STATE AUTHORITY TO REQUIRE USE TAX COLLECTION FROM DIRECT MARKETERS: 
QUILL CORP. V. NORTH DAKOTA

INTRODUCTION

Commerce between the States having grown up like Topsy, the Congress meanwhile not having undertaken to regulate taxation of it, and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there's little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.¹

So it was in 1959, and so it is today.²

Sales and use taxes compose a large portion of most states' revenues.³ States have grown increasingly aggressive in their attempts to collect these revenues, as states assume responsibility for more federal programs and budget shortfalls persist.⁴ A long-running battle has waged over the states' ability to impose use tax collection duties upon out-of-state retailers.⁵ States levy use taxes on customers who buy items in interstate commerce and bring them into their home states for use.⁶

Traditionally, retailers have been required to collect use taxes at the point of sale and then to remit the taxes to the states where the property will be used, stored, or consumed.⁷ The retailers are per-

² See infra notes 200-25 and accompanying text.
³ See infra note 209 and accompanying text.
⁵ See infra notes 87-167 and accompanying text. Unless otherwise specified in this Note, the term "retailers" will refer to out-of-state retailers who sell goods to state residents.
⁶ See Multistate Sales Tax Guide (CCH) § 13 (1992). The use tax is designed to complement the sales tax, which purchasers avoid by buying merchandise out of state. Id.
⁷ See infra notes 87-167 and accompanying text.
personally liable for any uncollected taxes.\textsuperscript{8} Retailers have long contended that collection duties are too onerous, an argument that the United States Supreme Court has occasionally reinforced.\textsuperscript{9} Twenty-five years ago, the Court ruled that a state could not impose collection duties on physically absent mail-order retailers.\textsuperscript{10} The Court held that such an imposition violated the Commerce Clause and the Due Process Clause of the United States Constitution.\textsuperscript{11} In \textit{Quill Corp. v. North Dakota},\textsuperscript{12} the Court had an opportunity to reexamine its decision regarding physically absent mail-order retailers and to create a new immunity standard.\textsuperscript{13} The Court upheld Quill’s Commerce Clause objection to the imposition of collection duties, recognizing that a contrary decision would cause confusion and economic hardship for retailers.\textsuperscript{14} However, the Court acknowledged the need for a new rule in this area.\textsuperscript{15} The Court encouraged Congress to take action, and it removed a potential barrier to such action by overruling the Due Process Clause element of previous taxing jurisdiction cases.\textsuperscript{16}

This Note discusses the history of the states’ attempts to require out-of-state retailers to collect use taxes, detailing the legitimate concerns of both parties.\textsuperscript{17} This Note analyzes the significant changes the Court in \textit{Quill} made to both Due Process Clause and Commerce Clause jurisprudence in taxing jurisdiction cases.\textsuperscript{18} This Note concludes that the wisdom and utility of the \textit{Quill} decision depend on Congress’s reaction to this latest development in the use tax wars.\textsuperscript{19}

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  \item \textsuperscript{8} \textit{E.g.}, 11 N.D. CENT. CODE § 57-40.2-07(3) (Supp. 1991). This section states: “The tax required to be collected, and any tax collected, by any retailer . . . shall constitute a debt owed by the retailer to this state.” \textit{Id}.
  \item \textsuperscript{9} \textit{See infra} notes 55-77, 127-51 and accompanying text.
  \item \textsuperscript{11} \textit{Id.} at 756-58. The Commerce Clause provides: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. The Due Process Clause of the Fourteenth Amendment provides: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.
  \item \textsuperscript{12} 112 S. Ct. 1904 (1992).
  \item \textsuperscript{13} \textit{See infra} notes 20-86 and accompanying text.
  \item \textsuperscript{15} \textit{See infra} notes 273, 304-05 and accompanying text.
  \item \textsuperscript{16} \textit{Quill}, 112 S. Ct. at 1911.
  \item \textsuperscript{17} \textit{See infra} notes 87-167, 200-25 and accompanying text.
  \item \textsuperscript{18} \textit{See infra} notes 233-306 and accompanying text.
  \item \textsuperscript{19} \textit{See infra} notes 307-13 and accompanying text.
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FACTS AND HOLDING

The State of North Dakota requires its residents to pay a use tax on personal property brought into North Dakota for storage, use, or consumption. All retailers "maintaining a place of business" in North Dakota must collect and remit the tax when such property is sold. Any person who distributes catalogues or otherwise advertises in North Dakota on a regular or systematic basis qualifies as a "retailer maintaining a place of business in the state." Regular or systematic solicitation is defined as "three or more separate transmissions of any advertisement or advertisements during a specified twelve-month period."

In 1989, the Tax Commissioner of North Dakota ("Commissioner") filed suit in a North Dakota district court, requesting that Quill Corporation ("Quill") be declared a "retailer maintaining a place of business in the state." The Commissioner also requested that Quill be ordered to pay use taxes, interest, and penalties on all sales since July 1, 1987. Quill, a Delaware corporation with property in Illinois, California, and Georgia, sold office supplies and equipment to North Dakota residents. Quill mailed catalogues and flyers into North Dakota sixty-two times a year and supplemented these efforts with telephone solicitation of its active customers. At the time of the lawsuit, Quill was the sixth largest retailer of office supplies in North Dakota. However, its presence in the State was

20. 11 N.D. CENT. CODE § 57-40.2-02.1(1) (Supp. 1991). The relevant portion of this statute provides: "[A]n excise tax is imposed on the storage, use, or consumption in this state of tangible personal property purchased at retail for storage, use, or consumption in this state, at the rate of five percent of the purchase price of the property." Id.

21. Id. § 57-40.2-07(1). The relevant portion of this statute provides: "Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state . . . shall obtain a permit from the commissioner to collect the tax imposed by this chapter, . . . and at the time of making such sales, whether within or without the state, shall . . . collect the tax imposed by this chapter from the purchaser." Id.

22. Id. § 57-40.2-01(7). Subsection 7 states: "Retailer maintaining a place of business in this state' . . . includes every person who engages in regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals, advertising flyers, or by other advertising." Id.


26. Id. at 1907-08.

27. Brief for Respondent, Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992) (No. 91-194). Quill leased software to a few customers for use in communicating with the company through an electronic bulletin board. Id.

28. State ex rel. Heitkamp, 470 N.W.2d at 204-05. The company's gross sales in North Dakota amounted to almost $1 million annually. Id. at 204.
almost entirely economic in nature. The company owned no real property and possessed a negligible amount of personal property in the state. Quill had no representatives, facilities, in-state telephone numbers, or bank accounts in North Dakota.

The district court rejected the Commissioner's request. In so doing, the court relied on the United States Supreme Court's decision in National Bellas Hess, Inc. v. Department of Revenue, a case decided on Commerce Clause and Due Process grounds. The court ruled that Quill could not be required to collect and remit use taxes because it lacked a sufficient connection, or "nexus," with the State.

On appeal, the North Dakota Supreme Court reversed. The court asserted that changes in the direct marketing business and in the legal landscape had reduced the Bellas Hess decision to an "obsolescent precedent." It contended that Quill's challenge on Commerce Clause and Due Process Clause grounds failed to reflect modern jurisprudence in these areas.

Commerce Clause cases decided since Bellas Hess, the court insisted, had moved toward an economic definition of nexus which would allow the states more power to tax interstate commerce. Similarly, courts in recent Due Process Clause decisions had held that a physical presence was no longer necessary to establish personal jurisdiction, an area "closely related" to due process. The court stated that the test applied in personal jurisdiction cases also should be used to analyze taxing jurisdiction cases. If a personal jurisdiction test were applied, an out-of-state retailer would be subject to use tax collection duties, as well as to being forced into state court, if it purposefully directed its activities at a state's residents.

