisis indicate that the Bellas Hess rule remains good law. For these reasons, we disagree with the North Dakota Supreme Court’s conclusion that the time has come to renounce the bright-line test of Bellas Hess.

The Court also commented on the benefit of the bright-line physical presence rule established in Bellas Hess, even though it admitted the bright-line rule was “artificial at its edges:”

Like other bright-line tests, the Bellas Hess rule appears artificial at its edges: whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or offices. . . . This artificiality, however, is more than offset by the benefits of a clear rule. Such as rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. . . . Moreover, a bright-line rule in the area

149. Id. at 309.
150. Id. at 312.
151. Id. at 313–14.
152. Id. at 311–12.
153. Id. at 314–19.
154. Id. at 317–18.
of sale and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. Indeed, it is not unlikely that the mail-order industry’s dramatic growth over the last quarter-century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*.155

Interestingly, in the end the Court seemed as if it might not have full confidence in its decision by inviting Congress to change the result, stating “our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.”156

Also interesting is that the Court further seemed to suggest that it might have reached a different decision if *Quill* had been a case of first impression.157

**IV. THE AFTERMATH: WHAT HAPPENED AFTER QUILL?**

The aftermath of *Quill* has brought about illogical results and revenue losses to the states.158

**i. Illogical Results**

Both *Bellas Hess* and *Quill* failed to explain how a bright-line physical presence rule for use tax collection magically causes administrative burdens to disappear.159 Consider these hypotheticals:

**Hypothetical 1:** You may be familiar with the GEICO® commercial where the well-known gecko appears on historic State Street in downtown Bristol.160

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155. *Id.* at 315–16.
156. *Id.* at 318; see also, e.g., ‘Economic Presence’ Enough for Sales Tax? Relying on Quill May Be Hazardous, TAX EXEC. (Aug 24, 2016), http://taxexecutive.org/economic-presence-enough-for-sales-tax-relying-on-quill-may-be-hazardous/ (“When the Supreme Court issued its decision in *Quill*, it expressed some doubt, recognizing that commerce was becoming less dependent on traditional sales at brick-and-mortar companies. The Court invited Congress to clarify nexus for sales tax purposes, but so far Congress has not done so.”).
157. *Id.* at 311 (“While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases.”).
158. See also *HELLERSTEIN*, supra note 12, at 42 (discussing the barrage of litigation after *Quill* regarding what constitutes physical presence).
159. See, e.g., *Pomp*, supra note 116, at 1145.
An historic feature of State Street, which is like a downtown Main Street, is that the middle of the street marks the official state line between Tennessee and Virginia.161 So there is a Bristol, Tennessee and a Bristol, Virginia.162 Because of the uniqueness of the state line being in the middle of the street, you can actually be in two states at the same time.163 Indeed, in the GEICO® commercial the gecko jumps back and forth between Tennessee and Virginia eventually standing in the middle of the street declaring that he’s in “Virginessee” or “Tenniginia.”164 Because the street is lined with shops, an interesting result can occur for sales and use tax collection purposes. Assume there is a brick-and-mortar store on the Virginia side (and assume this is the only brick and mortar location) that sells antique clocks both in the Virginia storefront and online. Further assume that a Tennessee resident orders a clock from the store online. Because the store only has physical presence in Virginia, it would not be required to collect and remit Tennessee use tax on the online order even though the seller is physically located on a street half of which is actually in Tennessee, and most likely has Tennessee residents crossing the street on a regular basis to come into the store.165

Hypothetical 2: Assume there is a small Internet business located in Clovis, New Mexico. The business has no brick-and-mortar stores and 100% of its sales are from online orders. The business sells collegiate fleece pullovers and 90% of its business comes from orders made by residents located in Lubbock, Texas where Texas Tech University is located.166 Clovis is located 9 miles west of the Texas border and the driving distance between

162. Id.
163. Id.
164. Discover Bristol, supra note 160.
165. See discussion supra Part II.
Clovis and Lubbock is approximately 1 hour and 40 minutes. The other 10% of sales are to residents in various other Texas cities. Even though 100% of the company’s sales are to Texas residents and it is only 9 miles west of the Texas border, the company would not be required to collect and remit Texas sales and use taxes on the sales.

**Hypothetical 3**: Assume an Internet business has its headquarters in Washington state. It also has physical presence in 4 other states by way of warehouses and distribution centers. Despite having physical presence in only 5 states, it has “economic presence” in all 50 states because it makes sales to customers nationwide. Further assume that sales for the 4 most recent quarters were $21.7 billion nationwide. This fact pattern describes Amazon back in 2009. In 2009, Amazon collected sales and use taxes in only 5 states, despite generating $21.7 billion in sales nationwide.

These hypotheticals, while perhaps extreme, illustrate the illogical results arising under *Quill*. In Hypothetical 1, how is it administratively burdensome to require a business to collect and remit sales and use taxes on the online Tennessee sale when it is already collecting and remitting taxes in Virginia (right across the street)? In Hypothetical 2, how is it administratively burdensome to require the business to collect and remit sales and use taxes in the only state where it has sales? In Hypothetical 3, how is it administratively burdensome to require a business generating $21.7 billion in sales nationwide to collect and remit sales and use taxes? Businesses have argued that the administrative burden involves them being required to know the sales and use tax rates and reporting rules in each state, including various local jurisdictions. But is this not simply a cost of doing business? In fact, businesses have other logistics to decipher, such as how to compute shipping charges and how to logistically deliver products on time to destinations across the county.

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168. See discussion supra Part II.


171. See discussion supra Part II.

How is sales and use tax collection any different, especially when computer software is available to electronically compute and remit required taxes?\(^\text{173}\)

Businesses also sometimes argue they do not receive any benefits from states where they are not physically present.\(^\text{174}\) But this argument seems to break down quickly. Businesses obtain benefits from access to (i) common carriers and the U.S. postal service located in the states used to make deliveries and returns; (ii) roads used by common carriers and the U.S. Postal Service; (iii) court systems to litigate customer disputes or collect on delinquent accounts; (iv) trash services where customers throw away catalogs and mailers; and (v) Internet infrastructure.\(^\text{175}\)

\section*{ii. States Attempts to Combat Revenue Losses}

As discussed in Part II, \textit{Quill} has resulted in revenue losses to the states. Because of the revenue losses, states began crafting ways to use tax collection responsibilities on remote sellers within the boundaries of \textit{Quill}.\(^\text{176}\)

One example is implementation by some states of what is commonly called “click-through” nexus.\(^\text{177}\) These statues/regulations are also sometimes called

