Comity and *Quill*: Has the Day of Reckoning Arrived?

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In this article, the authors discuss *Direct Marketing Association v. Brohl*, including whether the federal court should dismiss the case based on principles of comity and whether it presents an appropriate vehicle for reconsideration of *Quill*.

All our mistakes sooner or later surely come home to roost.

— James Russell Lowell, 1870

While all eyes were on *Wynne*,[1] *Direct Marketing Association v. Brohl*[2] received scant attention — until Justice Anthony M. Kennedy's concurring opinion. In no uncertain terms, Kennedy called for a reconsideration of *Quill*.[3]

On remand, the U.S. Court of Appeals for the Tenth Circuit has ordered the parties to fully brief not only the commerce clause, but also whether the case should be dismissed under the doctrine of comity. This article examines whether the Tenth Circuit should decline to exercise jurisdiction based on comity and whether *Direct Marketing* presents an appropriate vehicle for reconsidering *Quill*.

I. Direct Marketing

While other states were busy passing "Amazon" laws, Colorado adopted a different approach. In an effort to improve collection of sales and uses taxes on online purchases, Colorado enacted a notice and reporting law that required retailers that were not registered with the state to notify Colorado customers of their use tax obligations. The new law also required those retailers to report untaxed sales to the Colorado Department of Revenue.

The Direct Marketing Association (DMA) filed suit in federal district court claiming the notice and reporting requirements discriminated against and imposed an undue burden on interstate commerce in violation of the commerce clause. The federal district court granted partial summary judgment to the DMA and issued an injunction. On appeal, the Court of Appeals for the Tenth Circuit raised, *sua sponte*, the Tax Injunction Act (TIA) and held that it barred the action.[4] The U.S. Supreme Court granted certiorari.

In a unanimous opinion, the Supreme Court reversed and held that the TIA did not apply because the enforcement of the notice and reporting requirements was not an act of "assessment, levy or collection." The Court further stated that it took "no position on whether a suit such as this one might nevertheless be barred under the 'comity doctrine.'"[5]

The Court further observed that unlike the TIA, comity was not jurisdictional and that Colorado had not relied on the comity doctrine in either of the courts below.[6] The Court concluded: "[W]e leave it to the Tenth Circuit to decide on remand whether the comity argument remains available to Colorado."[7]

II. Colorado's Vacillating Approach to Comity

In its initial brief before the Tenth Circuit Court of Appeals, Colorado disavowed any reliance on the TIA or

[1] *Comptroller of the Treasury v. Wynne*, No. 13-485.

[2] *Direct Marketing Association v. Brohl*, ___ U.S. ___, 135 S. Ct. 1124, 1131 (2015).

[3] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[4] *Direct Marketing Association v. Brohl*, 735 F.3d 904 (10th Cir. 2013).

[5] *Direct Marketing*, 135 S. Ct. at 1133.

[6] Although Colorado had not raised comity before the appeals court, the court commented in a footnote that "the doctrine of comity also militates in favor of dismissal," *Direct Marketing*, 735 F.3d at 920 n.11. The Supreme Court stated that it did not understand the Tenth Circuit's comment "to be a holding that comity compels dismissal." *Direct Marketing*, 135 S. Ct. at 1134.

[7] *Id.*

comity, stating that the district court, by treating the reporting requirements like a tax, "may have unnecessarily implicated the Tax Injunction Act."[8] Colorado then stated that regardless, "this Court may reverse the district court's injunction without running afoul of the TIA or comity principles."[9]

Colorado first raised the comity issue before the Supreme Court. In its brief in opposition to the DMA's petition for certiorari, Colorado stated that in addition to the question regarding the TIA, the case also presented the question whether "principles of comity compel dismissal of federal claims for relief that seek to have a state's chosen tax collection method enjoined and declared unconstitutional."[10] Colorado further explained that because many states were apparently considering similar legislation, it did not challenge the district court's jurisdiction on TIA grounds, but instead agreed to seek an expedited ruling on the merits.[11]

The Supreme Court granted the DMA's petition for certiorari and did not order briefing on any additional questions.

Before the Supreme Court, Colorado argued that comity provided an independent basis for dismissal.[12] The Court declined to reach this question.