The North Dakota Supreme Court concluded that a seller's
nexus with a taxing state should be evaluated by analyzing the "economic realities" present in each case.\textsuperscript{43} Using this new economic yardstick, the court determined that Quill had a substantial nexus with North Dakota.\textsuperscript{44} The court also held that North Dakota had provided enough benefits to Quill to entitle the State to ask for recompense.\textsuperscript{45}

The court found a substantial nexus in Quill's "intentional solicitation and exploitation" of North Dakota's residents.\textsuperscript{46} The court determined that the company's economic presence was substantial, given its market share, level of advertising, and annual gross revenues in North Dakota.\textsuperscript{47} The court noted that the benefits, services, and opportunities that the State had provided to Quill justified the imposition of use tax collection duties.\textsuperscript{48} The court rejected Quill's argument that such benefits should be limited to tangible property protection functions.\textsuperscript{49} The court asserted that Quill had profited from the "benefit[s] of a trained work force and the 'other advantages' of a civilized society," and from the "economic benefits and opportunities conferred by the State."\textsuperscript{50}

The court noted that North Dakota regulated the financial institutions Quill had utilized to check customer credit.\textsuperscript{51} In addition, North Dakota provided fire and police protection for the software diskettes that Quill had leased to state residents.\textsuperscript{52} The State also supplied Quill with a benefit the court deemed indispensable — it had disposed of Quill's advertising.\textsuperscript{53} The Court reasoned that the retailer had profited from the advertising, and therefore benefitted from the annual disposal of an estimated twenty-four tons of dis-

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  \item \textsuperscript{43}Id. The Court noted that the physical presence rule may produce illogical results. A small retailer with one person in the taxing state may be required to collect and remit use taxes, for example, but a "leviathan" with no physical presence may reap millions in sales from the state while avoiding such duties. \textit{Id.}
  \item \textsuperscript{44}Id. at 216-17. The constitutionality of state sales and use taxes is analyzed using a four-prong test promulgated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). \textit{Id.} at 216; see infra notes 172-73 and accompanying text. Only the first prong was at issue in \textit{State ex rel. Heitkamp.} This prong requires a substantial nexus between the activity and the taxing state. \textit{State ex rel. Heitkamp}, 470 N.W.2d at 216.
  \item \textsuperscript{45}Id. at 217-19.
  \item \textsuperscript{46}Id. at 216.
  \item \textsuperscript{47}Id. \textit{See supra} notes 27-28 and accompanying text.
  \item \textsuperscript{48} \textit{State ex rel. Heitkamp}, 470 N.W.2d at 217-19.
  \item \textsuperscript{49}Id. at 217.
  \item \textsuperscript{50}Id. The Court stated that the infrastructures of a state — its laws and court system — provide a stable economic climate that allows a retailer to sell his product in the state. \textit{Id.} at 218.
  \item \textsuperscript{51}Id. at 219.
  \item \textsuperscript{52}Id. Six diskettes had been leased to state residents; only one North Dakota customer had ordered merchandise using a diskette. \textit{Reply Brief for Petitioner, Quill}, 112 S. Ct. 1904 (1992) (No. 91-194).
  \item \textsuperscript{53} \textit{State ex rel. Heitkamp}, 470 N.W.2d at 218-19.
\end{itemize}
carded advertisements.\textsuperscript{54}

Quill petitioned the United States Supreme Court for certiorari.\textsuperscript{55} The United States Supreme Court reversed, holding that a physical presence in the State was still necessary in order to establish a "substantial nexus" under the Commerce Clause.\textsuperscript{56} Although the Supreme Court agreed with the North Dakota Supreme Court in many respects, the Court stated that the importance of maintaining a bright-line rule required that \textit{Bellas Hess} not be overruled.\textsuperscript{57}

The United States Supreme Court stated that taxing jurisdiction cases, and therefore the requirement of a nexus, must be analyzed separately under the Due Process Clause and the Commerce Clause.\textsuperscript{58} Under a due process analysis, a retailer satisfies the nexus requirement when its connections with a state provide fair warning that it may be subject to the state's jurisdiction.\textsuperscript{59} Fair warning also is considered the analytic touchstone of personal jurisdiction cases.\textsuperscript{60} The Court agreed with the North Dakota Supreme Court that the same test should govern both taxing and personal jurisdiction cases.\textsuperscript{61} The Court held that North Dakota's collection requirements did not violate the Due Process Clause because Quill had purposefully directed its activities at North Dakota residents.\textsuperscript{62} Under this due process analysis, a retailer may establish a nexus in a state without being physically present.\textsuperscript{63} This determination effectively overruled the due process element of \textit{Bellas Hess} and other use tax decisions.\textsuperscript{64}

However, the Court upheld the \textit{Bellas Hess} rule to the extent that it requires physical presence under the Commerce Clause.\textsuperscript{65} The Court intended the separate Commerce Clause nexus requirement to restrict state burdens on interstate commerce.\textsuperscript{66} A retailer must

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\item \textsuperscript{54} Id.
\item \textsuperscript{55} Quill Corp. v. North Dakota, 112 S. Ct. 49 (1991) (granting certiorari).
\item \textsuperscript{56} Quill, 112 S. Ct. at 1913-14.
\item \textsuperscript{57} Id. at 1915-16.
\item \textsuperscript{58} Id. at 1909, 1913. The Court noted that in the past courts have not always made the distinction between the Due Process Clause and Commerce Clause analyses. Id. at 1909.
\item \textsuperscript{59} Id. at 1913.
\item \textsuperscript{60} Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (6-2 decision) (upholding Florida's assertion of personal jurisdiction over a nonresident defendant). See Quill, 112 S. Ct. at 1910-11.
\item \textsuperscript{61} Id. at 1911.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id. The Court noted: "In 'modern commercial life' it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: the requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." Id.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id. at 1911, 1916.
\item \textsuperscript{66} Id. at 1913.
\end{itemize}
have a substantial nexus with a state for Commerce Clause purposes before it can be required to undertake the significant burden of use tax collection. Conversely, for due process purposes, a retailer need only have "minimum contacts" with a state to establish a nexus with that state. As a result, the Court stated that a corporation may have a sufficient nexus for due process purposes but an insufficient nexus for Commerce Clause purposes.

The Court found that a retailer satisfied the substantial nexus requirement under the Commerce Clause when it was physically present in the taxing state. The physical presence requirement maintained the Bellas Hess bright-line rule. The Court stated that a bright-line rule would set boundaries on the states' authority to impose collection duties, and would reduce litigation over such impositions. The Court also emphasized that such a rule "encouraged settled expectations" and promoted business investment based on those expectations. The Court noted that businesses had relied on the physical presence requirement for twenty-five years, and the principles of stare decisis dictated that such a precedent should not be overruled.

Early in its opinion, the Court expressly noted that Congress was free to regulate interstate commerce but was incapable of authorizing activities that violate the Due Process Clause. In its conclusion, the

67. Id.
68. Id.
69. Id. at 1913-14. The Court noted that past cases had suggested the opposite may not be true. To date, every tax that has passed the Complete Auto Commerce Clause analysis has been found to be valid under the Due Process Clause. Id. at 1914 n.7 (citing Trinova Corp. v. Michigan Dep't of Treasury, 111 S. Ct. 818, 828 (1991); Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987)).
70. Id. at 1914.
71. Id. at 1914-15.
72. Id. at 1915. The Court found this preferable to the case-by-case analysis advocated by the North Dakota Supreme Court. Id. at 1914.
73. Id. at 1915.
74. Id. at 1915, 1916. The Court has cited Bellas Hess in the following cases: Goldberg v. Sweet, 488 U.S. 252, 263 (1989) (citing Bellas Hess in support of its statement that nexus is not established by the termination, within a state, of an interstate telephone call); D.H. Holmes Co. v. McNamara, 486 U.S. 24, 33 (1988) (rejecting the application of the Bellas Hess doctrine because the retailer was physically present in the taxing state); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981) (citing Bellas Hess for the proposition that no tax may be levied on an interstate business unless the business has a substantial nexus with the state); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436-37 (1980) (citing Bellas Hess in support of its statement that the Due Process Clause requires "a 'minimal connection' between the interstate activities and the taxing State"); National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 559 (1977) (holding that Bellas Hess does not require a nexus between the seller's activity within the taxing state and the activity which the state is attempting to tax).
75. Quill, 112 S. Ct. at 1909. Therefore, Congress would not have been free to reg-
Court encouraged Congress to take action on the use tax collection issue, emphasizing that *Bellas Hess* had been upheld solely on Commerce Clause grounds.\(^7\) The Court stated that Congress was better qualified to resolve the controversy.\(^7\)