\begin{itemize}
\item \textit{Quill} Corp. v. North Dakota, 504 U.S. 298, 328 (1992) (concurring in part and dissenting in part, Justice White stated: “Nevertheless, an out-of-state direct marketer derives numerous commercial benefits from the State in which it does business. These advantages include laws establishing sound local banking institutions to support credit transactions; courts to ensure collection of the purchase price from the seller’s customers; means of waste disposal from garbage generated by mail-order solicitations; and creation and enforcement of consumer protection laws, which protect buyers and sellers alike, the former by ensuring that they will have a ready means of protecting against fraud, and the latter by creating a climate of consumer confidence that inures to the benefit of reputable dealers in mail-order transactions.”).
\item See \textit{infra} notes 177--193 and accompanying text; \textit{see also} Mark P. Rotatori et al., \textit{The Past and Uncertain Future of “Quill” and the Physical Presence Standard}, BLOOMBERG BNA, WEEKLY STATE TAX REPORT (2015).
\item See \textit{Hellerstein}, supra note 12, at 44--54; \textit{see also} ‘Economic Presence’ Enough for Sales Tax? \textit{Relying on Quill May Be Hazardous}, TAX EXECUTIVE (Aug. 24, 2016), http://taxexecutive.org/economic-presence-enough-for-sales-tax-relying-on-quill-may-be-hazardous/ (“Companies have also seen states engaging in various nexus-expansion approaches, such as so-called click-through nexus. This kind of law, pioneered by New York State, asserts nexus over a company that enters into an agreement with state residents to post links to the company’s products on their websites in exchange for compensation.”); Rebecca Helmes, \textit{Sales and Use Tax on Remote Sales: Do Varied State Approaches Warrant Federal Action}, BLOOMBERG BNA (May 9, 2014), https://www.bna.com/sales-tax-remote-n17179890310/ (“States have been cobbled together their own approaches for capturing sales and use tax from remote sellers since the U.S. Supreme Court’s landmark \textit{Quill Corp. v. North Dakota} case, creating inconsistent and uncertain tax collection obligations for multistate businesses. That is once again on display this year in Bloomberg BNA’s annual \textit{Survey of State Tax Departments}. Click-through nexus is one example.”);
\end{itemize}
“Amazon laws.”\textsuperscript{178} The purpose is to impose physical presence on remote sellers by way of attributing the physical presence of an in-state representative.\textsuperscript{179} The notable case involving click-through nexus is the New York case involving both Amazon.com and Overstock.com.\textsuperscript{180} At issue was the “Affiliates Program” both companies used where third parties placed links on their websites and then when customers clicked on those links it sent the customers to Amazon’s and Overstock’s websites from where the customers then completed their purchases.\textsuperscript{181} The in-state representatives participating in the Affiliates Programs received commissions based on the percentage of revenues generated from customers “clicking through” the in-state website links.\textsuperscript{182}

To cause Amazon and Overstock (and other similar companies) to have nexus in New York for sales and use tax collection purposes, a law was enacted where this activity was deemed to constitute physical presence:

[A] person making sales of tangible personal property or services taxable under this article (‘seller’) shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods.\textsuperscript{183}

Amazon and Overstock brought suit alleging the statute was unconstitutional citing Due Process and Commerce Clause concerns.\textsuperscript{184} They ultimately lost.\textsuperscript{185} They petitioned the U.S. Supreme Court, but the writ of certiorari

\begin{footnotes}

\footnote{See Erika Lunder & Carol Pettit, “Amazon Laws” and Taxation of Internet Sales: Constitutional Analysis, \textsc{Congressional Research Service} (Nov. 28, 2014) (“In recent years, some states have enacted laws, often called ‘Amazon laws’ in reference to the Internet retailer, to try to capture uncollected taxes on Internet sales and yet still comply with the Constitution’s requirements. States have used two basic approaches. The first is enacting ‘click-through nexus’ statutes which imposes the responsibility for collecting tax on those retailers who compensate state residents for placing links on their websites to the retailer’s website (i.e., use online referrals).”).


\footnote{Id.}
\footnote{Id. at 633.}
\footnote{Id. at 631.}
\footnote{Id. at 632.}
\footnote{Id. at 591–92.}
\footnote{Id. at 593.}
\footnote{Id. at 597.}}
was denied in 2013.\textsuperscript{186} It is estimated that 20 states have click-through nexus laws (as of January 2016).\textsuperscript{187}

Another example of a state not sitting idly by in the wake of \textit{Quill} is Colorado.\textsuperscript{188} In 2010, Colorado enacted “information reporting” laws requiring remote sellers to file certain information with the Colorado Department of Revenue, including the names of customers who made purchases where sales and use taxes were not collected and the amount of such purchases.\textsuperscript{189} In effect, Colorado acknowledged that it could not require remote sellers to collect use taxes due to \textit{Quill}, so it did what it thought was the next best thing of requiring remote sellers to provide the necessary information to the Department of Revenue so they had the information to directly assess the purchasers for unpaid use taxes.\textsuperscript{190} The Direct Marketing Association (“DMA”), a trade association, brought suit asserting the information reporting requirement was unconstitutional.\textsuperscript{191} DMA ultimately lost and petitioned the U.S. Supreme Court to hear the case.\textsuperscript{192} The writ of certiorari was denied on December 12, 2016.\textsuperscript{193}

Most recently, states have become more brazen by enacting what are commonly called “economic presence” laws related to use tax collection.\textsuperscript{194} These laws go squarely against \textit{Quill} by imposing a use tax collection responsibility on remote sellers based on the amount of sales or revenues generated in the state rather than physical presence.\textsuperscript{195} The end goal being to cause the U.S. Supreme Court to revisit \textit{Quill}.\textsuperscript{196} Indeed, Justice Kennedy, in his concurring opinion in the DMA Marketing case (discussed above), expressly suggested \textit{Quill}’s physical presence standard needed to be revisited, noting that the holding in \textit{Quill} was “tenuous” and has led to “extreme harm and unfairness on the States.”\textsuperscript{197}


\textsuperscript{188} See, e.g., Hamilton, supra note 18.


\textsuperscript{190} See id.

\textsuperscript{191} See id.

\textsuperscript{192} See, e.g., Tripp Baltz, \textit{Hazy Outlook for High Court Probe of DMA Appeal: Sources}, BLOOMBERG BNA (Sept. 2, 2016), https://www.bna.com/hazy-outlook-high-r7301444714/.


\textsuperscript{194} See \textit{infra} notes 195–200 and accompanying text.

\textsuperscript{195} See discussion supra Part III.


\textsuperscript{197} \textit{Direct Mktg. Ass’n v. Brohl}, 135 S. Ct. 1124, 1134 (2015), rev’g 735 F.3d 904 (10th Cir. 2013); \textit{see also generally} Hamilton, supra note 18 (“For the states, the door to ‘killing Quill’ was opened—at
Alabama led the economic presence movement with implementation of Ala. Admin. Rule No. 810-6-2-.90.03. Alabama’s economic nexus standard is currently in litigation. However, South Dakota has now steamrolled ahead of Alabama and all other states pursuing economic nexus laws and regulations. On January 12, 2018, the U.S. Supreme Court granted the petition for writ of certiorari to hear South Dakota’s case, South Dakota v. Wayfair, Inc, and oral arguments were held on April 17, 2018.