In its motion regarding briefing on remand, the DMA requested briefing on the issue of comity and stated that Colorado had informed the DMA that it intended to argue comity on remand.[13] Colorado again reversed course and informed the Tenth Circuit that it did not intend to raise comity as an argument and expressly waived any reliance on that doctrine.[14] The Tenth Circuit nevertheless ordered the parties to brief the issue of whether the case should be dismissed under the doctrine of comity.[15] Briefs have not been filed yet.

III. The Comity Doctrine

The comity doctrine "restrains federal courts from entertaining claims for relief that risk disrupting state tax administration."[16] In *Levin v. Commerce Energy*, the U.S. Supreme Court settled a split between the circuits regarding the scope of comity. The Fourth and Tenth circuits had held that the doctrine was more expansive than the TIA, while the First, Sixth, and Seventh circuits had held that comity and the TIA were coextensive.

The Supreme Court agreed with the Fourth and Tenth circuits, stating that its "precedents affirm that the comity doctrine is more embracive than the TIA."[17] The Court wrote that it "is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."[18] The Court concluded, based on a "confluence of factors," that the comity doctrine controlled in that case, and also observed that comity is a prudential doctrine.[19]

IV. Can Comity Be Waived?

On remand, the DMA will likely argue before the Tenth Circuit that Colorado has waived comity. Indeed, Colorado may very well disclaim any reliance on the doctrine and urge the court to reach the merits. If so, is the court required to abide by the parties' wishes?

Prudential principles are "'judicially self-imposed limits on the exercise of federal jurisdiction.'"[20] They have been described as "self-imposed restraints that arise at the judiciary's discretion rather than by the command of the Constitution."[21] Litigants are unable to confer subject matter jurisdiction by consent where none exists. Similarly, that both parties may prefer a federal forum should not override a court's discretion to determine whether the exercise of its jurisdiction is appropriate.

The majority of courts to consider the question agree. For example, the U.S. Court of Appeals for the Third Circuit held that remand to the state court was proper even though state taxing authorities had removed the case to federal court.[22] This did not alter its conclusion that comity applied because, like the jurisdictional limitations imposed by the TIA, comity acts as a restriction on the power of the courts or — more precisely in comity cases — on the exercise of that power.[23]

Other courts have held that the restraints imposed by both the TIA and comity are restraints on the courts, not the parties.[24] As such, remand has been held proper despite the taxing authority's willingness to waive comity.[25]

As one federal district court explained, "this court may not ignore those considerations which the Supreme Court has consistently held to constrain federal court intervention

[8] Appellant's Opening Brief, at 31 n.3.
[9] *Id.*
[10] Respondent's Brief in Opposition, at i.
[11] *Id.* at 5-6 n.1.
[12] Respondent's Brief, at 41.
[13] Plaintiff-Appellee's Motion for Limited, Supplemental Briefing on Remand, at 5 n.1.
[14] Defendant-Appellant's Response to Plaintiff-Appellee's Motion, at 6.
[15] Order filed April 13, 2015.
[16] *Levin v. Commerce Energy Inc.*, 560 U.S. 413, 417 (2010).
[17] *Id.* at 424.
[18] *Id.* at 421 (quotations and citation omitted).
[19] *Id.* at 431.
[20] *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).
[21] *Corrie v. Caterpillar Inc.*, 503 F.2d 974, 981 (9th Cir. 2007).
[22] *Balazik v. County of Dauphin*, 44 F.3d 209, 218 (3d Cir. 1995).
[23] *Id.* at 218 n.11.
[24] *Hardwick v. Cuomo*, 891 F.2d 1097, 1104 (3d Cir. 1989); *Campbell v. Hilton Head No. 1 Public Service District*, 114 F. Supp.2d 482, 488 (1999).
[25] *Campbell*, 114 F. Supp.2d at 488.

and to promote federal court deference in state matters."[26] Referring to the established principle that the TIA operates to restrain the courts, not the parties, the court characterized the case before it as "another illustration of the refusal and reluctance of the federal courts to become involved in state tax matters, even where the state itself is willing to waive the jurisdictional limitations."[27] The court concluded that it "clearly would be improper for this court to waive the principle of comity in the case at bar, when this principle provides the federal courts with more latitude to defer to state courts than the Tax Injunction Act."[28]

Similarly, it has been held that courts have the obligation to raise the comity issue *sua sponte*.[29] One court held, however, that removal to the federal court operates as a waiver of comity.[30] This decision has been criticized by other courts.[31]

On remand, the Court of Appeals for the Tenth Circuit should determine as a threshold matter whether comity compels dismissal.

