LEADING CASES

I. CONSTITUTIONAL LAW

A. Commerce Clause

Dormant Commerce Clause — State Taxation of Interstate Commerce. — The mail-order industry has grown at an astonishing rate in the last quarter century.[1] From L.L. Bean catalogs to the Home Shopping Network, mail order has become a major part of American life.[2] This growth was significantly aided by *National Bellas Hess, Inc. v. Department of Revenue*,[3] in which the Supreme Court held that states could not force out-of-state mail-order businesses to collect use taxes[4] from their in-state customers without violating the Commerce and Due Process Clauses of the United States Constitution.[5]

Last Term, in *Quill Corp. v. North Dakota ex rel. Heitkamp*,[6] the Supreme Court reaffirmed its Commerce Clause ban on interstate use tax collection statutes,[7] a ban that many states had ignored in recent years.[8] The Court overruled the due process holding of *Bellas Hess*,[9] however, and cleared the way for Congress to permit the states to enact such statutes.[10] But by ultimately refusing to lower the constitutional floor on state taxing jurisdiction, the Court properly reaffirmed the history, doctrine, and economic policies behind the Commerce Clause, all of which subordinate concerns of federalism to the maintenance of a free national market.

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[1] In 1989, mail-order sales accounted for $183.3 billion worth of merchandise, which was 75 times greater than industry sales in 1967. *See* State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d 203, 209 (N.D. 1991).

[2] *See id.* (stating that over 54% of Americans made a mail-order purchase in 1990).

[3] 386 U.S. 753 (1967).

[4] Use taxes are taxes that are imposed on out-of-state goods purchased for in-state consumption.

[5] *See Bellas Hess*, 386 U.S. at 758.

[6] 112 S. Ct. 1904 (1992).

[7] *See id.* at 1916.

[8] As of 1991, 36 states had passed legislation that ignored the holding of *Bellas Hess*. *See* Brief for Petitioner at 46–47, 23–25 app., *Quill* (No. 91-194).

[9] *See Quill*, 112 S. Ct. at 1911.

[10] *See id.* at 1916. Because Congress has exclusive power to regulate interstate commerce, it may overturn Supreme Court rulings that are based entirely on the "dormant" Commerce Clause. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423–24 (1946). The dormant Commerce Clause prevents states from engaging in certain activities that unduly burden interstate commerce even in the absence of congressional action. *See, e.g.*, Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977) ("It is now established beyond dispute that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States . . . .'" (quoting Freeman v. Hewit, 329 U.S. 249, 252 (1946)).

Quill Corporation is a Delaware company that sells office equipment and supplies through the use of catalogs, fliers, magazine ads, and telephone solicitations.[11] Although Quill has no employees and only insignificant tangible property in North Dakota, it sells almost $1 million worth of goods to approximately 3,000 customers in the state each year.[12] In 1987, North Dakota passed legislation that required every "retailer" who engaged in the "regular and systematic solicitation" of North Dakota consumers to collect and remit use taxes from their North Dakota customers.[13] Challenging the state's authority to require such a tax, Quill refused to pay the taxes.[14]

North Dakota filed an action in state court to compel the payment of taxes on all sales made by Quill to North Dakota residents after July 1, 1987.[15] The trial court ruled in Quill's favor, finding the case indistinguishable from *Bellas Hess*.[16] The North Dakota Supreme Court reversed, however, holding that "tremendous social, economic, commercial, and legal innovations" had rendered the bright-line "physical presence" test of *Bellas Hess* obsolete.[17] The state supreme court based its holding primarily on *Complete Auto Transit, Inc. v. Brady*,[18] in which the Supreme Court explicitly overruled its own bright-line test for reviewing Commerce Clause challenges to state taxation schemes.[19]

By a vote of 8–1, the Court reversed. Writing for the majority,[20] Justice Stevens reaffirmed *Bellas Hess* in part by holding that North

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[11] *See Quill*, 112 S. Ct. at 1907.

[12] *See id.* at 1907–08.

[13] N.D. CENT. CODE § 57-40.2-07 (Supp. 1991) (requiring that any "retailer maintaining a place of business in this state" collect a use tax); *id.* § 57-40.2-01(6) (defining "retailer" to include any business that engages in the "regular or systematic solicitation of a consumer market" within the state); N.D. ADMIN. CODE § 81-04.1-01-03.1(3) (1988) (defining "regular or systematic solicitation" to mean three or more advertisements within a specified twelve-month period).