Justice Byron White, in a separate opinion, agreed with the majority in overruling the due process element of *Bellas Hess* but disagreed with the Commerce Clause analysis.\(^7\) Justice White argued that subsequent decisions had disavowed the theoretical underpinnings of the physical presence requirement, and that these subsequent decisions had cited *Bellas Hess* for points of law other than the physical presence requirement.\(^7\)

Justice White criticized the majority for its “novel” finding of two separate nexus definitions, noting that the Court had “never before found . . . sufficient contacts for due process purposes but an insufficient nexus under the Commerce Clause.”\(^8\) Briefly reviewing previous cases, Justice White concluded that nexus was a due process fairness inquiry.\(^8\) Justice White asserted that requiring physical presence was an “anachronistic notion,” even if a Commerce Clause nexus requirement existed.\(^8\) Rejecting the majority’s reliance on the importance of a bright-line rule, Justice White argued that such a rule produced unfairness, and he expressed doubts as to its efficacy.\(^8\)

In a concurring opinion, Justice Antonin Scalia, joined by Justices Anthony Kennedy and Clarence Thomas, stated that the Commerce Clause element of *Bellas Hess* should be upheld on *stare decisis* grounds.\(^8\) Justice Scalia noted that *stare decisis* had special force when Congress was free to alter the Court’s decision.\(^8\) Justice Scalia also agreed that the Court should not overrule a decision upon which so many businesses had relied.\(^8\)

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\(^7\) *Id.* at 1916.
\(^7\) *Id.*
\(^7\) *Id.* at 1916-17 (White, J., concurring in part and dissenting in part).
\(^7\) *Id.* at 1918 & n.2 (White, J., concurring in part and dissenting in part).
\(^8\) *Id.* at 1919 (White, J., concurring in part and dissenting in part).
\(^8\) *Id.* See supra note 44 for a discussion of the substantial nexus test. Justice White contended that this test was “definitely traceable to concerns grounded in the Due Process Clause.” *Quill*, 112 S. Ct. at 1920 (White, J., concurring in part and dissenting in part).
\(^8\) *Id.*
\(^8\) *Id.* at 1920-22 (White, J., concurring in part and dissenting in part). Justice White considered the holding unlikely to reduce litigation, given the amount of tax revenues at stake for the states. *Id.* at 1921 (White, J., concurring in part and dissenting in part).
\(^8\) *Id.* at 1923 (Scalia, J., concurring).
\(^8\) *Id.*
\(^8\) *Id.* at 1923-24 (Scalia, J., concurring). Justice Scalia thought that a contrary
BACKGROUND

SUPREME COURT DECISIONS

In 1934, the United States Supreme Court upheld a state law which required out-of-state retailers to collect use taxes from purchasers within the State of Iowa.\(^7\) In *Monamotor Oil Co. v. Johnson*,\(^8\) an Arizona fuel distributor contended that Iowa's tax on motor vehicle fuel constituted a burden on interstate commerce.\(^9\) Iowa imposed the tax upon the use of such fuel within the State and required distributors to collect the tax from their customers.\(^9\) The Court held that the tax was levied on a local use of property and had no connection with interstate commerce.\(^9\) Therefore, the tax did not violate the Commerce Clause, and the required collection duty was merely "a common and . . . lawful arrangement."\(^9\)

Three years later, in *Henneford v. Silas Mason Co.*,\(^9\) the Court reiterated its position.\(^9\) In *Henneford*, the taxpayers were contractors and subcontractors who brought equipment and supplies into the State of Washington.\(^9\) The State levied a tax upon the taxpayers' use of these chattels in the State.\(^9\) The Court held that the use tax did not violate the Commerce Clause because the interstate portion of the transaction had been completed.\(^9\) The Court noted that use taxes had become so common that their validity "ha[had] been withdrawn from the arena of debate."\(^9\)

The Court in *Henneford* also noted that the collection require-

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\(^7\) *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 97 (1934).
\(^8\) 292 U.S. 86 (1934).
\(^9\) *Monamotor Oil Co.*, 292 U.S. at 93.
\(^10\) *Id.* at 88-89. The relevant portion of the Iowa Code of 1931 provided: "Any person using motor vehicle fuel within the state shall be liable for [a license fee of two cents per gallon on all motor vehicle fuel within the State]." *Iowa Code* ch. 251-A1, § 5093-a1 (1931). Distributors were required to collect and remit the license fee to the state treasurer of Iowa. *Monamotor Oil Co.*, 292 U.S. at 89-90.
\(^11\) *Id.* at 93.
\(^12\) *Id.* at 93-95. *See supra* note 11.
\(^13\) 300 U.S. 577 (1937).
\(^15\) *Henneford*, 300 U.S. at 579.
\(^16\) *Id.* at 578. Chapter 180, Title IV of the Laws of Washington provided for "a tax or excise for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935." 1935 Wash. Laws 180 ch. IV.
\(^17\) *Henneford*, 300 U.S. at 582-83.
\(^18\) *Id.* at 583 (citing, *inter alia*, *Monamotor Oil Co.*, 300 U.S. at 93).
ment accomplished several goals. First, the Court stated that state revenues would be increased. Because the use tax rate was equal to the sales tax rate, state residents would no longer save money by purchasing goods out of state. These customers would thus be more inclined to spend their money at home, which in turn would increase state sales tax revenues. Secondly, the Court stated that the imposition of the use tax would enable in-state retailers to better compete with nonresident retailers. Only in-state retailers were required to collect a sales tax when they sold merchandise. Therefore, a nonresident retailer could charge the same price and gain a competitive advantage by not having to collect a use tax.

In Felt & Tarrant Manufacturing Co. v. Gallagher, an Illinois retailer argued that California's use tax laws violated the Due Process Clause as well as the Commerce Clause. Felt & Tarrant Manufacturing Co. ("Felt & Tarrant") maintained offices and agents in California for purposes of soliciting sales from California residents. The Court held that California's use tax statutes did not violate the Commerce Clause. Relying upon its earlier decisions in Monamotor and Henneford, the Court reasoned that the tax was levied on the use of property after the interstate transaction had been completed. The Court also ruled that the laws did not violate the Due Process Clause, but the Court provided no rationale for its ruling.

Two years later, in Wisconsin v. J.C. Penney Co., a nonresi-

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100. Id.
101. Id. at 579-81. The sales and use tax rates are equal in all states which impose such taxes. 1 Multistate Sales Tax Guide (CCH) ¶ 13 (1992); Sandra B. McCray, Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation, 17 Urb. Law. 529, 557 (1985).
102. Henneford, 300 U.S. at 581. A commentator has noted that the collected use taxes also provide a state with the same revenues it would have received had the sale been consummated in the state. Sandra B. McCray, Overturning Bellas Hess: Due Process Considerations, 1985 B.Y.U. L. Rev. 265, 266 n.6. (1985).
103. Henneford, 300 U.S. at 581.
104. Id. at 579-80.
105. Id. at 581. See supra note 101 and accompanying text.
107. Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62, 64-66 (1939). Felt & Tarrant argued that the statute, if upheld, would deprive the company of its property without due process of law. Id. at 66. The relevant sections of the California Use Tax Act of 1935, 1935 Cal. Stat. 361, required a retailer to collect use tax from purchasers if the retailer maintained a place of business in California. Id. at 64, 66. See supra note 11.
109. Id. at 67-68.
110. Id.
111. Id. at 66.
112. 311 U.S. 435 (1940).
dent retailer contended that Wisconsin’s corporate income tax violated the Due Process Clause. The Court upheld the tax and declared that state tax laws must pass a “nexus” test to withstand due process challenges. Under this test, a state is free to exact a tax if it provides protection, opportunities, and benefits to a taxpayer. If a state provides such services to a taxpayer, the taxpayer would have a connection, or nexus, with the state.

In *Nelson v. Sears, Roebuck & Co.*, the Court applied this test to a state use tax law. Sears, a New York corporation, maintained retail stores in Iowa and also sold merchandise to Iowa residents through its catalogues. Furthermore, these catalogue orders were filled out of state. As Felt & Tarrant Manufacturing had done, Sears challenged the use tax laws as violative of the Due Process Clause and the Commerce Clause. The Court upheld the tax. Citing *J.C. Penney Co.*, the Court rejected Sears’s due process argument by noting that the retailer’s Iowa stores had received significant

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113. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 439 (1941). The relevant portions of the Wisconsin income tax statute provide as follows:

For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. . . . In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin.

