

# Overturing *Quill*: Where Are We Now?

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BURGER KING #5371  
520-421-0820

# 1  
1 WHOPPER \$ 0.99  
1 TO GO  
1 SALES 114723  
SUBTOTAL \$ 0.99  
TAX \$ 0.13  
TOTAL \$ 1.12

YOUR ORDER NUMBER IS 23

AMT TENDERED \$ 1.27  
CHANGE \$ 0.15

TIME 11:47AM DATE 8/10/04

# Quexit Overview

- **Overarching thesis:** the physical presence test for state tax jurisdiction has been slowly eroding for at least 75 years
- history of the physical presence test through *Quill*
- responses to *Quill*
  - judicial interpretations
  - state legislation
  - Streamlined Sales and Use Tax Agreement (SSUTA)
  - federal legislation
- efforts to revisit *Quill*
  - *Direct Marketing Ass'n v. Brohl* (2015) (Kennedy, J., dissenting)
  - South Dakota and Alabama litigation
- conclusion

# Handicapping *Quill*

- a popular pastime in our field
- the longshot effect
- is it different **this time?**



YES  
CARTOONSTOCK  
.com

Search ID: ksmn4350

"Is this a slow motion replay, or the horse you've bet on?"

# History

## The first click of the ratchet

*Nelson v. Sears, Roebuck & Co.; Nelson v. Montgomery Ward & Co.*  
(1941)

- mail order operations of brick and mortar retailers subject to use tax collection obligation
- pure mail order businesses distinguished
- two dissenting justices opined that tax collection obligation violated the Due Process and Commerce Clauses

# History

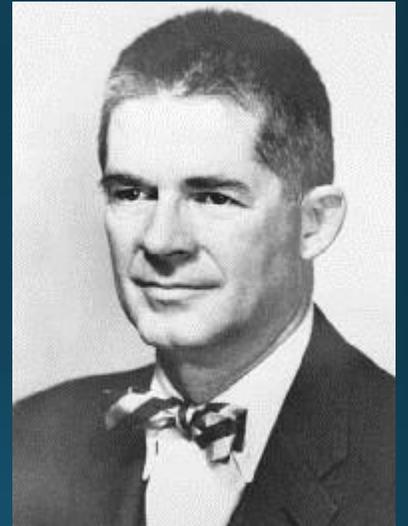
## *Scripto, Inc. v. Carson (1960)*

- in-state presence of independent contractor salespersons created sufficient nexus for state to impose a use tax collection obligation on out-of-state seller
- the “fine distinction” between employee and salesperson “is without legal significance”
- one dissenting justice
- significance of opinion

# History

## *National Bellas Hess v. Dep't of Revenue (1967)*

- mail order seller without a physical presence not subject to use tax collection obligation
  - violates Due Process
  - unduly burdens Commerce Clause
- **"The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of government.'"**
- three dissenting justices
- Archibald Cox represented the taxpayer



# History

## *Complete Auto Transit, Inc. v. Brady* (Mar. 7, 1977)

- four-pronged Commerce Clause test
  - **substantial nexus**
  - fair apportionment
  - non-discrimination
  - fairly-related to benefits and protections provided by state
- key points
  - interstate commerce may be asked to pay its fair share of taxes (provided no discrimination)
  - "substantial nexus"

# History

*National Geographic v. St. Bd. of Equalization (Apr. 4, 1977)*

- physical presence need not be related to sales activity

# History: *Quill Corp. v. North Dakota* (1992)

- use tax collection obligation did not violate Due Process
  - “In ‘modern commercial life’ it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers.”
  - “[T]here is no question that ... the use tax is related to the benefits Quill receives from access to the State.”
  - Significance of due process holding
- use tax collection obligation unduly burdened interstate commerce
  - **burdens *Quill***
  - ***stare decisis Quill***
  - **disappearing ink *Quill***
  - one dissent to Commerce Clause ruling
  - three concurring justices would have decided the Commerce Clause issue on *stare decisis* grounds alone (Kennedy, Scalia, Thomas)

# Responses to *Quill*

## Judicial

- income tax
- temporary presence
- agency
- corporate affiliates

## State Legislation

- (corporate) affiliate nexus
- click-through-nexus
- information reporting
- marketplace provider laws



YEAH, THE CONVENIENCE IS GREAT, BUT THEY CANT ESCAPE PAYING SALES TAX!