V. Should the Federal Court Decline to Exercise Jurisdiction?

In concluding that the comity doctrine prevented it from striking down Ohio's gas tax scheme, the Court in *Commerce Energy* found three factors significant. First, the respondents in that case sought federal court review of commercial matters over which the state had wide regulatory latitude. Unlike *Hibbs v. Winn*,[32] Ohio's tax scheme did not involve any fundamental right or classification that warranted heightened judicial scrutiny.[33] Second, although the respondents in *Commerce Energy* sought to portray themselves as third-party challengers to an unconstitutional tax scheme, the Court concluded that in reality, they were seeking the assistance of the federal courts to improve their competitive position.[34] Finally, the Court concluded that state courts were better positioned than their federal counterparts to correct any constitutional violation because they were more familiar with state legislative preferences.[35]

Regarding the last point, the Supreme Court has previously explained that if it finds a state's allocation of benefits or burdens impermissibly discriminatory, it generally leaves the remedial choice to the state.[36] In particular, when it holds a tax statute unconstitutional, the Court's practice, based on comity considerations, has been to abstain from deciding the remedial effects of such a holding.[37]

This practice, however, extends only to the review of a state high court's decision. The Court has further explained that if "lower federal courts were to give audience to the merits of suits alleging uneven state tax burdens . . . recourse to state court for the interim remedial determination would be unavailable."[38]

In *Commerce Energy*, the Court observed that the "most obvious" solution to any discrimination would be to reduce the respondents' tax liability, a remedy not sought in that case and precluded by the TIA. It stated that "a more ambitious solution would reshape the relevant provisions of [the state's] tax code." The Court explained, however, that if a federal court were to grant such relief, it would be engaging in the very interference in state taxation the comity doctrine seeks to avoid.[39]

It concluded that if the state scheme were declared unconstitutional, the state courts or the state legislature would be better positioned than the federal courts to determine how to comply with the mandate of equal treatment.[40] The Court held that collectively, these considerations "demand deference to the state adjudicative process."[41]

Applying these factors counsels in favor of the Tenth Circuit dismissing *Direct Marketing* because:

- the action does not involve a fundamental right or a suspect classification;
- the plaintiffs are seeking to improve their competitive position at the expense of retailers with physical presence in Colorado or other retailers who are voluntarily collecting the tax; and
- if the notice and reporting requirements are found to be discriminatory, the federal courts have traditionally deferred to the state courts in fashioning a remedy, particularly when that remedy may be legislative.

VI. Effect of Pending State Court Action

After the federal injunction was dissolved, the DMA filed an action in state court seeking essentially the same relief.

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[26] *Cox Cable Hampton Roads Inc. v. City of Norfolk*, 739 F. Supp. 1074, 1077 (E.D. Va. 1990).

[27] *Id.*

[28] *Id.*

[29] *Lawson v. Brousseau*, No. 4:06-cv-00033 (W.D. Mich. 2006), at 2.

[30] *Howard v. City of Detroit*, 73 Fed. Appx. 90, 94 (6th Cir. 2003).

[31] *See Coleman v. Campbell County Library Board of Trustees*, 901 F. Supp.2d 925, 932 (E.D. Ken. 2012) (conclusion in *Howard* based on a tenuous premise); *District Lock & Hardware Inc. v. District of Columbia*, 808 F. Supp.2d 36, 43 (D.D.C. 2011) (*Howard* did not provide any specific support for waiver by removal and did not indicate that federal court had to entertain action).

[32] *Hibbs v. Winn*, 542 U.S. 88 (2004), involved the establishment of religion. *Hibbs* also did not involve a potential depletion of the state's coffers. Instead, the relief requested would have provided additional funds. The Supreme Court characterized *Hibbs* as "essentially an attack on the allocation of state resources for allegedly unconstitutional purposes." *Commerce Energy*, 560 U.S. at 429.