1935 Wis. Laws § 3(1), (4) (chs. 505, 552).


115. *Id.* at 444. The Court stated that “[t]he simple but controlling question is whether the state has given anything for which it can ask return.” *Id.* This has been described as the “governmental benefits” test. Donald P. Simet, *The Concept of “Nexus” and State Use and Unapportioned Gross Receipts Taxes*, 73 Nw. U. L. Rev. 112, 131 (1978).


117. 312 U.S. 359 (1941) (6-2 decision).


An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this act . . . for use in this state, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission as hereinafter provided . . . . [E]very retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state . . . shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser.

IOWA CODE §§ 6943.102-.109 (1939).

119. *Sears, Roebuck & Co.*, 312 U.S. at 362 & n.3.

120. *Id.*

121. *Id.* at 362.

122. *Id.* at 366.
benefits from the State. These benefits accrued to the mail-order business as well because it was part of Sears's entire Iowa business. Iowa had provided benefits to the mail-order division and therefore could require the division to collect use taxes from Iowa residents.

The Court also has upheld use tax laws when retailers have sent traveling salesmen into a state, or employed independent contractors who were state residents. However, the Court found a state use tax to be unconstitutional in Miller Bros. v. Maryland. Miller Brothers sold furniture in Delaware, the state in which it was located. Maryland residents often crossed State lines to make purchases at the store. Occasionally, the store's representatives were physically present in Maryland to deliver goods. Maryland sought to impose use tax collection duties on Miller Brothers, a requirement that the retailer viewed as violative of the Due Process and Commerce Clauses.

The Court in Miller Bros. stated that "due process requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax." The Court stated that this connection was created when a retailer entered a state to ac-

123. Id. at 364. These benefits consisted of the privilege of doing business in Iowa.

124. Id.

125. Id. On the same day, the Court also decided Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941), on substantially identical grounds. See Montgomery Ward & Co., 312 U.S. at 375 (holding that Iowa could impose a use tax collection burden as a price for the benefits that the State provided to Montgomery Ward).

126. Scripto, Inc. v. Carson, 362 U.S. 207, 209, 213 (1960) (holding that the presence of several independent contractors in the State constituted a "more than sufficient" minimum connection with the State); General Trading Co. v. State Tax Comm'n, 322 U.S. 335, 337-38 (1944) (finding the case to be indistinguishable from Felt & Tarrant, even though traveling salesmen, rather than state residents, were used to solicit business within the State).


129. Id. at 341.

130. Id. The store advertised in Delaware newspapers, some of which were probably sold in Maryland; it also sent four mailings a year to previous customers, including those in Maryland. Id. app. at 349-50 n.4(3(b)-(c)).

131. Id. at 341. Maryland was relying on a statute that stated:

An excise tax is hereby levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State . . . . Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State . . . . shall collect the tax imposed by this sub-title from the purchaser . . . . As used in this sub-title, . . . "Engaged in business in this State" means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State.


tively and aggressively solicit state residents. Miller Brothers had not done so, and the Court held that due process would be violated if the store was required to collect and remit use taxes to Maryland. Because the Court determined that the use tax violated due process, the Court considered it unnecessary to address Miller Brothers' Commerce Clause objections.

In *National Bellas Hess, Inc. v. Department of Revenue*, the Court did not analyze the nature and depth of the retailer's contacts with the taxing state. Instead, the Court conditioned nexus upon a finding that the retailer was physically present in the state, thus creating a bright-line rule that has prevailed to the present day. In *Bellas Hess*, National Bellas Hess, Inc. ("Bellas Hess" or "company"), a mail-order company incorporated in Delaware and headquartered in Missouri, was required by Illinois to collect and remit use taxes. The company had no stores, agents, property, or telephone numbers in Illinois. Its contacts with Illinois residents consisted of mailing two catalogues each year to past and potential customers, supplemented by the occasional flyer. Bellas Hess accepted orders by mail and shipped goods by mail or by common carrier.

Addressing Commerce Clause and Due Process Clause challenges by Bellas Hess, the Court stated that the claims were closely related:

"State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." . . . And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the "simple but controlling question is whether the state has given anything for which it can ask return." . . .

133. *Id.* at 346-47.
134. *Id.* at 347; see supra note 131 and accompanying text.
136. 386 U.S. 753 (1967) (6-3 decision).
138. *Id.* at 758; see supra notes 65-77 and accompanying text.
139. *Bellas Hess*, 386 U.S. at 753-54. Retailers maintaining a place of business in Illinois were required to collect and remit use taxes to the State. *Id.* at 754-55. An Illinois statute defined such retailers in part as those "[e]ngaging in soliciting orders within this State from users by means of catalogs or other advertising, whether such orders are received or accepted within or without this State." ILL. REV. STAT. ch. 120, para. 439.2 (1965). National Bellas Hess, Inc., fit this definition. *Bellas Hess*, 386 U.S. at 755.
139. *Id.* at 754.
139. *Id.*
140. *Id.* at 754-55. Bellas Hess's method of advertising placed the company within Illinois's definition of a "retailer maintaining a place of business in this State." *Id.* at 755.
The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."\textsuperscript{143}

In reviewing its previous decisions, the Court found a simple pattern: a retailer with stores, solicitors, or property within a state received the protection and services of the taxing state, while retailers relying solely on the mail or common carriers did not receive such benefits.\textsuperscript{144} The Court emphasized the intolerable burden that would be placed on Bellas Hess's business if the collection duties were enforced.\textsuperscript{145} If the use tax statute was upheld, the Court stated, every other taxing jurisdiction would be at liberty to place similar burdens on the company.\textsuperscript{146} The resulting obligation — to collect and remit taxes to thousands of jurisdictions with different tax rates and exemptions — would be an unjustifiable entanglement of Bellas Hess's business.\textsuperscript{147}

The Court in \textit{Bellas Hess} also commented that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail-order transactions here involved."\textsuperscript{148} States were not allowed to tax the privilege of carrying on interstate business because of a 1951 decision, \textit{Spector Motor Service, Inc. v. O'Connor}.\textsuperscript{149} The Court in \textit{Bellas Hess} did not mention the \textit{Spector Motor Service} decision or allude to the unconstitutionality of taxing interstate commerce.\textsuperscript{150} However, the Court stated that allowing Illinois to impose collection duties on Bellas Hess would enable states to similarly burden interstate retailers of all sizes.\textsuperscript{151}

\textsuperscript{143} \textit{Id.} at 756 (quoting \textit{Freeman v. Hewit}, 329 U.S. 249, 253 (1946); \textit{J.C. Penney Co.}, 311 U.S. at 444; \textit{Miller Bros.}, 347 U.S. at 344-45; \textit{Scripto, Inc.}, 362 U.S. at 210-11). \textit{See supra} notes 112-16, 126-35 and accompanying text.

\textsuperscript{144} \textit{Bellas Hess}, 386 U.S. at 737-38. In recognizing this pattern, the Court devised a bright-line rule that exempts physically absent mail-order sellers from use tax collection duties. \textit{Id.}; see \textit{Quill Corp. v. North Dakota}, 112 S. Ct. 1904, 1914 (stating that "the bright-line rule of \textit{Bellas Hess} furthers the ends of the dormant Commerce Clause"). Although the physical presence rule has been retained in use tax cases, it has been discarded in other types of state jurisdiction cases. For example, a state may require a physically absent commercial actor to defend a lawsuit in its courts, if the actor has purposefully directed its activities at state residents. \textit{Burger King Corp. v. Rudzewicz}, 471 U.S. 462, 476 (1985). \textit{See infra} notes 186-99 and accompanying text.

\textsuperscript{145} \textit{Bellas Hess}, 386 U.S. at 759-60.

\textsuperscript{146} \textit{Id.} During this period, more than 2300 localities had imposed local sales and use taxes. \textit{Id.} at 759 n.12.

\textsuperscript{147} \textit{Id.} at 759-60.

\textsuperscript{148} \textit{Id.} at 759.