[14] *See Quill*, 112 S. Ct. at 1908.

[15] *See id.*

[16] *See id.*

[17] State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d 203, 208 (N.D. 1991). Many commentators in recent years had also criticized *Bellas Hess*'s physical presence rule. *See, e.g.*, Paul J. Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 994, 1006–15 (1986); Charles Rothfeld, *Mail Order Sales and State Jurisdiction to Tax*, 53 TAX NOTES 1405, 1414–19 (1991).

[18] 430 U.S. 274 (1977).

[19] Prior to *Complete Auto*, the Court upheld a taxation scheme only if it was not a "direct" burden on interstate commerce. *See, e.g.*, Freeman v. Hewit, 329 U.S. 249, 256 (1946). In *Complete Auto*, the Court rejected this test in favor of a new four-part "economic realities" balancing test. *See Complete Auto*, 430 U.S. at 279. Under the "economic realities" test, a state taxation scheme will be upheld only if it is applied to an activity with a substantial nexus with the taxing state, it is fairly apportioned, it does not discriminate against interstate commerce, and it is fairly related to the services provided by the state. *See id.*

[20] Chief Justice Rehnquist and Justices Blackmun, O'Connor, and Souter joined in the full opinion of the Court.

Dakota's taxation scheme violated the dormant Commerce Clause and was therefore invalid.[21] The Court overruled the part of *Bellas Hess* that was based on the Due Process Clause,[22] however, and thus cleared the way for Congress to resolve the issue.[23]

Justice Stevens began by noting that *Bellas Hess* was decided on both Due Process and Commerce Clause grounds. Although he recognized that the two clauses are "closely related" in that they both limit state taxing power,[24] Justice Stevens explained that the two clauses are "analytically distinct" and "reflect different constitutional concerns."[25] As a result, a tax might satisfy the minimum requirements of the Due Process Clause but nevertheless violate the Commerce Clause.[26] Therefore, each clause must be examined separately.

Turning first to Quill's due process claim, Justice Stevens drew an analogy between North Dakota's power to tax Quill and a state court's power to exercise jurisdiction over a defendant.[27] Noting that recent jurisdictional decisions under the Due Process Clause had abandoned formal tests based on physical presence in favor of a more flexible "minimum contacts" inquiry,[28] Justice Stevens overruled the due process rationale for *Bellas Hess*'s bright-line rule because Quill had "more than sufficient" minimum contacts with North Dakota to warrant its subjection to the state's use tax collection statute.[29]

Turning next to the Commerce Clause, Justice Stevens surveyed the history of state taxation challenges under the dormant Commerce Clause.[30] He rejected North Dakota's argument that *Complete Auto* overruled *Bellas Hess* and explained that *Bellas Hess* was merely incorporated into the first prong of the *Complete Auto* test, which

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[21] *See Quill*, 112 S. Ct. at 1916. Justices Scalia, Kennedy, and Thomas concurred in the result on this issue, but disagreed with the majority's reasoning.

[22] *See id.* at 1911. Justice Stevens wrote for a unanimous Court on this issue.

[23] *See id.* at 1916.

[24] *Id.* at 1909 (quotation omitted).

[25] *Id.*

[26] *Id.* at 1914 n.7; *see also* International Harvester Co. v. Department of Treasury, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part) ("[T]hough overlapping, the two conceptions are not identical. There may be more than sufficient factual connections . . . to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce.").

[27] *See Quill*, 112 S. Ct. at 1910–11.

[28] *Id.* at 1910. For example, in Shaffer v. Heitner, 433 U.S. 186 (1977), the Court rejected physical presence as the sole criterion for determining whether a state could exercise in rem jurisdiction over a defendant. *See id.* at 212. In its place, the *Shaffer* Court adopted a test that depended on "'traditional notions of fair play and substantial justice.'" *Id.* at 203 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))). The Supreme Court has also described this test in terms of whether a corporation "purposefully avail[ed] itself of the benefits of an economic market." *Quill*, 112 S. Ct. at 1910.

[29] *Quill*, 112 S. Ct. at 1911.