XIMUM CURITY PRISON

ACME PRISON BREAK KIT!  
Some assembly required.

amazon

# Responses to *Quill*

## Computer technology, the internet and e-commerce

- **panic!**
- NTA Project
  - laid much of the intellectual groundwork for SSUTA
  - no consensus
- Advisory Commission on Electronic Commerce
  - one commentator: an “ideological circus”
- SSUTA first adopted 2002

# Responses to *Quill*

## SSUTA

- 24 member states currently
- rate, base and administrative simplifications
- sourcing uniformity
- product definition uniformity (some products)
- **goal of removing compliance burden predicate of *Quill*, clearing way for**
  - **federal legislation**
  - **judicial overturning of *Quill***

# Federal legislation

- bills have been introduced for decades
- Marketplace Fairness Act cleared Senate in 2013
- current key proposals
  - **Marketplace Fairness Act (S. 698)**
  - **Remote Transactions Parity Act (HR 2775)**
  - **Online Sales Simplification Act (draft origin sourcing proposal)**
  - (No Regulation Without Representation (HR 2775) (keeps status quo))

# Federal Legislation

## Marketplace Fairness Act

- physical presence not required for SSUTA states or states that have adopted alternative simplifications
- \$1 million small seller exception

THE  
MARKETPLACE  
FAIRNESS ACT  
WILL LEVEL  
THE PLAYING  
FIELD.

WE'VE  
LEVELED IT  
ALREADY.



ONLINE  
SALES TAX  
LOOPHOLE

GOING OUT  
OF BUSINESS  
SALE

BRICK AND  
MORTAR STORE

Shop  
Local

# Federal legislation

## Remote Transactions Parity Act

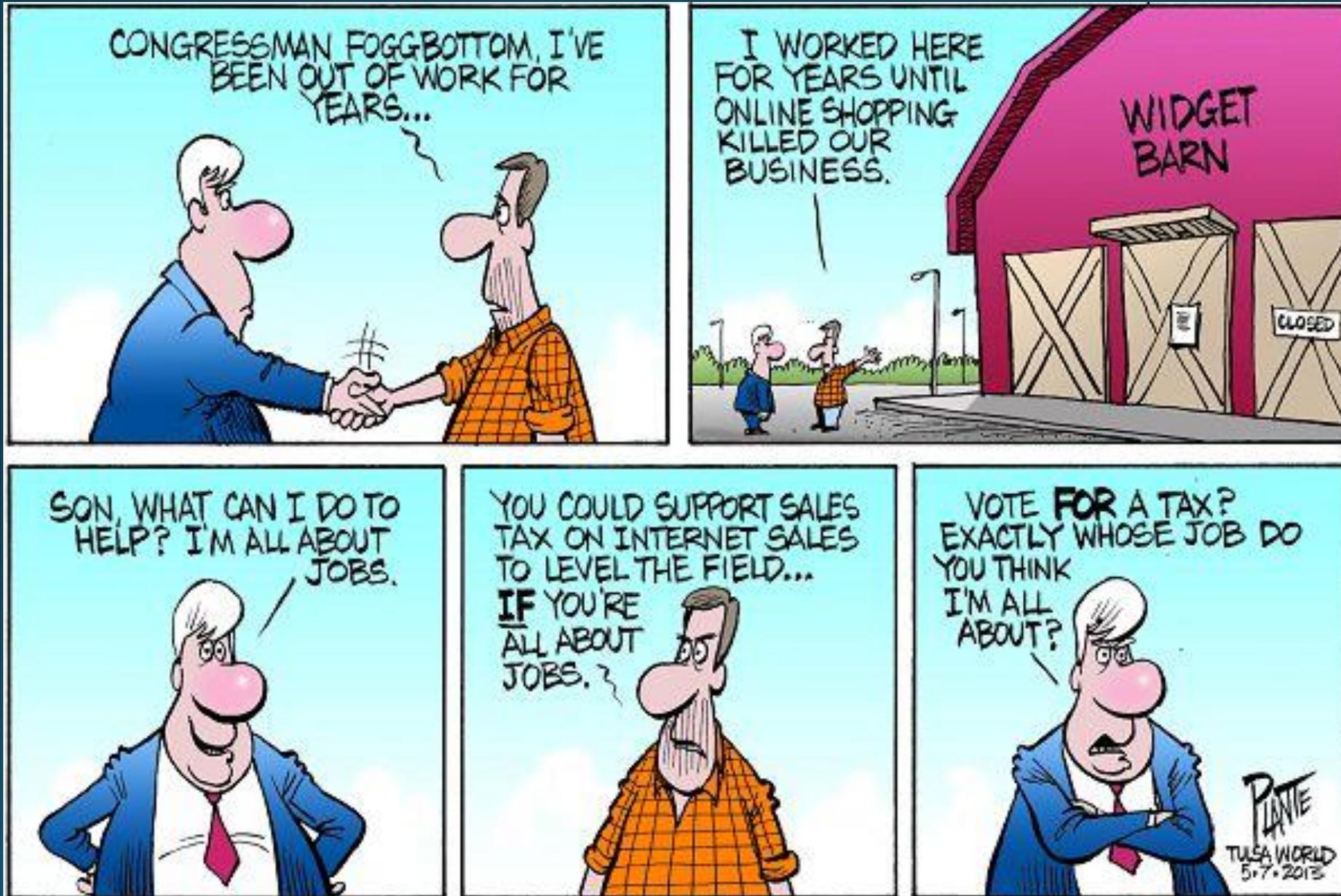
- physical presence not required for SSUTA states or states that have adopted alternative simplifications
- \$1 million small seller exception (three year phase in: \$10m, \$5m, \$1m)
- more conditions than MFA
  - compliance software
  - other