least a crack—in 2015 by Supreme Court Justice Anthony M. Kennedy in Direct Marketing Association v. Brohl, which challenged Colorado’s 2010 law that requires out-of-state sellers that don’t collect sales and use tax on sales made into the state to provide notices to purchasers and report information about those sales to the state Department of Revenue. In a concurring opinion, Justice Kennedy agreed with the majority opinion in the case, which favored the state. He also made what he called a ‘separate statement concerning what may well be a serious, continuing injustice faced by Colorado and many other States.’ In this statement, he encouraged the states to bring a challenge to Quill, noting how much electronic commerce had evolved since Quill was decided in 1992. He referred to Quill as ‘[a] case questionable even when decided.’ States quickly took up the invitation, first with Alabama’s challenge made by rule change in 2015, followed by South Dakota’s ‘economic nexus’ law in 2016.”; Rebecca Newton-Clarke, “Growing Online Tax Reach,” BLOOMBERG BNA (May 4, 2017). For more information on Alabama’s congress-feel-n57982076514/ (“Alabama, which took the lead by adopting its regulation months after Kennedy’s concurrence, received its long-awaited lawsuit when online retailer Newegg, Inc. brought the first challenge in June...”)”; Jennifer McLoughlin, E-Retailers, South Dakota Agree: Strike Digital Sales Tax, BLOOMBERG BNA (Aug. 15, 2016), https://www.bna.com/eretailers-south-dakota-n73014444403/ (“South Dakota and Alabama have led the charge against Quill, enacting economic nexus standards that disregard the physical presence rule. Those efforts heeded the call from Justice Anthony Kennedy, who suggested in a March 2015 concurring opinion that Quill may be outdated and ripe for the U.S. Supreme Court’s reconsideration. . . .”); Eric Yauch, Getting to Quill: The Path to Overturning an Outdated Supreme Court Decision, TAX ANALYSTS (Feb. 3, 2016), http://www.taxanalysts.org/content/news-analysis-getting-quill-path-overturning-outdated-supreme-court-decision. 200. South Dakota, Petitioner v. Wayfair, Inc., et al., U.S. SUPREME COURT, https://www.supremecourt.gov/search.aspx?filename=docket/docketfiles/html/public/17-494.html (last visited May 3, 2018).
In addition to the above state efforts, at various times Congress has attempted to overturn Quill with federal legislation.\footnote{See, e.g., Thomas Godfrey, Remote Seller Sales & Use Tax Collection: Online Sales; Marketplace Fairness; Act Now, BLOOMBERG BNA WEEKLY STATE TAX REPORT (Mar. 27, 2015), https://www.bna.com/uploadedFiles/BNA_V2/PDF/2015/Godfrey_perspective.pdf; Andrew J. Haile et al., A Potential Game Changer in E-Commerce Taxation, TAX ANALYSTS (Mar. 11, 2013), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3436&context=facpub; Jennifer McLoughlin, E-Retailers, Congress Feel Heat From States' Digital Tax Frenzy, BLOOMBERG BNA (July 5, 2016), https://www.bna.com/eretailers-congress-feel-n57982076514/ (“For almost 15 years, Congress has toyed with the concept of one nexus standard governing all states, but various proposals either stalled or never materialized into a formally introduced design.”).} In fact, legislation to overturn Quill has been pending in Congress more or less continuously since the case was decided.\footnote{See, e.g., Terry Ryan & Eric J. Miethke, A ‘Radical’ Solution to the Internet Sales Tax Problem, TAX NOTES (July 29, 2014) (stating “[s]hortly after the U.S. Supreme Court decided Quill in 1992, Congress introduced legislation to overturn it. In fact, legislation has been pending in Congress almost continuously since then Sen. Dale Bumpers introduced his Tax Fairness for Main Street Business Act in 1994”).} Federal legislative attempts to overturn Quill have been unsuccessful so far.\footnote{For information on bills introduced in 2017, see, e.g., Paige Jones, Remote Sales Tax Bills Reintroduced in Congress, TAX NOTES (Apr. 28, 2017) (“Federal bills on state remote sales taxation were reintroduced April 27, kicking off this year’s congressional efforts on the topic.”). For information regarding bills introduced in 2016, see, e.g., Jennifer McLoughlin, A Primer: The Congressional Battle Over Digital Sales Tax, BLOOMBERG BNA (Sept. 16, 2016), https://www.bna.com/primer-congressional-battle-d57982077192/; For general information on federal legislative efforts to overturn Quill, see, e.g., Scott T. Allen, Adapting to the Internet: Why Legislation is Needed to Address the Preference for Online Sales that Deprives States of Tax Revenue, 66 TAX LAW 939 (2013).}

V. WHAT CAN BE LEARNED FROM THE WINE INDUSTRY?

There are many reasons why Quill’s physical presence standard for use tax collection should be abandoned.\footnote{See discussion supra Part IV.} There have been many excellent articles written on this subject.\footnote{See supra note 18 (listing examples of articles written on subject).} Taking a related but different focus, the concentration of this article is looking to the wine industry. More specifically, this article makes several observations about what we can learn from the U.S. Supreme Court decision in Granholm v. Heald and the aftereffects, which helps provide further support for an abandonment of Quill.

Some background about the wine industry and Granholm is presented first as it is helpful in understanding the conclusions reached in this article.

As discussed in Part II, sales and use taxes are paid by the end-user consumer and collected by the retailer if the retailer has sufficient nexus in the state where the item is sold. As wine is an item of tangible personal property, sales and use taxes are imposed on the retail purchase of wine.\footnote{See discussion supra Part I. Notably, there are a few exceptions. See, e.g., Wine Compliance Rules, WINE INSTITUTE, https://wineinstitute.compliancerules.org (last visited Apr. 23, 2018).} Thus, if the seller has nexus for sales and use tax collection purposes in the subject state, then the seller collects
the taxes from the end-user customer and remits them to the state revenue department.207

States also impose excise taxes on wine.208 Excise tax rates are typically a percentage imposed on the volume of wine sold to the retailer.209 Rates vary amongst the states.210 Excise taxes are typically paid by the distributor.211 The distributor also remits the taxes and files state excise tax returns with the state revenue departments.212 The “distributor,” along with the “manufacturer” and “retailer” are the parties in the wine industry making up what is commonly called the “3-tier system” of alcohol distribution.213

The 3-tier system dates back to the end of Prohibition.214 The repeal of Prohibition occurred in 1933 with the passage of the 21st Amendment to the U.S. Constitution.215 Section 1 of the 21st Amendment repealed Prohibition while Section 2 gave the states power to regulate their alcohol markets (to the point of forbidding the sale of alcohol and remaining dry if they so desired).216 Sections 1 and 2 of the 21st Amendment provide:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. . . . 217

Not surprisingly, with the end of Prohibition, states began to exercise their right to regulate alcohol.218 There are two categories of state regulation: (i) control

207. See discussion supra Parts I & II.
209. See, e.g., State Tax Rates on Wine, supra note 208.
210. See id.
212. See id.
214. See, e.g., Mendelson, supra note 208, at 13–19.
215. See id.
216. See id. at 195.
218. See, e.g., Mendelson, supra note 208, at 195.
states, and (ii) open license states. In control states, the state government controls the sale of alcohol through government agencies at the distributor and/or retail level. Most states, though, operate as open license states where they maintain licensing systems for private businesses to engage in the sale and distribution of alcohol through the 3-tier system.

The 3-tier system separates manufacturers, distributors, and retailers into distinct and independent tiers, where a licensee of one tier generally cannot be a licensee of another tier. Tier 1 comprises manufacturers, which includes wineries, as well as breweries and distilleries. Under the 3-tier system, manufacturers are allowed to sell their products only to the Tier 2 distributors, also sometimes referred to as wholesalers. The Tier 2 distributors are then allowed to sell only to retailers, which includes restaurants, taverns, bars, and retail market stores, such as Spec’s® and Total Wine & More®. The Tier 3 retailers are the only tier within the 3-Tier system allowed to make sales to end-user consumers. The diagram below shows how the 3-tier system works:

![Diagram of the 3-tier distribution system]

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220. See, e.g., Mendelson, supra note 208, at 17.

221. See, e.g., id. at 15; Hamilton, supra note 219.

222. See, e.g., Mendelson, supra note 208, at 206–07; NAT’L ALCOHOL BEVERAGE CONTROL ASS’N, THE THREE-TIER SYSTEM: A MODERN VIEW 1–5 (2015), https://web.archive.org/web/20170815204443/http://ali.state.al.us/documents/1Three-TierSystemModernView.pdf (noting that the specifics of the licensing regimes in each of the open states vary); Hamilton, supra note 219 (noting that under the 3-tier system “[e]verybody had a piece of the pie, but nobody got more than one piece.”).

223. See supra note 222 and accompanying text.

224. See id.

225. See id.

226. See id.
Those who support the 3-tier system argue that it ensures the efficient payment of excise taxes and prevents alcohol from getting into the hands of underage individuals.\textsuperscript{227} There has been much debate about the pros and cons of the 3-tier system.\textsuperscript{228} Some describe it as necessary for the reasons outlined above, as well as other reasons, including the argument that it helps secure market access for manufacturers.\textsuperscript{229} Others, however, describe the 3-tier system as inefficient, unnecessary, and existing only to protect the profits of distributors.\textsuperscript{230}

While a full discussion of the pros and cons on the 3-tier system is beyond the scope of this article, one significant disadvantage of the system relevant to this article is that it did not accommodate consumers who wanted to purchase wine directly from a winery (\textit{i.e.}, the manufacturer).\textsuperscript{231} Consider this:

\textbf{Fact Pattern:} You are from Texas and you visit a winery in Napa Valley, California. You take a tour and enjoy a wine tasting. Before you leave, you would like to purchase a bottle of wine to take back home with you to Texas.