[30] *See id.* at 1911–12. For a discussion of the dormant Commerce Clause, see note 10 above.

requires a "substantial nexus" between the taxable activity and the taxing state.[31] Justice Stevens then rejected North Dakota's alternative argument that the "substantial nexus" test under the Commerce Clause was identical to the "minimum contacts" test[32] under the Due Process Clause.[33] He explained that whereas the Due Process Clause embodies ideals of "fair warning" or "notice,"[34] the Commerce Clause embodies "structural concerns" about the national economy.[35] Justice Stevens concluded by discussing the merits of bright-line rules and the resulting reliance of corporations on *Bellas Hess* over the past quarter century.[36] He reaffirmed the longstanding doctrine that Congress remained free to alter the outcome of the Court's decisions in this area[37] and explicitly invited it to overrule *Bellas Hess*, now that the due process barrier to Congressional action had been removed.[38]

Justice White, concurring in part and dissenting in part,[39] argued that the majority should have gone further and given *Bellas Hess* "the complete burial it justly deserves."[40] First, he criticized the majority's attempt to reconcile *Bellas Hess* with *Complete Auto* and argued that the Court in *Complete Auto* in fact repudiated *Bellas Hess*'s reasoning.[41] Second, he criticized the majority's "uncharted and treacherous" attempt to distinguish the "substantial nexus" test from the "minimum contacts" test[42] and argued that a historical review of the "substantial nexus" test shows that it in fact constitutes a due process-like inquiry.[43] Third, he criticized the majority's "illogic" in attempting to

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[31] *Quill*, 112 S. Ct. at 1912. The "substantial nexus" requirement of the *Complete Auto* test, *see supra* note 19, embodies the ideal that a corporation's activities must have some kind of minimum connection with a state before the corporation can be subjected to the state's taxing jurisdiction.

[32] *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[33] *See Quill*, 112 S. Ct. at 1913.

[34] *Id.*

[35] *Id.* (citing THE FEDERALIST Nos. 7, 11 (Alexander Hamilton)).

[36] *See id.* at 1914–15.

[37] *See id.* at 1916; *supra* note 10.

[38] *See Quill*, 112 S. Ct. at 1916.

[39] Interestingly, Justice White is the only remaining sitting justice from the *Bellas Hess* majority. *See Arguments Before the Court — Taxation: State Taxation of Mail Order Sales to State Residents by Out-of-State Firms*, 60 U.S.L.W. 3511, 3512 (Jan. 28, 1992).

[40] *Quill*, 112 S. Ct. at 1917 (White, J., concurring in part and dissenting in part).

[41] *See id.* According to Justice White, the reasoning underlying the physical presence rule in *Bellas Hess* — that "'interstate commerce is immune from state taxation'" per se — was clearly repudiated in *Complete Auto*. *Id.* (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1977)).

[42] *Id.* at 1918.

[43] *See id.* at 1919–20; *see also* Trinova Corp. v. Michigan Dep't of Treasury, 111 S. Ct. 818, 828 (1991) ("The *Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well the[se] Due Process requirement[s] . . . ."); Amerada Hess Corp. v. Director,

justify the "anachronistic notion of physical presence" in this era when "physical presence frequently has very little to do with a transaction a State might seek to tax."[44] Finally, Justice White countered several of the arguments raised by the majority to support its reaffirmation of *Bellas Hess*'s physical presence rule.[45]

Justice Scalia, concurring in part and concurring in the judgment,[46] agreed that the due process rationale of *Bellas Hess* should be overruled and that the Commerce Clause rationale should be reaffirmed.[47] However, he disagreed with the majority's decision to reexamine the merits of *Bellas Hess*. Justice Scalia argued that *Bellas Hess* could have been reaffirmed without further discussion under stare decisis, which, he noted, applies with particular force in any case in which Congress has the power to alter the outcome of the Supreme Court's decisions.[48] Upsetting precedent would "visit economic hardship" on those who rely on a "square, unabandoned holding" of the Court.[49]

Div. of Taxation, 490 U.S. 66, 79 (1989) ("[T]he *Complete Auto* test encompasses due process standards.").

Indeed, until *Quill*, commentators assumed that "substantial nexus" was simply a due process "minimum contacts" inquiry into whether it is fundamentally fair for a state to exercise its taxing power over an out-of-state corporation. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-16, at 446 (2d ed. 1988) (describing a "minimum contacts" test for the "substantial nexus" requirement); *id.* at 452 (discussing the similarities between the Due Process and the Commerce Clause tests).