\textsuperscript{149} 340 U.S. 602, 610 (1951) (6-3 decision).

\textsuperscript{150} \textit{Bellas Hess}, 386 U.S. at 753-60.

\textsuperscript{151} \textit{Id.} at 759 n.14.
Justice Abe Fortas dissented, contending that Bellas Hess had satisfied the Due Process Clause and Commerce Clause nexus test. Justice Fortas compared Bellas Hess's activities to those of an Illinois-based retailer and concluded that the benefits both received were equal, although their burdens were not. Both solicited Illinois residents, used Illinois financial institutions and credit facilities, and profited from sales in Illinois. However, only the local retailer was required to assess a sales tax, a requirement Justice Fortas considered discriminatory.

Justice Fortas also disagreed that Bellas Hess and other mail order retailers would be unduly burdened if Illinois's collection requirements were upheld. Justice Fortas contended that the burdens imposed upon out-of-state retailers would merely equal those borne by in-state retailers who collect sales taxes from their customers. Moreover, he criticized the majority's concerns about the administrative burdens of record-keeping and reporting, stating that the majority had "vastly underestimate[d] the skill of contemporary man and his machines."

In National Geographic Society v. California Board of Equalization, the Supreme Court rejected the notion that the slightest presence of a seller constituted a sufficient nexus with the taxing state. The State of California sought to impose use tax collection duties on the National Geographic Society ("Society"). The Society sold items to California residents from its offices in Washington,

152. Id. at 765-66 (Fortas, J., dissenting).
153. Id. at 762-63 (Fortas, J., dissenting).
154. Id.
155. Id. at 763 (Fortas, J., dissenting). Justice Fortas noted, prophetically, that "this haven of immunity may well increase in size and importance" as a result of the majority's decision. Id. at 764 (Fortas, J., dissenting).
156. Id. at 766 (Fortas, J., dissenting).
157. Id.
158. Id. Justice Fortas noted that in-state mail-order retailers had complied with the requirement, despite its burden. Id.
160. National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 556 (1977). However, the Court did not define the boundary between "slightest presence" and the more substantial presence that constitutes sufficient nexus. Two years earlier, it had upheld a Washington gross receipts tax imposed on a company with one employee in the State. Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560, 561, 564 (1975). The employee "made possible the realization and continuance of valuable contractual relations" between the company and its customer in Washington. Id. at 562.
161. National Geographic Soc'y, 430 U.S. at 553. The relevant portions of California's Revenue and Tax Code stated:

Every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, shall... collect the tax from the purchaser... "Retailer engaged in business in this state"... includes... any retailer maintaining, occupying, or
However, it maintained two offices in California to solicit advertising for National Geographic Magazine. The Court observed that the two offices, which raised one million dollars annually for the Society, had more than a slight presence within the State.

The Court also rejected the Society's argument that the activity being taxed—mail-order sales—must be connected to the in-state activity that constituted the seller's nexus with the State. Quoting *Miller Bros.*, the Court asserted that the nexus test required "some definite link, some minimum connection, between [the State and] the person . . . it seeks to tax." The two offices, and thus the Society, received the benefit of state police and fire services, and could be asked in return to collect use taxes on behalf of the State.

During the same Term the Court decided *National Geographic Society*, it also decided *Complete Auto Transit, Inc. v. Brady*. The Court in *Complete Auto* upheld, on Commerce Clause grounds, a Mississippi sales tax on the transportation services sold by an interstate motor carrier. In *Complete Auto*, the Court accomplished two tasks. First, the Court overruled *Spector Motor Service*, thus holding that a state may tax the privilege of engaging in an activity that is part of interstate commerce. The Court argued that the decision in *Spector Motor Service* had "no relationship to economic realities."

Second, the Court in *Complete Auto* announced a four-prong test that has become the standard for determining the constitutionality of state sales and use taxes. The Court held that to withstand a Commerce Clause challenge, a tax must have the following characteristics:

- using, . . . an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.


162. *National Geographic Soc'y*, 430 U.S. at 552.
163. Id.
164. Id. at 556.
165. Id. at 560-61.
166. Id. at 561.
167. Id. at 561-62.
170. Id. at 288-89.
171. Id. at 279. The Court noted that the *Spector Motor Service* rule did not invalidate differently labelled taxes with the same economic effect as a privilege tax. Id. at 288.
172. Id. at 279. Subsequent sales tax and use tax cases, including *Quill*, have been argued and analyzed under the *Complete Auto* test. See, e.g., *Quill*, 112 S. Ct. at 1912-16; *Goldberg v. Sweet*, 488 U.S. 252, 259-60 (1989) (upholding an Illinois tax on interstate telecommunications); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 26 (1988) (upholding Louisiana's right to collect use taxes on catalogues distributed by a retailer with 13 stores in the State).
The tax is "applied to an activity with a substantial nexus with the taxing State"; [1]
The tax is "fairly apportioned"; [2]
The tax "does not discriminate against interstate commerce"; and [3]
The tax "is fairly related to the services provided by the State." [4]

RELEVANT DECISIONS IN OTHER AREAS OF THE LAW

Taxing Jurisdiction — Income Tax Cases

The Court decided Complete Auto solely on Commerce Clause grounds. [174] Within three years, however, the Court used language reminiscent of the first and fourth prongs of Complete Auto in enunciating a Due Process Clause test. In Mobil Oil Corp. v. Commissioner of Taxes, [175] a nonresident corporation challenged Vermont's authority to tax dividends a corporation had earned out of state. [176] In Mobil Oil, the Court held that due process required two conditions to be met before a state could tax income produced through interstate commerce: (1) a minimal connection must exist between the taxing state and the interstate activities; and (2) a rational relationship must exist between the intrastate values of the enterprise and the income attributed to the state. [177]

The Court subsequently acknowledged the similarity in wording between the Mobil Oil test and the first and fourth prongs of the Complete Auto test. In Amerada Hess Corp. v. Director, Division of Taxation, [178] thirteen oil companies challenged New Jersey's Corporation Business Tax Act ("Act"). [179] This Act disallowed the deduction of all federal income taxes in computing income for state tax pur-

173. Complete Auto, 340 U.S. at 279 (citing the following cases: General Motors Corp. v. Washington, 377 U.S. 436, 437-49 (1964) (upholding a Washington gross receipts tax against Due Process Clause and Commerce Clause challenges), overruled by Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959) (rejecting Due Process Clause and Commerce Clause challenges to a Minnesota tax assessed on the interstate earnings of a foreign corporation); Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 82, 96 (1948) (5-4 decision) (upholding a Mississippi franchise tax assessed on a Delaware corporation despite Delaware's Commerce Clause challenge); J.C. Penney Co., 311 U.S. at 444 (see supra notes 112-16 and accompanying text)).
174. Complete Auto, 430 U.S. at 274.
177. Id. at 436-37 (1980) (citing, inter alia, Bellas Hess, 386 U.S. at 756).
The oil companies argued that they should be allowed to deduct the federal taxes paid on windfall profits; the taxes were imposed on crude oil production occurring outside New Jersey. The Court upheld the constitutionality of the Act over the taxpayers' Due Process Clause and Commerce Clause challenges. In so doing, the Court acknowledged without comment that the Complete Auto test included due process standards. Justice Antonin Scalia, in a concurring opinion, stated:

To the extent... that the Complete Auto analysis pertains to the due process requirements that there be "a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise"... I agree with the Court's conclusion.

It appeared that a "substantial nexus," the first prong of the Complete Auto test, was grounded in both the Due Process Clause and the Commerce Clause.

**Personal Jurisdiction**

Personal jurisdiction is defined as "the principle that the court must have jurisdiction over defendant's person, his property, or the res that is the subject of the suit." A court possessing this power may force a nonresident defendant into a state court to litigate a dispute. An assertion of personal jurisdiction will satisfy Due Process Clause requirements if a defendant has "fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign."
In 1985, the United States Supreme Court, in *Burger King Corp. v. Rudzewicz*, held that a state court could assert personal jurisdiction over a physically absent defendant. John Rudzewicz, the defendant in *Burger King*, was a Michigan resident who had entered into a franchise agreement with the Burger King Corporation ("Burger King"), a Florida corporation. When a dispute arose between the two parties, Burger King sued Rudzewicz in a Florida court. Rudzewicz claimed that the court could not assert personal jurisdiction over him because he lacked sufficient contacts with the State. Rudzewicz had never visited Florida and had conducted all negotiations from Michigan.