It is this and similar fact patterns that caused many states in the 1970s to craft exceptions to the 3-tier system whereby wineries (\textit{i.e.}, the manufacturers) became allowed to sell wine directly to consumers, but only to consumers who visited their wineries.\textsuperscript{232}

Fast forward to the Internet age and you likely already can see what happened: consumers wanted to buy wine directly from winery websites.\textsuperscript{233} And not surprisingly, wineries wanted to fulfill this demand.\textsuperscript{234} Especially small wineries that needed to depend on online sales as part of their business model.\textsuperscript{235}

\textsuperscript{227} See, \textit{e.g.}, NAT’L ALCOHOL BEVERAGE CONTROL ASS’N, supra note 222.


\textsuperscript{229} See, \textit{e.g.}, When Wine Enters, Sense Leaves, supra note 228; What’s The Three Tier System and Why is It Corroding?, supra note 228.

\textsuperscript{230} See, \textit{e.g.}, When Wine Enters, Sense Leaves, supra note 228; What’s The Three Tier System and Why is It Corroding?, supra note 228.

\textsuperscript{231} See supra notes 222–226 and accompanying text.

\textsuperscript{232} See, \textit{e.g.}, Mendelson, supra note 208, at 207.


\textsuperscript{234} See, \textit{e.g.}, Mendelson, supra note 208, at 207.

\textsuperscript{235} See, \textit{e.g.}, William C. Green, Creating a Common Market for Wine: Boutique Wines, Direct Shipment, and State Alcohol Regulation, 39 OHIO N.U. L. REV. 13, 14 (2012) (“The American wine industry has changed substantially with the establishment of several thousand boutique wineries. These small wineries found it difficult to sell their limited production to customers in other states, in spite of the access provided by the Internet and package delivery services, because state governments were unwilling to permit out-of-state wineries to ship directly to consumers. In response, these boutique wineries, their producer associations, and customers sued states in federal court.”).
Some states began allowing wineries to ship directly to consumers, even though it seemingly eroded the traditional 3-tier system. But the rules put in place by the states oftentimes discriminated against out-of-state wineries as compared to in-state wineries. Richard Mendelson, an internationally-recognized expert on vineyard and wine law, described the situation like this in his book WINE IN AMERICA:

By 2003, 30 states permitted winery direct-to-consumer shipments within the state. Of this number 24 states also allowed some form of direct interstate shipping. Thirteen of these 24 passed “reciprocity” laws that granted out-of-state wineries the right to ship a certain amount of wine per month to an in-state consumer on the express condition that the winery’s home state must afford wineries in the destination state a similar direct-to-consumer privilege. Some of the remaining 11 states allowed direct shipping by out-of-state wineries, but placed restrictions on their interstate shipments that were not imposed on intrastate shipments. Still, approximately half the states allowed no direct interstate shipments at all, and some of these states made it a felony for out-of-state wineries to ship wine to in-state consumers.

As to the restrictions placed on interstate shipments that were not imposed on intrastate shipments, Mendelson further points out: “[t]he states made these decisions under the authority of the Twenty-first Amendment, presumably without considering the requirements of the dormant Commerce Clause.” Stated differently, states took the position they could discriminate against interstate commerce because they believed the 21st Amendment’s grant to them of the power to regulate alcohol trumped the Commerce Clause.

This situation set the stage for the U.S. Supreme Court case Granholm v. Heald. Granholm was a consolidated case involving state laws in Michigan and New York that allowed in-state wineries to ship directly to consumers in the state but not out-of-state wineries. The discriminatory treatment was easy to spot with the Michigan law. The Michigan law gave in-state wineries the ability to ship directly to consumers as long as the winery obtained a license and adhered to certain requirements, but out-of-state wineries were not afforded this opportunity. The differential treatment led to increased prices to Michigan consumers wanting to purchase the out-of-state wines, and in some cases even led to small wineries being

236. See, e.g., Mendelson, supra note 208, at 206–15.
237. See id., at 207–08.
238. Id.
239. Id. at 208.
240. See infra notes 236–239 and accompanying text; see also infra note 252 and accompanying text.
242. Id. at 465–66; see also, e.g., Mendelson, supra note 208, at 209.
244. Id.
barred from entering the Michigan market because wholesalers would choose not to contract with small wineries.245

New York’s law was different. It did not ban direct shipments by out-of-state wineries altogether.246 Instead, out-of-state wineries could obtain a license to acquire direct shipping privileges (just like an in-state winery), but only if the out-of-state winery established a physical presence in New York by forming a branch office or warehouse in the state.247 The “physical presence” requirement effectively created a system where in-state wineries had direct-shipping access to New York consumers on a preferential basis.248 The Court was keen to point out that the cost of requiring an out-of-state winery to open up a branch office or warehouse in New York led to the result where “not a single out-of-state winery has availed itself of New York’s direct shipping privilege.”249

The Court had no problem concluding that the direct shipping laws in both Michigan and New York discriminated against interstate commerce.250 At the heart of the case was Michigan and New York’s argument that they were allowed to engage in the discrimination because of Section 2 of the 21st Amendment.251 In effect, Michigan and New York argued that Section 2 of the 21st Amendment trumped the Commerce Clause and allowed states to discriminate against out-of-state wineries.252

After a lengthy discussion of history both before and after Prohibition, the history of the 18th and 21st Amendments, the Wilson Act, the Webb-Kenyon Act, and applicable cases, the Court ultimately concluded that “the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give discriminatory preference to their own producers.”253

In reaching its decision, though, the Court also had to consider whether the Michigan or New York law “advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives.”254 New York and Michigan argued such was the case under two theories: (1) keeping alcohol away from underage individuals; and (2) tax collection.255 The States did not prevail on either theory.256

The tax collection issue is relevant to this article. New York and Michigan argued (unsuccessfully) that their laws were necessary because without them there would be lost revenue from unpaid taxes.257 Somewhat interestingly, at first glance,
it a bit difficult to tell whether the Court’s opinion addresses the tax collection issue only with respect to excise taxes or with respect to both excise taxes and the collection of use taxes. The relevant part of the Court’s opinion states:

The States’ tax collection justification is also insufficient. Increased direct shipping, whether originating in state or out of state, brings with it the potential for tax evasion. With regard to Michigan, however, the tax-collection argument is a diversion. This is because Michigan, unlike many other States, does not rely on wholesalers to collect taxes on wines imported from out-of-state. Instead, Michigan collects taxes directly from out-of-state wineries on all wine shipped to in-state wholesalers. Mich. Admin. Code Rule 436.1725(2) (1989) (“Each outside seller of wine shall submit . . . a wine tax report of all wine sold, delivered, or imported into this state during the preceding calendar month”). If licensing and self-reporting provide adequate safeguards for wine distributed through the three-tier system, there is no reason to believe they will not suffice for direct shipments.

New York and its supporting parties also advance a tax-collection justification for the State’s direct-shipment laws. While their concerns are not wholly illusory, their regulatory objectives can be achieved without discriminating against interstate commerce. In particular, New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping. This is the approach taken by New York for in-state wineries. The State offers no reason to believe the system would prove ineffective for out-of-state wineries. Licensees could be required to submit regular sales reports and to remit taxes. Indeed, various States use this approach for taxing direct interstate wine shipments, e.g., N. H. Rev. Stat. Ann. 178.27 (Lexis Supp. 2004), and report no problems with tax collection. See FTC Report 38-40. This is also the procedure sanctioned by the National Conference of State Legislatures in their Model Direct Shipping Bill. See, e.g., S. C. Code Ann. 61-4-747(C) (West Supp. 2004).