# Federal legislation

## Online Sales Simplification Act

- remote sellers pay tax to **origin** state, revenue is redistributed to destination
  - origin base (but purchasers may claim home state exemptions (**whipsaw**))
  - destination rate
- clearinghouse is created for redistribution and other governance purposes
- sales made from non-sales tax states are subject to an alternative tax
- expansive definition of remote sellers eligible for origin-based treatment
- **origin sourcing is a bad idea**
  - Preserves physical presence test: not a good proxy for small sellers
  - mobile taxpayers and products
  - florists example
  - may have a role for truly small remote sellers, but these sellers seem destined for complete exemption

# Handicapping federal legislation



# Revisiting *Quill*

- *Direct Marketing Ass'n v. Brohl* (2015)

- Tax Injunction Act

- Kennedy concurrence

- “the *Quill* majority acknowledged the prospect that its conclusion was wrong when the case was decided”
- the *stare decisis* basis for *Quill* has been undercut by changes in the law and in the technological, economic and social milieu
- “it is unwise to delay any longer a reconsideration of the Court’s holding in *Quill*”
- “It should be left in place only if a powerful showing can be made that its rationale is still correct”



# Revisiting *Quill*

## South Dakota legislation

- a non-physically present remote seller must remit tax if either:
  - the seller's gross revenue from South Dakota sales exceeds **\$100k**, or
  - the seller makes more than **200 sales** for delivery to South Dakota
  - during the previous or current calendar year

## Alabama regulation

- out-of-state sellers must remit tax if they had **\$250,000** or more in retail sales "sold into the state" in the previous calendar year

# Revisiting *Quill*

## South Dakota litigation

- *South Dakota v. Wayfair, Overstock.com, and Newegg*
- *American Catalogue Mailers Association and Netchoice v. Gerlach*

## Alabama litigation

- *Newegg v. Department of Revenue* (administrative)

# Revisiting *Quill*

## Possible contours of a Court decision

- uphold challenged statute or regulation without additional guidance, or
- provide guidance along due process lines
  - “purposefully directed activities” of a sufficient “magnitude”
  - more than de minimis, isolated or sporadic
  - admonish that the threshold for commerce clause “substantial nexus” is higher than for due process “minimum contacts”
- specify required simplifications?
- retroactivity?

## Handicapping

# Conclusion

Plan all the way to the end.

-The 48 Laws of Power, Law 29

Look to the end, no matter what it is you are considering. Often enough, God gives a man a glimpse of happiness, and then utterly ruins him.

- The Histories, Herodotus, Fifth Century B.C.

*What will Congress do?*