The Supreme Court held that the Florida court could assert personal jurisdiction over Rudzewicz because he had purposefully directed his activities at Florida. Rudzewicz had entered into a twenty-year contract agreement with Burger King. The contract provided that all problems be handled by the Florida headquarters, and all franchise payments be sent to Florida. The franchise documents stated that all disputes were to be governed by Florida law. Thus, the Court held that Rudzewicz had fair warning that he was subject to suit in Florida and could be subjected to the State's personal jurisdiction.

THE EVOLUTION OF THE DIRECT MARKETING INDUSTRY SINCE 1967

In the twenty-five years since *Bellas Hess* was decided, the direct

assert jurisdiction over a nonresident by sequestering property that was unrelated to the cause of action.

190. *Id. at 464, 466.*
191. *Id. at 468.*
192. *Id. at 469, 478.*
193. *Id. at 479-80.*
194. *Id. at 482. The Court stated:
Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

195. *Id. at 476. (citations omitted).*
196. *Id. at 480.*
197. *Id. at 480-81.*
198. *Id. at 481.*
199. *Id. at 480, 482.*
marketing industry has changed dramatically. Retailers have developed the ability to target customers by "lifestyle, life-event, demographic, geographic, and previous purchasing characteristics." Furthermore, these retailers are no longer limited to soliciting customers through the mail. Customers may order merchandise from a telemarketer or call a toll-free "800" number. They may place their orders via computer, fax machine, interactive television, or an electronic "bulletin board."

Because of these technological advances, direct marketing revenues have skyrocketed. In 1967, when the Court decided *Bellas Hess*, mail-order sales totalled $2.4 billion per year. Direct marketing sales now total $130.4 billion annually, and compose between fifteen percent and twenty-five percent of all retail sales in the United States. Most direct marketers are much smaller than Quill, which on average grosses about $200 million in annual sales. More than ninety-four percent of mail-order firms sell less than $12.5 million worth of merchandise annually.

States and local governments are cognizant of the importance of sales and use taxes, which currently provide twenty-five percent of their annual revenues. In 1991, governmental entities lost an estimated $3.08 billion in uncollected use taxes. The increase in direct marketing sales has been mirrored by an increase in the number of

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200. See Brief for Respondent, Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992) (No. 91-194) (quoting Rapp, *The Tower of Babel*, 54 DIRECT MKTG. MAG. 1, May 1991, at 76). Today, mail-order sales are just a component of direct marketing, described as "the distribution of goods, services, or information to targeted consumers through response advertising while keeping track of sales, interest, behavior, wants and needs in a relational computer database." Id.


203. *State ex rel. Heitkamp*, 470 N.W.2d at 208 n.4.


205. *Bellas Hess*, 386 U.S. at 763 (Fortas, J., dissenting).


207. *State ex rel. Heitkamp*, 470 N.W.2d at 204. See infra note 208 and accompanying text.


209. Rothfeld, 53 *TAX NOTES* at 1406-07.

taxing jurisdictions, from 2300 in 1965 to more than 8800 today. In addition, the tax rates are not uniform: in 1967, eight different sales and use tax rates existed, while more than ninety exist today.

Since 1985, Congress regularly has examined the use tax collection problem and has proposed solutions. In the past, Congress has proposed legislation to establish uniformity in tax rates and a de minimis standard. The states and the retailers generally have resisted congressional action in this area. The states have objected to a single tax rate per state. In addition, retailers have contended that Congress is powerless to alter the physical presence rule of Bellas Hess because it is based on the Due Process Clause.


213. H.R. 2230, 101st Cong., 1st Sess. (1989) (granting states the power to require nonresident retailers to collect use taxes if the retailer annually grosses $12.5 million nationally or $500,000 in the taxing state); S. 480, 101st Cong., 1st Sess. (1989) (granting states the power to require use tax collection by nonresident retailers with annual national sales of $12.5 million or sales of $500,000 in the taxing state); S. 2368, 100th Cong., 2d Sess. (1988) (granting states the power to require use tax collection by nonresident retailers with annual national sales of $15 million or sales of $750,000 in the taxing state); H.R. 3521, 100th Cong., 1st Sess. (1987) (granting states the power to require use tax collection by nonresident retailers with annual national sales of $12.5 million or sales of $500,000 in the taxing state); H.R. 1891, 100th Cong., 1st Sess. (1987) (granting states the power to require sales tax collection by nonresident retailers with annual national sales of $12.5 million or sales of $500,000 in the taxing state); H.R. 1242, 100th Cong., 1st Sess. (1987) (granting states the power to require use tax collection by nonresident retailers with annual national sales of $5 million and requiring retailers to file annual information returns); S. 1099, 100th Cong., 1st Sess. (1987) (granting states the power to require use tax collection by nonresident retailers with annual national sales of $12.5 million or sales of $500,000 in the taxing state); S. 539, 100th Cong., 1st Sess. (1987) (granting states the power to tax interstate sales by nonresident retailers); S. 2913, 99th Cong., 2d Sess. (1987) (granting states the power to require use tax collection by nonresident retailers and requiring one uniform sales tax and use tax rate per state); H.R. 3549, 99th Cong., 1st Sess. (1985) (granting states the power to require use tax collection by nonresident retailers with annual national sales of $5 million and requiring one uniform sales tax and use tax rate per state); S. 1510, 99th Cong., 1st Sess. (1985) (granting states the power to require use tax collection by nonresident retailers on any interstate sale).


215. See infra notes 216-17 and accompanying text.

216. Amicus Curiae Brief for the Direct Marketing Association in Support of Appellant, Quill, 112 S. Ct. 1904 (1992) (No. 91-194). Currently, a single state may contain several taxing jurisdictions, each with its own tax rate. Id. See supra note 213 and accompanying text.

ANALYSIS

In recent years, states have pushed the boundaries of the rule articulated in *National Bellas Hess, Inc. v. Department of Revenue*, by passing use tax laws which focus more on a retailer's economic presence than on its physical presence in the state. This, in turn, has placed out-of-state retailers in a dilemma — either challenge the applicability of the state laws to their businesses or collect and remit the tax. A challenge requires expenditures for attorney fees and court costs, and, if unsuccessful, costs the retailers back taxes, interest, and penalties.

As the foregoing discussion indicates, both the states and the out-of-state retailers have legitimate concerns about the current state of use tax laws. The *Bellas Hess* physical presence rule deprives the states of a primary use tax collection method — requiring the nonresident retailers to collect the taxes when they sell to state residents. Given the current economic conditions in many states, this is a matter of grave concern. Conversely, the out-of-state retailers, particularly the small ones, are concerned about the potentially overwhelming burden of collecting and remitting use taxes to thousands of jurisdictions with different tax rules.

The United States Supreme Court's decision in *Quill Corp. v. North Dakota* provides some guidance to retailers and to the states on how to apply the *Bellas Hess* rule. However, the decision in *Quill* does not aid the states in their efforts to collect use taxes, and it does not reduce the burdens currently placed on retailers by the states. The Court stated that Congress is better qualified to address these problems.

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218. 386 U.S. 753 (1967).
219. Ferdinand F. Schoettle, *Use Taxes and The Out-Of-State Seller*, 48 TAX NOTES 463, 472-74 (July 23, 1990). Since 1987, more than 50% of the states have passed "expanded nexus" statutes. These statutes, which are enforced with varying degrees of aggressiveness, generally are based on an economic nexus standard. Id. at 472, 473 & n.6, 474.
220. Id. at 466.
221. Id.
222. See supra notes 209-12, 215-17 and accompanying text.
224. Id. at 1087 n.1 (noting that several states are facing financial difficulties).
227. See infra notes 294-97 and accompanying text.
228. See infra notes 298-306 and accompanying text; see supra note 225 and accompanying text.
removed all barriers to congressional action. If Congress moves swiftly to establish an equitable, rational sales tax and use tax policy, the Court's significant changes to existing jurisprudence will have been justified. If, however, Congress is unable to enact such legislation, the Court's decision leaves all parties in their former position and may result in more confusion and more litigation.