Focusing first on the discussion of Michigan in the first paragraph above, Mich. Admin Code Rule 436.1725(2) is a rule related solely to excise taxes. However, in the second paragraph above, the Court’s reference to the FTC Report and the Model Direct Shipping Bill relates to both excise taxes and the collection of sales and use taxes. Furthermore, the party’s briefs on the tax collection issue discussed both excise taxes and the collection of sales and use taxes. Thus, it seems

258. See infra notes 259–261 and accompanying text.
clear the Court’s decision on this issue related to both excise taxes and the collection of sales and use taxes.\textsuperscript{261}

With this in mind, the remaining focus of this article is looking to what can be observed from Granholm and the aftereffects of the decision that can be used to provide additional support for overturning Quill. This discussion is broken out into five subparts below.

\textbf{i. Granholm Allows Tax Collection Despite No Physical Presence}

The first observation is that the Granholm decision allows states to impose a use tax collection responsibility on out-of-state wineries despite such wineries not having a physical presence in the state.\textsuperscript{262} Recall that under Quill an out-of-state company without physical presence in the state(s) to which it is shipping is not required to collect use taxes.\textsuperscript{263} However, the Court in Granholm did not impose this same physical presence requirement, and instead allowed states to impose a use tax collection responsibility on out-of-state wineries in conjunction with obtaining the necessary permit to gain direct-shipping access.\textsuperscript{264}

Consider the National Conference of State Legislature’s Model Direct Shipping Act, which provides in relevant part:

\begin{quote}
All Wine Direct Shipper Licensees shall:

\begin{itemize}
  \item (e) If located outside of this state, annually pay to the [State Revenue Agency] all sales taxes and excise taxes due on sales to residents of [State] in the preceding calendar year, the amount of such taxes to be calculated as if the sale were in [State]. . . .
\end{itemize}
\end{quote}

In implementing Granholm, states have adopted language similar to the Model Act’s language requiring out-of-state wineries to obtain a sales tax permit in order to receive a direct shipping permit.\textsuperscript{265} By way of example, three of the largest

\begin{footnotesize}
\begin{enumerate}
  \item See supra notes 258–260 and accompanying text.
  \item See supra notes 241–250.
  \item See supra note 259.
  \item See infra notes 267–282 and accompanying text.
\end{enumerate}
\end{footnotesize}
direct shipment states (California, Texas, and New York) require this. The relevant parts of the direct shipping permit applications for these states are set forth below.

California Department of Alcoholic Beverage Control, Wine Direct Shipper Permit Application  
(b) A wine direct shipper permit authorizes the permitholder to do all of the following:

...  
(5) If the permitholder is located outside of this state, pay to the State Board of Equalization all sales and use taxes, and excise taxes on sales to residents of California under the wine direct shipper permit. . . .

Texas Form L-DS-I, Out-of-State Winery Direct Shipper’s Permit

This permit may only be issued to a person who:


268. See supra notes 269–274 and accompanying text; see also Getting REAL about DtC Shipping: Issues Wineries Need to Consider, SHIPCOMPLIANT, http://go.sovos.com/GettingRealaboutDtCShipping-OnDemandVideo.html?aliId=43204372 (indicating that most states usually require wineries to register for sales/use tax collection and excise taxes in order to obtain an out-of-state winery direct shipping permit). However, a handful of states do not require sales/use tax collection or payment of excise taxes. See id. For example, the District of Columbia does not require a permit for direct shipping, and by extension does not require tax registrations for sales/use tax collection or the payment of excise taxes. See id. Another example is Florida, which does not require a permit for direct shipping but does require the out-of-state winery pay excise taxes. See id. With respect to sales/use tax collection, Florida gives the winery the option to collect or include information in the shipment that details the purchaser’s responsibility to directly remit sales/use taxes. See id. Another example is Massachusetts, which requires out-of-state wineries to pay excise taxes but does not require use tax collection. See New Direct Wine Shipper License Applications Now Available for Massachusetts, SHIPCOMPLIANT, (Mar. 9, 2018), https://www.shipcompliant.com/blog/2014/11/24/new-direct-shipper-permit-applications-now-available-massachusetts/.

269. Wine Direct Shipper Permit Application, CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, http://www.abc.ca.gov/forms/ABC248.pdf (last visited Mar. 9, 2018). California is somewhat unique to the other direct shipping states because a larger amount of direct shipment of sales occur inside California as compared to other states. See id. The significance is that these inside-state sales would not be relevant to the issues discussed in this article. California continues to be relevant, though, because it still has a large amount of winery direct sales being shipped outside of California. A statistic related to Napa Valley shows that only 32% of direct-to-consumer winery sales go to California residents. See, e.g., Wine Industry Metrics, WINES & VINES (June 15, 2017), https://www.winesandvines.com/template.cfm?section=wide&wideDomain=dtc&wideYYYYMM=201705. However, another statistic related to California direct-to-consumer shipping indicates that 96% of California’s direct-to-consumer sales are from California wineries. See supra note 269. Further, but for other typical wine producing states, the figures are lower. For example, in Oregon, 61% of Oregon residents received their direct shipments from Oregon wineries. Id. For Washington State residents, only 47% received their direct shipments from Washington State wineries. Id.
Does not hold a winery permit in the State of Texas;
Operates a winery located in the United States and holds all state and federal permits necessary to operate the winery at the permitted location, including the federal winemaker’s and blender’s basic permit;
Holds a Texas Sales Tax Permit;
Expressly submits to personal jurisdiction in Texas state and federal courts and expressly submits to venue in Travis County, Texas, as proper venue for any proceeding that may be initiated by or against the commission; and
Does not directly or indirectly have any financial interest in a Texas wholesaler or retailer as those terms are used in Section 102.01 of the Alcoholic Beverage Code.270

New York Application for a New York Out-of-State Direct Shipper’s License, ABC Law § 79-2, 3 Year License

THE APPLICANT VOLUNTARILY ACCEPTS THE FOLLOWING CONDITIONS IN CONNECTION WITH THE ISSUANCE OF AN OUT-OF-STATE DIRECT SHIPPER’S LICENSE, AND AS AN APPLICANT AND LICENSEE WILL ABIDE BY THE FOLLOWING CONDITIONS:

6. The Licensee will file returns with and pay to the New York State Department of Taxation and Finance all State and local sales taxes and excise taxes due on sales into New York State in accordance with the applicable provisions of the New York State Tax Law relating to such taxes, the amount of such taxes to be determined n [sic] the basis that each sale in this State was at the location where delivery is made.”271

Similarly, Pennsylvania, which is one of the most recent states to grant direct shipping privileges to out-of-state wineries (and one of the largest wine markets in the United States),272 also requires out-of-state wineries to obtain a sales

272. See Pennsylvania Legalizes Winery Direct Shipping, Grocery Store Wine Sales, WINE SPECTATOR, http://www.winespectator.com/webfeature/show/id/Pennsylvania-Legalizes-Winery-Direct -Shipping (last visited Mar. 10, 2018); see SOVOS SHIPCOMPLIANT, supra note269, at 5, 29 (stating that Pennsylvania began issuing permits in August 2016 and wineries “had shipped more than 59,000 cases of wine with a value of $21.7 million by the end of the year.”).
tax permit in order to acquire a direct-shipping permit. The relevant part of Pennsylvania’s direct shipping permit application in the FAQ section provides:

Applicants must file online through PLCB+, pay a $250 fee, provide a copy of the applicant’s current producer license, provide documentation that the applicant has obtained a sales tax number from the Department of Revenue, and provide other information as required by the PLCB’s Bureau of Licensing.