[33] *Id.* at 431.

[34] *Id.*

[35] *Id.* at 431-432.

[36] *Id.* at 427.

[37] *Id.* at 428.

[38] *Id.* This is because federal tribunals lack the authority to remand to the state court system an action initiated in federal court.

[39] *Id.* at 429.

[40] *Id.*

[41] *Id.* at 432.

The court granted a preliminary injunction, which remains in effect. The state court action has been stayed.

In *Commerce Energy*, the Supreme Court, quoting *Ohio Bureau of Employment Services v. Hodory*,[42] stated: "'If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.'"[43]

Hodory involved a challenge to the state's unemployment compensation laws. The plaintiff had applied for and was denied unemployment compensation benefits because Ohio law prohibited benefits if the unemployment resulted from a labor dispute. Leonard Paul Hodory filed a request for reconsideration with the Board of Review. While his case was pending before the state tribunal, Hodory filed a separate action in federal district court seeking declaratory and injunctive relief under 42 U.S.C. section 1983.

Before the federal district court, Ohio argued that abstention was required and that Hodory had failed to exhaust his administrative remedies. The federal district court disagreed. First, the court observed that the U.S. Supreme Court has held that administrative remedies do not need to be exhausted when a plaintiff states a good cause of action under section 1983 in federal court. Second, the court found that exhaustion of administrative remedies would be futile when the administrative appeal process does not allow a constitutional challenge to a statute and when the Ohio courts had already held the statute constitutional. Finally, the court reiterated that the challenged statute was not an ambiguous one involving unsettled questions of state law.[44]

Ohio did not raise abstention in its appeal to the Supreme Court, but several amici did. The Court determined that the appropriate doctrine was *Younger* abstention, which is "designed to allow the State an opportunity to 'set its own house in order' when the federal issue is already before a state tribunal."[45]

At oral argument Ohio resisted remand to state court. According to the Court, Ohio either thought the federal district court's analysis of abstention was correct or desired an immediate federal resolution rather than protracted administrative and state judicial proceedings. The Court held that "under these circumstances *Younger* principles of equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks."[46]

In another case involving *Younger* abstention, the Supreme Court stated that the doctrine "arose from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced."[47] The Court further explained, however, that a "State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention."[48] In that case — which did not involve state taxation — the Court found that there had been no consent or waiver.[49] Significantly, the Court of Appeals for the First Circuit has stated that it found no consent cases involving challenges to state tax laws.[50]

The U.S. Supreme Court has determined that the doctrine of comity or "equitable restraint" was of "notable application" and "carried peculiar force" in actions challenging the constitutionality of state tax laws.[51]

How will the Tenth Circuit reconcile these seemingly conflicting principles — that comity operates with peculiar force in the state tax administration context, yet a state may affirmatively consent to federal court jurisdiction?

The answer may depend on whether the Court views the matter as a tax case or as a regulatory case. The fact that the Supreme Court held that the statute in question does not involve the collection of a tax for purposes of the TIA does not answer the larger question of whether, for comity purposes, the statute implicates state tax administration.

The better answer seems to be yes, as the Court itself recognized that "enforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from consumers."[52]

VII. Kennedy's Concurrence

According to Kennedy, Colorado and many other states face "a serious, continuing injustice" as a result of *Quill*.[53] Kennedy characterized that holding as "tenuous" and said that it was "now inflicting extreme harm and unfairness on the States."[54] *Quill* is not only responsible for "a startling revenue shortfall in many states" but is also unfair to local retailers and their customers who pay sales tax, Kennedy said.[55] Describing *Quill* as "questionable even when decided," Kennedy called for its reconsideration, adding that

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[42] 431 U.S. 471 (1977).

[43] *Commerce Energy*, 560 U.S. at 432 (quoting *Hodory*, 431 U.S. at 480).

[44] *Hodory*, 431 U.S. at 478-479.

[45] *Id.* at 479-480. In *Younger v. Harris*, 401 U.S. 37 (1971), the Court held that traditional principles of equitable restraint bar federal courts from enjoining pending state criminal prosecutions except under extraordinary circumstances.