The Court in Quill altered both the Due Process Clause and Commerce Clause analyses. Breaking with precedent, the Court equated taxing jurisdiction with personal jurisdiction and determined that Quill Corporation ("Quill") was not immune from collection duties on due process grounds. The Court also redefined the nexus test to be applied under the Commerce Clause. These actions resulted in the retention of a bright-line rule for Commerce Clause purposes which the Court viewed as important to those engaged in interstate commerce.

THE DUE PROCESS ANALYSIS

Initially, the Supreme Court stated that state taxes meet due process requirements if the state provides benefits to the nonresident taxpayer for which it could require reimbursement. Subsequent use tax collection decisions also required that, under the Due Process Clause, the out-of-state retailer must actively and aggressively establish a definite link with the state via its residents. In Bellas Hess, the Court noted the common denominator of cases in which courts had upheld the imposition of collection duties. In each of those cases, a retailer had personnel or property within the taxing state. The Court's rationale in Bellas Hess is straightforward. Unquestionably, people and property within a taxing state receive tangible benefits such as police and fire protection from that state.

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230. Id.
231. See infra notes 297-306 and accompanying text.
232. See infra note 306 and accompanying text.
233. See supra notes 58-77 and accompanying text.
234. See supra notes 58-64 and accompanying text.
235. See supra notes 65-77 and accompanying text.
236. See supra notes 70-74 and accompanying text.
237. See supra notes 112-26 and accompanying text.
240. Id. at 756-58.
benefits to a physically absent retailer, however, are difficult to prove and measure.242

In at least one other area of the law, the Court has found that a state may assert jurisdiction over a physically absent commercial actor.243 The Court ruled in Burger King Corp. v. Rudzewicz244 that a state could assert personal jurisdiction over a nonresident defendant.245 Commentators have argued that the Court’s rationale in Burger King also should apply to taxing jurisdiction cases.246 The Court in Quill agreed, stating that fair warning was at the heart of the due process nexus requirement, as it is in personal jurisdiction cases.247 Accordingly, for due process purposes, the Court justifiably could equate personal jurisdiction with taxing jurisdiction.248 As a result, nonresident retailers are subject to use tax collection duties if they purposefully direct their activities at the taxing state.249 Quill undoubtedly did so, and thus lost its due process challenge.250

Modern due process analyses often focus on whether a party received notice or fair warning.251 However, notice was not the underlying concern in Bellas Hess and other use tax decisions.252 These cases searched for a quid pro quo before imposing tax collection duties.253 If the retailer received benefits from the state, it could be required to aid the state in funding those benefits.254 This rationale is now obsolete, replaced by a test that evaluates the degree of contact a retailer has established within the state.255

The Court, in its zeal to abolish the problematic due process barrier to congressional action, equated taxing jurisdiction with personal jurisdiction.256 The Court appeared to agree with the North Dakota...
Supreme Court that it is no more burdensome for a nonresident retailer to collect and remit use taxes than it is to defend a suit in a state.\textsuperscript{257}

Modern technology has lessened much of the burden of preparing for and participating in litigation.\textsuperscript{258} However, a mail-order retailer may assume many expensive and time-consuming duties if it is required to collect and remit use taxes.\textsuperscript{259} A retailer will be required to print detailed lists of tax rates in catalogues, and to correct customer mistakes in payment or to bear the expense of such mistakes.\textsuperscript{260} A retailer may undergo lengthy audits by the states in which it does business.\textsuperscript{261} It may be forced to hire additional personnel to track sales and prepare returns.\textsuperscript{262} Finally, a retailer with

\textsuperscript{257} Quill, 112 S. Ct. at 1923 (Scalia, J., concurring). Significantly, Justice Scalia added the following statement:

I agree with the Court, moreover, that abandonment of Bellas Hess's due process holding is compelled by reasoning "[c]omparable" to that contained in our post-1967 cases dealing with state jurisdiction to adjudicate . . . . I do not understand this to mean that the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are necessarily identical.

\textsuperscript{258} Burger King, 471 U.S. at 474. As Justice White noted, a seller can conduct activities in the taxing state without physically entering it. Quill, 112 S. Ct. at 1920 (White, J., concurring in part and dissenting in part).

\textsuperscript{259} State ex rel. Heitkamp, 470 N.W.2d at 203, 214.

\textsuperscript{260} This section states: "[E]very retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state.... shall... collect the [use] tax imposed by this chapter from the purchaser." 11 N.D. CENT. CODE § 57-40.2-07 (1), (4), (5) (Supp. 1991). The relevant sections of the North Dakota Century Code provide:

\[\text{(E)ach retailer required or authorized... to collect such tax shall pay the tax in quarterly installments...} \]

\[\text{Every retailer, at the time of making the return required by this chapter, shall compute and pay to the commissioner the tax due for the preceding period...} \]

\[\text{[T]he retailer,... shall make out a return for the preceding quarter period in such form and manner as may be pre-} \]
sales in many states may find it necessary to purchase costly computer software to track numerous tax rates, exemptions, and special rules of each taxing jurisdiction. Despite the Court's conclusion, these burdens are greater than those imposed on a retailer who must appear in state court.

However, as alluded to by the North Dakota Supreme Court, an economic quid pro quo did exist between Quill and North Dakota. Quill was the recipient of substantial benefits from the State. These benefits included an employed population, consumers with ample purchasing power, consumer protection laws, a regulated banking industry, and a court system to litigate delinquent accounts. Given that Quill received such benefits, the Court's decision was consistent with previous use tax decisions analyzed under the Due Process Clause.

The Court's decision also avoids the inherent difficulties of analyzing nexus on a case-by-case basis, as advocated by the North Dakota Supreme Court. Using an economic nexus standard would have returned all parties full circle to the problem of application in future cases. Neither the retailers nor the states would know the limits of the standard, and the resulting confusion could have a harmful effect on the nation's economy, as well as on the direct marketing industry.

The Commerce Clause Nexus Test

The Court in Quill faced a difficult task in addressing the Com-
To avoid legislating, a job the Court properly recognized belonged to Congress, the Court had to uphold a rule it apparently thought was no longer viable. Although its Commerce Clause analysis contained statements as far-reaching as those found in its due process analysis, the Court did clarify some issues over which commentators have argued for years.

The Court rejected the notion that *Bellas Hess* had been effectively overruled in 1977. As noted above, the Court had stated in *Bellas Hess* that the company’s transactions were exclusively interstate in nature. These words led some to think that the Court’s decision was based, at least in part, on *Spector Motor Service, Inc. v. O’Connor*. In 1977, the *Spector Motor Service* decision was overruled by *Complete Auto Transit, Inc. v. Brady*. The Court in *Quill* stated that *Bellas Hess* did not rely on *Spector Motor Service*, and, therefore, the decision remained valid. The Court in *Quill* noted that *Spector Motor Service* had held a direct tax on interstate commerce to be unconstitutional, while upholding a state’s right to impose a different tax with the same economic effect. The Court in *Complete Auto* eliminated that meaningless distinction.

The Court in *Complete Auto* did not destroy the rationale of *Bel-

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272. See infra note 273 and accompanying text.
273. *Quill*, 112 S. Ct at 1916, 1912-16. The Court made the following statements in its Commerce Clause analysis:

> 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. Although we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes, that silence does not imply repudiation of the *Bellas Hess* rule. Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges. This artificiality, however, is more than offset by the benefits of a clear rule. Indeed, even if we were convinced that *Bellas Hess* was inconsistent with our Commerce Clause jurisprudence, “this very fact [might] giv[e] us pause and counse[l] withholding our hand, at least for now. Congress has the power to protect interstate commerce from intolerable or even undesirable burdens.” *Id.* at 1912-16. (citations omitted).

274. *Rothfeld*, 53 TAX NOTES at 1409 & n.49; Gillis, 79 GEO. L.J. at 536 n.10 (noting that commentators disagree about whether the nexus requirement is grounded in the Due Process Clause, the Commerce Clause, or both); Schoettle, 48 TAX NOTES at 473 (noting that states recently have passed use tax laws which base nexus on the retailer’s economic rather than physical presence because “[t]here are those who believe that, given the opportunity, the Court would rule differently than it did in 1967 [in *Bellas Hess*]”).
275. *Quill*, 112 S. Ct at 1912.
279. *Quill*, 112 S. Ct at 1912.
280. *Id.*
281. *Id.*
The Court in *Bellas Hess* did not even mention *Spector Motor Service*. Furthermore, the Court has cited *Bellas Hess* approvingly in post-*Complete Auto* cases; this would not have occurred if the Court no longer considered its holding valid.