Some states have reconciled *Granholm* and *Quill* by requiring out-of-state wineries to collect only the state portion of use taxes. Texas fits into this category. The Texas Comptroller of Public Accounts takes the position that the out-of-state winery needs to have physical presence in Texas in order to also be required to collect the local portion of use taxes due on the sale. In online publication 94-179, the Texas Comptroller’s office explains this position as follows:

Out-of-state wineries must collect and remit state sales tax on sales and deliveries to Texas. The current state sales and use tax rate is 6.25 percent. An out-of-state winery must also collect local use tax if it ships to a customer in a local taxing jurisdiction where the winery is engaged in business. For purposes of the tax law, “engaged in business” means that within the last 12 months the winery had a physical contact or presence in the jurisdiction, such as sending traveling salespersons or attending trade shows or similar events to solicit or promote sales. An out-of-state winery that is not engaged in business in any local jurisdictions in Texas does not have to collect local use tax. The winery can voluntarily collect use tax, however, as a convenience to their customers who owe the tax based on the point of delivery.

Other states, however, have reconciled *Granholm* and *Quill* by requiring out-of-state wineries to collect both state and local use taxes. New York is an

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274. *Id.*

275. See infra notes 276–278 and accompanying text.


277. See *Strayhorn*, supra note 276.

278. *Id.*

example.280 Pennsylvania is another example.281 The Pennsylvania Department of Revenue stated in Direct Wine Shipment Tax Bulletin 16-001:

On June 8, 2016, Governor Tom Wolf signed into law Act 39 of 2016, amending the Liquor Code to provide for various consumer convenience initiatives including direct shipment of wine from out-of-state wine producers to residents of this commonwealth. The amendments to the Liquor Code impose a $2.50 per gallon excise tax on direct wine shipments. In addition, all direct wine shipment sales are subject to Pennsylvania state and local sales tax.282

Thus, states have taken different approaches to reconciling Granholm and Quill.283 The less aggressive approach is to require out-of-state wineries to collect only the state portion.284 From the winery’s perspective, it is difficult to see how the collection of both state and local use taxes—but especially only the state portion—would be administratively burdensome.285 In today’s age of the Internet and software, it should not be difficult to determine the one and only rate for the state portion of use taxes due on a sale. It also seems difficult to argue that determining the local rates, as well as filing sales and use tax returns and remitting the taxes, is burdensome.286 Especially considering the growing number of sales and use tax software service providers, such as ShipCompliant (specifically for wineries and others in the alcohol industry) and Avalara (for all businesses of all types).287

In fact, there does not appear to have been any reported backlash from out-of-state wineries related to the imposition of the use tax collection responsibility.288 Instead, out-of-state wineries seem to have welcomed the requirement in exchange for the ability to compete in a marketplace where they desired to be.289 That is, out-of-state wineries simply viewed it as a cost of doing business in the direct-to-consumer market.290 This can be seen from statements made at a 2003 workshop on direct-to-consumer wine shipping where the Wine Institute, a trade association for wineries, commented that wineries “will embrace any kind of scheme that would require payment of taxation if we can simply get access to the markets.”291

The significance is this: With the revisiting of Quill, the Supreme Court can look to what has happened after Granholm as proof that imposing use tax collection

280. See Application for a New York State Out-of-State Direct Shipper’s License, supra note 271.
281. Direct Wine Shipment Tax Bulletin 16-001, supra note 279.
282. Id.
283. See supra notes 276–282 and accompanying text.
284. See discussion supra Parts II & III.
285. See infra notes 286–291 and accompanying text.
287. ShipCompliant, supra note 286; Avalara, supra note 286.
289. Id.
290. Id.
291. Id.
responsibilities on remote sellers in today’s age of technology does not wreak havoc on society.\textsuperscript{292} Congress could also look to this same phenomenon if federal legislation to overturn \textit{Quill} ever heats up again.\textsuperscript{293}

It is important to note that there have been arguments advanced on both sides concerning whether \textit{Granholm} went further to undermine \textit{Quill}.\textsuperscript{294} The discussion above is not meant to suggest \textit{Granholm} undermined \textit{Quill}. Rather, it is meant only to point out that \textit{Granholm} allowed states to impose a use tax collection requirement on out-of-state wineries in conjunction with obtaining an out-of-state direct shipping permit, and out-of-state wineries appeared to simply view it as a cost of doing business and not an administrative burden.\textsuperscript{295} The lack of administrative burdens is discussed below in more detail.

\textbf{ii. Use Tax Collection Not Administratively Burdensome}

The second observation continues to build on administrative burdens, or what appears to be a lack thereof.\textsuperscript{296} Despite the Supreme Court finding in \textit{Bellas Hess} (upon which the Court continued to rely in \textit{Quill} on \textit{stare decisis} grounds) that physical presence in the taxing state was necessary in order to alleviate administrative burdens on out-of-state retailers,\textsuperscript{297} the Court in \textit{Granholm} did not articulate a similar finding.\textsuperscript{298} In fact, the majority in \textit{Granholm} seemed to reach the opposite conclusion.\textsuperscript{299} Recall that in \textit{Granholm} the Court found that requiring out-of-state wineries to obtain direct shipping permits, which in turn could require them to collect use taxes, was an appropriate solution to the lost revenue argument of the states.\textsuperscript{300} The Court seemed to see it this way: if tax collection works as to in-state wineries, then why shouldn’t it work as to out-of-state wineries?\textsuperscript{301} The Court did not even find it necessary to mention administrative burdens, thereby seeming to suggest none existed.\textsuperscript{302} In effect, \textit{Granholm} seems to suggest that the collection of sales and use taxes (perhaps both the state and local portions, but at a minimum the state portion) is not administratively burdensome.\textsuperscript{303} If the Court thought it was administratively burdensome, then it does not seem that it could have made the

\begin{itemize}
\item \textsuperscript{292} See FED. TRADE COMM’N supra note 288.
\item \textsuperscript{293} See id.
\item \textsuperscript{294} See WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION ¶ 19.02[4] (3rd ed. 2001); Walter Hellerstein & John A. Swain, Distinguishing Swill from Quill, STATE TAX TODAY (Aug. 8, 2005); Brian L. Browdy, An Open Letter to the U.S. Supreme Court on Sales Taxes, Office Equipment, And Mail-Order Hooch, STATE TAX TODAY (July 18, 2005).
\item \textsuperscript{295} See supra notes 262–293 and accompanying text.
\item \textsuperscript{296} See supra notes 285–291 and accompanying text.
\item \textsuperscript{297} See discussion supra Part III.
\item \textsuperscript{298} See Granholm v. Heald, 544 U.S. 460.
\item \textsuperscript{299} See id.
\item \textsuperscript{300} See id. at 491–92.
\item \textsuperscript{301} See id. at 491 (“In particular, New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping. This is the approach taken by New York for in-state wineries.”).
\item \textsuperscript{302} Id. at 491–93.
\item \textsuperscript{303} See id.; see also supra notes 276–284 and accompanying text.
\end{itemize}
determination that the use tax collection requirement was a reasonable nondiscriminatory alternative to the statutes at issue in the case.  

Perhaps this, along with Justice Kennedy’s comments in DMA, are indications that change is on the horizon in the Wayfair case. As discussed earlier, Justice Gorsuch, while still sitting on the Tenth Circuit, commented as part of DMA that Quill does not seem viable in today’s world.

Another observation from Granholm further illustrating that use tax collection is not administratively burdensome is that in addition to there being no reported backlash on the issue of use tax collection, many of these direct-shipment wineries are also small businesses (i.e., over 90% of U.S. wineries are small businesses). And significant with respect to direct-shipment wineries is that the use tax collection responsibility is in addition to the excise tax responsibility. This observation concerning small wineries is significant because many who object to a reversal of Quill are small businesses who argue use tax collection would be administratively burdensome because they are small businesses.