[46] *Id.* at 480.

[47] *Ohio Civil Rights Comm'n v. Dayton Christian Schools Inc.*, 477 U.S. 619, 626 (1986) (involving claim of sex discrimination).

[48] *Id.*

[49] The other two cases in which the Court discussed waiver or consent did not involve state taxation. *Brown v. Hotel Employees*, 468 U.S. 491, 500 n.9 (1984) (state regulation of casino industry union officials); *Sosna v. Iowa*, 419 U.S. 393, 396-397 n.3 (1975) (state residency requirement for divorce).

[50] *Coors Brewing Co. v. Mendez-Torres*, 678 F.3d 15, 25 (1st Cir. 2012).

[51] *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 (1981) (quotations and citations omitted).

[52] *Direct Marketing*, 135 S. Ct. at 1131.

[53] *Id.* at 1134 (Kennedy, J., concurring).

[54] *Id.*

[55] *Id.* at 1135.

the "legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[56]

VIII. Is *Direct Marketing* an Appropriate Vehicle to Reconsider *Quill*?

Quill confirms that the commerce clause's substantial nexus demand equates to a "bright-line, physical-presence" test that must be met before mail-order businesses can be directed to collect use taxes.[57] In light of the Court's acknowledgment that *stare decisis* factored heavily in its decision[58] and Kennedy's invitation for reconsideration of *Quill*,[59] significant interest exists in identifying a case suitable for revisiting that decision.

We suggest *Direct Marketing* is not that case because at its heart, *Direct Marketing* is a regulatory case while *Quill* is a tax case. A regulatory analysis is qualitatively different from a tax analysis and — for the Court to properly revisit the substantial nexus requirement — *Direct Marketing* offers a less-than-ideal model.

A. *Direct Marketing* Predominately Involves Regulatory State Action

The DMA challenges on commerce clause grounds the constitutionality of Colorado's burdens placed on out-of-state sellers having at least $100,000 in annual sales to Colorado residents. The statute imposes three duties on those sellers[60]:

- sellers must tell their Colorado customers they may be liable for sales or use tax on their purchases;
- sellers must provide to Colorado customers an annual summary of the customer's purchases; and
- for customers having made at least $500 in purchases, sellers must file an annual report with the Colorado DOR identifying the total sales made to those customers.

These duties do not impose on the out-of-state seller any burden to collect Colorado taxes. Rather, while relevant to the in-state purchaser's tax duties, the burden on the out-of-state seller is wholly regulatory. Thus, in the absence of a tax collection duty, the state action is regulatory and not tax collection.

B. A Different Commerce Clause Analysis Applies to Regulatory and Tax Actions

The constitutional analysis in a tax case begins by acknowledging that taxing statutes survive a commerce clause challenge only by meeting the now familiar four-part inquiry of *Complete Auto Transit:* (1) Does the activity being taxed have a substantial nexus to the taxing state? (2) Is the tax fairly apportioned? (3) Is the tax nondiscriminatory against interstate commerce? (4) Is the tax fairly related to the services provided by the state?[61]

The four-prong test is so ubiquitous as to be the diagnostic tool for analyzing tax statutes potentially afflicted with commerce clause maladies. It has been applied to sales taxes,[62] corporate franchise taxes,[63] state use taxes,[64] value added taxes,[65] highway use taxes,[66] corporate business taxes based on entire net income,[67] a telecommunications excise tax,[68] axle taxes and marker fees,[69] severance taxes,[70] ad valorem property taxes,[71] and business and occupation taxes.[72] Its application is virtually universal.

On the other hand, suspected infirm regulatory statutes are evaluated under a different approach involving a two-tiered protocol: First, test for discrimination; if appropriate, test further for undue burdens. The discrimination tier considers whether the state action on its face creates "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[73] If the first test shows the state action is not discriminatory, the second-tier inquiry asks if the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[74] Thus, ruling out the presence of discrimination will not save the state action — excessive burdens must also be absent.