More difficult to understand is the Court’s ruling that all four prongs of the *Complete Auto* test are Commerce Clause requirements. Particularly startling is the statement that the first prong, the "substantial nexus" requirement, is not a due process test, but rather a "means for limiting state burdens on interstate commerce." The Court was forced to acknowledge that courts in recent cases had found a due process element in the substantial nexus requirement. However, the Court suggested that the Commerce Clause element was the dominant element in the substantial nexus requirement. The majority stated that a tax valid under the Commerce Clause would automatically be valid under due process standards; however, the reverse would not necessarily be true.

In his dissent, Justice Byron White noted that the majority provided no authority for, or explanation of, its assertion that substantial nexus for Commerce Clause purposes must be analyzed separately from nexus for due process purposes. Justice White stated that the *Complete Auto* nexus requirement was grounded solidly in the Due Process Clause.

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282. *Id.*

283. *Bellas Hess*, 386 U.S. at 759-60 (1967). The portion of the Court’s decision which discussed the “exclusively interstate” nature of *Bellas Hess*’s transactions contained no citations to precedent. See *id.* It appears, therefore, that the Court was breaking new ground when it discussed the potential burdens on interstate commerce that would result if Illinois’s use tax was upheld. The majority also was criticized for its statements by Justice Abe Fortas. *Id.* at 766 (Fortas, J., dissenting). If the Court had meant to rely on *Spector Motor Service*, surely it would have cited the case and saved itself from additional effort and criticism.

284. *Quill*, 112 S. Ct. at 1912-13 (citations omitted).

285. *Id.* at 1912. As Justice Byron White noted in his dissent, the *Complete Auto* test had distinct Due Process Clause undertones. *Quill*, 112 S. Ct. at 1919-20 (White, J., dissenting).

286. *Id.* at 1918-19.

287. *Id.* at 1914 n.7.

288. *Id.*


290. *Quill*, 112 S. Ct. at 1919 (White, J., dissenting).

291. *Id.* at 1919-20 (White, J., dissenting). Justice White noted: “Instead of explaining the doctrinal origins of the Commerce Clause nexus requirement, the majority breezily announces the rule and moves on to other matters.” *Id.* at 1919 (White, J., dissenting). By contrast, Justice White was able to quote language in several cases that supported his view that the nexus test is a due process requirement. *Id.* at 1919-20 (White, J., dissenting) (citing, *inter alia*, *Complete Auto*, 430 U.S. at 280-81; Memphis
Whether Justice White's assertion is correct, or whether nexus is a combination of Due Process Clause and Commerce Clause inquiries, the majority's decision to create two independent nexus tests does not seem likely to end the litigation over the use tax collection issue. The physical presence requirement has been retained, which leaves the states and the retailers in the same positions as they were before the Court decided *Quill*.

However, the reiteration of the bright-line rule provides a degree of efficiency and certainty to all parties involved. Retailers have been reassured that they are not subject to use tax collection duties as long as they are physically absent from the taxing state. The Court also avoided a drastic alteration of twenty-five years of precedent; such a change would almost certainly "visit economic hardship upon those who took [the Court] at [its] word." It is not for the Court, but rather for Congress, with the benefit of studies, hearings, and other background information, to create a new rule for retailers who thought themselves immune from use tax collection duties.

Yet, leaving the physical presence rule in place is unsatisfactory. This rule does not place all competitors on an equal basis. Out-of-state retailers can charge the same price as in-state retailers, yet maintain a competitive advantage because they are not required to collect use taxes. Direct marketers with a physical presence in more than one state must shoulder all of the burdens that *Quill* argued were so onerous. A physically absent direct marketer may be

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Natural Gas Co. v. Stone, 335 U.S. 80 (1948); Miller Bros. v. Maryland, 347 U.S. 340, 344-45 (1954)).

292. *Id.* at 1921 (White, J., dissenting).
293. *See id.* at 1921 (White, J., dissenting) (stating that it is very doubtful that the majority decision will reduce litigation over the collection issue or fix the boundaries of state taxing authority). Given the dollars at stake, the states are likely to expand the definition of "physical presence," and both sides will continue litigating this issue. *See id.* at 1921 (White, J., dissenting).

294. *See id.* at 1915.
295. *Id.* at 1914-16.
296. *Id.* at 1923-24 (Scalia, J., concurring).
297. *See Amicus Curiae Brief for the Direct Marketing Association in Support of Appellant, Quill, 112 S. Ct. 1904 (1992) (No. 91-194) (stating that Congress is better equipped to investigate the facts and develop a well-reasoned and balanced statutory scheme). Given the nature of the direct marketing industry, providing a *de minimis* rule and some sort of uniform tax structure appears to be necessary. The level of detail removes this issue from the Court's domain and subjects it to Congress's domain. *Id.*

298. *See Quill, 112 S. Ct. at 1920-21 (White, J., dissenting) (stating that the retention of the *Bellas Hess* bright-line rule was unfair and of dubious rationality).*
299. *Id.* (White, J., dissenting).
300. *See supra* notes 104-05 and accompanying text (noting that in-state retailers are required to charge a sales tax on all customer purchases).
301. *See Amicus Curiae Brief for the Multistate Tax Commission in Support of Respondent, Quill, 112 S. Ct. 1904 (1992) (No. 91-194). Direct marketers such as Sears
the dominant seller in a state, but may give nothing back to the state despite the benefits it has received.302

The Court’s creation of a separate Commerce Clause nexus is unlikely to resolve the dispute between the states and the direct marketers.303 The only apparent justification for the Court’s action was that the Court thought it should uphold Bellas Hess so as to allow Congress to regulate use taxes.304 This justification will suffice if Congress recognizes the Court’s open encouragement to regulate the use tax laws.305 If Congress does not act, direct marketers will continue to enjoy an advantage over their in-state competitors, and states will continue to find new and ingenious ways to require use tax collection.306

CONCLUSION

The United States Supreme Court, in Quill Corp. v. North Dakota,307 refused to require a retailer to collect and remit use taxes to a state in which it had no physical presence.308 Although the decision reestablished a bright-line rule which many states had ignored, it did not address many real concerns of the parties involved.309 The Court stated that Congress was the proper body to establish updated laws in this area.310 Congress should heed the Court’s invitation and take action. Such action is vital to the states, attempting to collect use taxes owed by their residents, and to the in-state businesses, competing against the interstate retailers.311 It also is important to the direct marketers who must gauge the constitutionality of a use tax law, knowing that an incorrect decision could subject them to years

and J.C. Penney have stores in every state and have dealt with the use tax collection burdens. Id.
  302. Quill, 112 S. Ct. at 1920 (White, J., dissenting).
  303. See supra notes 292-93 and accompanying text.
  304. Quill, 112 S. Ct. at 1916. The Court stated: “Indeed, even if we were convinced that Bellas Hess was inconsistent with our Commerce Clause jurisprudence, ‘this very fact [might] give[us] pause and counse[l] withholding our hand. . . . Congress has the power to protect interstate commerce from intolerable or even undesirable burdens.’” Id. (citations omitted).
  305. Quill, 112 S. Ct. at 1916.
  306. Id. at 1920-21 (White, J., dissenting) (noting that “[r]easonable minds surely can . . . differ over what showing is required to make out a ‘physical presence’ adequate to justify imposing responsibilities for use tax collection”).
  310. Quill, 112 S. Ct. at 1916.
  311. See supra notes 5-7, 300 and accompanying text.
of back taxes, penalties, and interest. \textsuperscript{312} These groups deserve guidance and uniformity of a sort the Supreme Court wisely recognized it could not provide. \textsuperscript{313}

\textit{Roberta J. Loberg—'94}

\textsuperscript{312} See supra notes 219-21 and accompanying text.

\textsuperscript{313} Quill, 112 S. Ct. at 1916.