And again, perhaps the most notable observation concerns out-of-state wineries having to comply with two state tax obligations, use tax collection and state excise taxes. If out-of-state wineries can comply with two tax-related obligations seemingly without issue, then that would seem to demonstrate that requiring other out-of-state retailers to comply with only one tax-related obligation should not be administratively burdensome.

This is not to say that use tax collection does not involve costs, such as acquiring necessary software, training employees to use the software, etc., and that it is not as easy for small businesses to absorb these costs as compared to large

304. See Granholm, 544 U.S. 460, at 491–93.
307. See Lexi Williams & Ben O’Donnell, New Report Shows Winery Direct Shipping Sales Surging, WINE SPECTATOR (Jan. 31, 2017), http://www.winespectator.com/webfeature/show/id/New-Report-Show-Proof-Report-Sales-Surging (stating “Roughly 90 percent of the new U.S. wineries fell into the ‘limited production’ and ‘very small production’ categories.”); see, e.g., Brief for the Wine and Spirits Wholesalers of America et al., Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120, 03-1274), 2004 WL 173943; see also SOVOS SHIPCOMPLIANT, supra note 269, at 4 (indicating that in 2017, out of a total of 9,069 U.S. wineries: (i) 3,500 were categorized as limited production, which are the smallest wineries producing less than 1,000 cases; (ii) 3,675 were categorized as very small wineries, producing 1,000–4,999 cases; and (iii) 1,560 were categorized as small wineries, producing 5,000–49,999 cases). The remaining wineries were categorized as either medium or large. See id. 260 were categorized as medium, producing 50,000–499,999 cases. See id. Sixty-four wineries were categorized as large, producing more than 500,000 cases. See id.; see also Lexi Williams & Ben O’Donnell, New Report Shows Winery Direct Shipping Sales Surging, WINE SPECTATOR, Jan. 31, 2017.
308. See supra notes 208–213 and accompanying text.
310. See supra notes 208–213 and accompanying text.
311. Although not related to the wine industry, another recent occurrence further supporting the conclusion that collecting use taxes is not administratively burdensome is South Carolina’s new economic presence standard where it has been reported that some businesses are voluntarily complying with the use tax collection requirement while the law is in litigation.
businesses. But if the goal is to provide some amount of relief to small businesses, this goes back to the question discussed in Part III: how does physical presence in a state suddenly and magically make the administrative burden of these costs for small businesses disappear?\textsuperscript{312} For example, if a small business located in New Mexico close to the Texas border makes deliveries into Texas in company-owned trucks rather than common carrier (thereby creating physical presence in Texas under the \textit{Quill} standard), how does this “physical presence” suddenly and magically make the cost of use tax collection any more affordable or make the administrative burden disappear as compared to if the company avoided physical presence by using a common carrier to make the deliveries?\textsuperscript{313} Indeed, as the Court in \textit{Quill} acknowledged, the physical presence standard is “artificial at its edges.”\textsuperscript{314} A better model to assist small businesses is not keeping \textit{Quill}, but rather, creating exceptions to use tax collection based on the amount of sales and/or revenues generated as was done with the economic presence rules implemented in Alabama and South Dakota.\textsuperscript{315}

\textbf{iii. Growing Number of States Allowing}

\textit{Direct Shipping Post-Granholm}

Another observation gleaned from the aftereffects of \textit{Granholm}, further related to demonstrating use tax collection is not administratively burdensome, is the growing number of states post-\textit{Granholm} now allowing out-of-state winery direct shipping.\textsuperscript{316}

As a result of \textit{Granholm}, states had two choices: (1) allow the same direct shipping privileges to both in-state and out-of-state wineries (what was commonly called “level up”); or (2) do not allow direct shipping at all (what was commonly

\begin{itemize}
  \item \textsuperscript{312} See discussion supra Part III.
  \item \textsuperscript{313} See, e.g., John A. Swain, \textit{State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century}, 38 GA. L. REV. 343, 345–46 (2003) (“In \textit{Quill Corp. v. North Dakota}, the Court held that constitutionally sufficient nexus turns not on the level of in-state economic activity but on the essentially arbitrary marker of whether a taxpayer is physically present in a state. Thus, according to the Court imposing a use tax collection obligation on a remote mail order company making $10 million in annual in-state sales would unduly burden interstate commerce, while asking the same favor of a low volume seller with a single in-state sales representative would not. The Court acknowledged that the physical presence test is ‘artificial at its edges.’ In truth, it is artificial ‘through and through.’”).
  \item \textsuperscript{315} See supra notes 195–200 and accompanying text. Perhaps thresholds as seen in Alabama and South Carolina are not high enough. If this is proved to be the case, then the thresholds can be adjusted. An analogous situation is Texas’ small business exemption from the Texas franchise tax. The revenue threshold for what constitutes a small business for purposes of the exemption has been increased throughout the years. See Swain, supra note 313, at 345 (“As between collecting tax from each individual consumer or from the seller, it is more administratively practical to collect the tax from the seller. Thus, anyone making taxable sales to consumers within the taxing jurisdiction should have a collection obligation, subject to a de minimis threshold below which the cost of collection exceeds the benefit. It does not take much thought to conclude that a de minimis threshold should be measured by the sales volume or the percentage of its total business that a seller does in a jurisdiction, or both.”).
  \item \textsuperscript{316} See Green, supra note 235, at 39; SOVOS SHIPCOMPLIANT, supra note 267
\end{itemize}
called “level down”). At the time Granholm was decided only 3 states had laws allowing direct shipping on equal terms as between in-state and out-of-state wineries. As of 2016, 44 states have come to allow direct shipping by both in-state and out-of-state wineries. The only states currently not allowing direct-to-consumer shipping are: Utah, Oklahoma, Mississippi, Alabama, Kentucky, Delaware, and Rhode Island.

As previously outlined, most states that allow direct shipping also require the out-of-state winery to comply with excise taxes as well as collect use taxes in order to obtain a direct shipping permit. No doubt many factors went into a state deciding to “level up” post-Granholm. But one factor would seem to be that states do not perceive, and have not experienced, substantial compliance problems associated with putting the use tax collection requirement on the out-of-state wineries. If not posing a significant compliance problem, then logic would seem to dictate a lack of administrative burdens. Indeed, South Dakota is already experiencing voluntary compliance with its economic nexus law even while in litigation, which may also indicate that compliance with use tax collection requirements is not overly burdensome.

iv. Large Number of Direct-Shipping Permits Issued

Another observation related to the wine industry and the aftereffects of Granholm that can be applied in support of overturning Quill concerns the number of direct shipping permits that have been issued to out-of-state wineries. As discussed below, this observation provides further support to the lack of administrative burdens argument.

A recent example is Pennsylvania. In August 2016, a new law went into effect in Pennsylvania causing it to be the 44th state to allow out-of-state winery

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318. See, e.g., Green, supra note 235, at 39.
319. See, e.g., SOVOS SHIPCOMPLIANT, supra note 269.
321. See supra notes 262–311 and accompanying text.
322. See, e.g., FEDERAL TRADE COMM’N, supra note 288, at 38.
324. See infra notes 325–344 and accompanying text.
325. See infra notes 326–329 and accompanying text.
As with most other states, in order to obtain the direct shipping permit, Pennsylvania requires out-of-state wineries to agree to comply with both excise tax obligations and use tax collection responsibilities. As little as five months later, Pennsylvania regulators reported they had already issued more than 700 direct shipping permits, which experts report is “a very rapid start-up compared to other states.” This begs the question: if the collection of use taxes is so administratively burdensome, then why would the number of out-of-state wineries desiring to obtain a direct-shipping permit occur at such a rapid pace?