C. Efforts to Apply *Quill* to Regulatory Burdens Have Been Unfruitful

The reluctance to use *Direct Marketing* as a case for reevaluating *Quill* begins with the observation that the only clear overlap in the analysis of a regulatory case and a tax case is the discrimination element.[75] No plain overlap is seen in

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[56] *Id.*
[57] *Quill*, 504 U.S. at 317.
[58] *Id.*
[59] *Direct Marketing*, 135 S. Ct. at 1134 (Kennedy, J., concurring).
[60] C.R.S. section 39-21-112(3.5)(c)-(d).
[61] *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 287 (1977).
[62] *Oklahoma Tax Comm'n v. Jefferson Lines Inc.,* 514 U.S. 175 (1995).
[63] *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994).
[64] *Quill*, 504 U.S. 298.
[65] *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991).
[66] *American Trucking Associations Inc. v. Smith*, 496 U.S. 167 (1990).
[67] *Amerada Hess Corp. v. Dir., Div. of Taxation*, 490 U.S. 66 (1989).
[68] *Goldberg v. Sweet*, 488 U.S. 252 (1989).
[69] *American Trucking Associations Inc. v. Scheiner*, 483 U.S. 266 (1987).
[70] *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).
[71] *Japan Line Ltd. v. Los Angeles County*, 441 U.S. 434 (1979).
[72] *Dep't of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978).
[73] *Oregon Waste Systems Inc. v. Dep't of Environmental Quality,* 511 U.S. 93, 99 (1994).
[74] *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970).
[75] *See, e.g., General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). In that case, the Court recognized discrimination is common to state tax matters and to regulation, stating: "The negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce." *Id.* (citations omitted).

the substantial nexus element so critical to *Quill*. Attempts to find such an overlap have not been productive.

In *American Target Advertising Inc. v. Giani*, a Utah statute required professional fundraisers raising money from Utah residents to register and pay $250.[76] Both the registration burden plus the monetary duty applied regardless of the fundraiser's status as a resident or nonresident. Likewise, registration and payment were required regardless of a lack of physical presence in Utah. Against a commerce clause challenge, the Court found no need to apply the *Complete Auto* standards or the *Quill* physical presence standard. The Court held that the "Utah Act imposes licensing and registration requirements, not tax burdens. *The Bellas HessQuill* bright-line rule is therefore inapposite."[77]

In *Ferndale Laboratories v. Cavendish*, a Michigan wholesaler of mail-order drugs shipped drugs to Ohio customers.[78] Ohio's regulatory duties required the wholesaler to register with Ohio and pay a $100 fee. The wholesaler challenged the Ohio duties as a violation of the commerce clause. The court found the substantial nexus element of *Quill* was inapplicable because the regulation under review "is a statute passed by Ohio under its police powers; it aims to protect Ohio's citizens from mislabeled or adulterated prescription drugs rather than simply trying to collect a tax."[79]

In short, *Quill*'s nexus rule should not apply in an action challenging a notification or reporting requirement in which the challenger is not subject to a tax collection responsibility.

IX. Conclusion

The Tenth Circuit has plainly signaled its interest in the comity doctrine, both in its initial opinion and in its briefing order. Absent Colorado's affirmative consent to a federal forum (and maybe even in spite of it), the court appears poised to remand the matter to the state court.

The wild card is Colorado's on-again, off-again relationship with comity. Will Colorado disclaim reliance on the doctrine or change its position yet again? More importantly, what significance — if any — will the Tenth Circuit accord to any such consent to a federal forum?

Finally, whether the merits are ultimately reached by a federal court or a state court, what is the significance of *Quill*? Will *Direct Marketing* serve as the means by which the Supreme Court may face the question of whether its holding in *Quill* was a mistake, either when decided or in hindsight?

No compelling reasons exist to rely on *Direct Marketing* as the vehicle to revisit *Quill*. Instead of a regulatory case like *Direct Marketing*, a more tailored analysis of substantial nexus is likely to be achieved from a tax collection action. With the keen interest in this topic from many states, a suitable candidate will not be long in mailing its RSVP accepting Kennedy's invitation. ☆

[76] *American Target Advertising Inc. v. Giani*, 199 F.3d 1241 (10th Cir. 2000).
[77] *Id.* at 1255.
[78] *Ferndale Laboratories v. Cavendish*, 79 F.3d 488 (6th Cir. 1996).
[79] *Id.* at 494.