Another example is Texas. Texas also requires out-of-state wineries to agree to collect use taxes in order to obtain a direct shipping permit. The number of direct shipping permits issued by Texas to out-of-state wineries is listed below for each of the noted fiscal years:

- Fiscal year ended August 31, 2015: 681
- Fiscal year ended August 31, 2014: 581
- Fiscal year ended August 31, 2013: 659
- Fiscal year ended August 31, 2012: 518
- Fiscal year ended August 31, 2011: 585

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326. See, e.g., FREE THE GRAPE!, http://freethegrapes.org/free-the-grapes-update/ (last visited June 19, 2017); Alex Koral, A Keystone Change—Pennsylvania to Allow Direct to Consumer Sales of Wine, SHIPCOMPLIANT (June 8, 2016), https://www.shipcompliant.com/blog/2016/06/08/keystone-rule-change-pennsylvania-allow-direct-consumer-sales-wine/ (“Pennsylvania technically [already allowed] DtC sales of wine. However, the difficulty of getting a DtC license, and the strict requirement that sales be fulfilled through state-controlled liquor stores effectively prohibit[ed] the practice. But the new rules resemble the standard DtC rules propagated by Wine Institute and Free the Grapes!, meaning that sales of DtC wine to Pennsylvania residents will look much like they do in any other state.”); Direct Wine Shipment Tax Bulletin 16-001, supra note 279 (“On June 8, 2016, Governor Tom Wolf signed into law Act 39 of 2016, amending the Liquor Code to provide for various consumer convenience initiatives including direct shipment of wine from out-of-state wine producers to residents of this commonwealth.”).

327. There are a handful of exceptions, one of which is Florida, which doesn’t require a shipping permit or sales/use tax collection. See supra note 268 and accompanying text.

328. See supra notes 278–300 and accompanying text.


330. See Information and Instructions for Out-of-State Winery Direct Shipper’s Permit, supra note 270; see also Winery Shipping Laws, TEX. ALCOHOLIC BEVERAGE COMM’N, https://www.tabc.state.tx.us/laws/texas_wine.asp (announcing the Texas legislation allowing direct wine shipping signed by Governor Rick Perry on May 9, 2005.) (last visited May 3, 2018).


With the exception of 2010, the number of direct shipping permits issued by Texas has stayed relatively constant since 2008. And the dip in 2010 was likely not caused by a decline in out-of-state wineries seeking permits, but instead because it was during this time that Texas went from requiring the re-submission of permit applications on an annual basis to requiring re-submissions every other year. Fiscal year 2010 would have been the first year affected by this change.

Surveying these figures is not meant to be an empirical study; rather, it is only meant to provide some observations. The numbers would seem to indicate a steady number of out-of-state wineries seeking to obtain direct shipping permits. Of course, looking at Texas by way of example, the numbers could represent out-of-state wineries getting a permit for one year, never seeking to renew thereafter, and then each subsequent year the permit numbers are brand new out-of-state wineries seeking a first-time permit, with the same cycle continuing. While possible, that scenario is probably not likely. The more probable scenario is that most permit applications are renewals.

All this again goes to the question: if the collection of use taxes is so administratively burdensome, then why would the number of out-of-state wineries (again, many of which are small businesses) desiring to obtain a direct-shipping permit be constant?

v. Reliance Interests of Distributors on 3-Tier System

A last observation from Granholm is the Court’s failure to discuss the reliance interests of distributors. A fundamental part of the Court’s analysis in Quill was the reliance interests of the catalog mail order industry. The Court stated in Quill:

339. See supra notes 331–338.
340. See, e.g., Winery Shipping Laws, TEX. ALCOHOLIC BEVERAGE COMM’N, (Sep. 1, 2009) https://www.tabc.state.tx.us/laws/texas_wine.asp (“Out-of-state wineries are required to obtain from the TABC an out-of-state winery direct shipper’s permit prior to shipping. The annual state fee for an out-of-state winery direct shipper’s permit is $75, plus an additional surcharge of $160. A statutory change required TABC to begin issuing two-year permits in 2009, so the total cost of a direct shipper’s permit is $470 every two years.”).
341. See id.
342. See infra notes 331–338.
343. See infra notes 331–338.
344. See supra note 307 and accompanying text.
The Bellas Hess rule has engendered substantial reliance and has become part of the basic framework of a sizeable industry. The “interest in stability and orderly development of the law” that undergirds the doctrine of stare decisis, see Runyon v. McCrary, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring), therefore counsels adherence to settled precedent.\footnote{437} In Granholm, the distributors (i.e., Tier 2 in the 3-tier system) also had a reliance interest.\footnote{438} Just like catalog retailers had “engendered substantial reliance” on the physical presence standard, which became the “basic framework” of the catalog industry, distributors also engender substantial reliance on the 3-tier system, which has become the basic framework of their existence.\footnote{439} While Granholm did not invalidate the 3-tier system,\footnote{440} it did seem to erode away at it by allowing distributors to be taken out of the chain with respect to the direct shipping sales.\footnote{441} Indeed, it has been reported that “[w]holesalers and retailers are usually the opponents to direct wine shipping laws that would loosen restrictions. . . . They believe that any infringement on their current monopolies will hurt their businesses.”\footnote{452} In an article published around the time when the direct shipping issue began to heat up, it was written that “[t]he wholesaler’s monopoly has flourished under the three-their distribution system.”\footnote{453} Similar to the Court in Quill finding significance in the mail-order industry’s reliance on the physical presence standard, the Court in Granholm could have likewise noted the reliance interests of distributors if it so desired.\footnote{454} The Court in Granholm, however, did not even mention the reliance interests of distributors.\footnote{455} Although this analogy is admittedly comparing apples to oranges, it still seemed worth mentioning because of the stronghold distributors historically have held in the alcohol marketplace pre-Granholm.\footnote{456} The significance is that perhaps it is an indication that the current Court is not as quick to put emphasis on reliance interests of particular industries when advances in technology (i.e., the Internet) have caused marketplace changes.\footnote{457}

VI. CONCLUSION

This question was posed in the introduction: in today’s age of technology, does it really matter where we are physically present? Largely because of the

\footnote{437} Id. at 317.
\footnote{438} See supra notes 222–230 and accompanying text.
\footnote{439} See supra notes 222–230 and accompanying text.
\footnote{440} Granholm, 544 U.S. at 488–89.
\footnote{445} See Id.
\footnote{446} See supra notes 222–230.
\footnote{447} See Direct Marketing Ass’n v. Brohl, 814 F.3d 1129, 1151 (2016).
Internet, as far as purchasing retail items, where we (as buyers) or companies (as sellers) are physically present does not really seem to matter anymore. For example, a person in rural Montana can buy items online, just as if that person was shopping in a brick-and-mortar store in New York City, Dallas, or San Francisco. Or an Internet business having employees and offices only in Chicago could sell products to customers located in all 50 states.

Even though it seems the concept of physical presence has become a bygone of the past, the legal world still talks about it because of the 1992 U.S. Supreme Court decision in *Quill Corp. v. North Dakota.*\(^\text{358}\) There have been many excellent articles written about how the time has come to “Kill *Quill.*”\(^\text{359}\) Hopefully, this article has helped provide additional support to the “Kill *Quill*” movement by looking to the wine industry and the aftereffects of the U.S. Supreme Court’s decision in *Granholm v. Heald.*\(^\text{360}\)

As this article analogized to the wine industry, I thought appropriate to end on a similar note. Even though we oftentimes hear about wines becoming better with age, according to Wine Spectator, many wines have an expiration date.\(^\text{361}\) So too it has actually been said about *Quill* . . . by Justice Gorsuch. While he was still sitting on the bench for the U.S. Court of Appeals for the Tenth Circuit, Justice Gorsuch stated in the Tenth Circuit’s DMA opinion that *Quill* may also have “a sort of expiration date.”\(^\text{362}\) Cheers to that!

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359. See *supra* note 18 and accompanying text.
360. See discussion *supra* Part V.