[44] *Quill*, 112 S. Ct. at 1920 (White, J., concurring in part and dissenting in part).

[45] For example, Justice White criticized the majority for using "convenience" as a justification in adhering to *Bellas Hess*'s bright-line rule, *id.* at 1920, for creating a "tax shelter" that discriminates against in-state retailers, *id.* at 1920–21, for failing to "indicate what constitutes physical presence," *id.* at 1921, for imposing its own economic preferences on the states, *see id.* at 1922, for its excessive reliance on stare decisis, *see id.*, and for skirting the thorny issue of retroactive liability, which would have affected all mail-order businesses if the Court had ruled in favor of North Dakota, *see id.*

One of the more interesting issues raised by Justice White's dissent is his criticism that the bright-line appeal of the physical presence test is illusory; the test merely shifts the focus of the debate to what is meant by "physical presence." For example, it is unclear whether computer software leased by Quill to its customers for ordering goods constitutes "physical presence" in the state. *See id.* at 1921. But, as Justice Scalia pointed out, there is a considerable body of existing common law defining the scope of physical presence that would aid courts in their interpretive efforts. *See id.* at 1924 (Scalia, J., concurring in part and concurring in the judgment); *cf.* sources cited *infra* notes 63–70 (defining physical presence).

[46] Justices Kennedy and Thomas joined in Justice Scalia's concurrence.

[47] *See Quill*, 112 S. Ct. at 1923 (Scalia, J., concurring in part and concurring in the judgment). Although he agreed that North Dakota's taxation scheme comported with due process standards, Justice Scalia did not think that jurisdiction to adjudicate was necessarily coextensive with jurisdiction to regulate. *See id.* (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113–16 (1987); and American Oil Co. v. Neill, 380 U.S. 451, 457–59 (1965)).

[48] *See id.* (citing Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989)). In fact, Congress did "alter" *Patterson* through § 101(a)(b) of the Civil Rights Act of 1991, Pub L. No. 102-166, 105 Stat. 1071, 1072 (1991) (to be codified at 42 U.S.C. § 1981(b)). *See* Fray v. Omaha World Herald Co., 960 F.2d 1370, 1373 (8th Cir. 1992).

[49] *Quill*, 112 S. Ct. at 1924 (Scalia, J., concurring in part and concurring in the judgment).

Described as "one of the biggest tax challenges of the decade,"[50] *Quill* sheds much light upon the Supreme Court's byzantine jurisprudence[51] concerning state taxation schemes. By reaffirming the physical presence requirement for state taxation, the Court properly declined to lower the constitutional floor on state taxation schemes, and thus acted in accordance with the history, doctrine, and economic policies behind the Commerce Clause.

Much of the confusion in the area of state taxation has stemmed from the tension between the conflicting ideals of federalism and a free national economy.[52] In other words, the Court must not only respect the states' power to tax persons who benefit from state services, but it must also prevent the states from using this power to impose excessive burdens on interstate commerce. This conflict formed the central debate in *Quill*. According to North Dakota, the "substantial nexus" prong of the *Complete Auto* test[53] required the lower constitutional threshold of "minimum contacts" between a taxing state and a corporation, which would give relatively great taxing power to the states.[54] According to Quill, however, "substantial nexus" required the higher constitutional threshold of "physical presence," which would give less taxing power to the states in favor of a stronger national market.

By ultimately siding with the ideals of a free national market through the more restrictive physical presence rule, the *Quill* Court acted in accordance with the history of Commerce Clause. From its inception, the Commerce Clause[55] was expressly intended to protect the national market from the oppressive power of the individual states.[56] Specifically, one of the main purposes of the Federal Con-

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[50] Marcia Coyle, *Supreme Court Rejects Mail-Order Tax Issue*, NAT'L L.J., June 8, 1992, at 17. In 1985, the out-of-state mail-order industry accounted for more than $1.5 billion in unpaid use taxes. *See* Hartman, *supra* note 17, at 994 & n.2.

[51] As one noted constitutional scholar explained in dropping the subject from his casebook, "pursuit of the intricacies of state taxation . . . would require more time and space than the undertaking warrants." GERALD GUNTHER, CONSTITUTIONAL LAW 307 (12th ed. 1991). The Supreme Court has itself described this area as a "quagmire." American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 280 (1987) (citing Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959)).

[52] *See, e.g.*, Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 72 (1977).

[53] *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977); *supra* note 19.

[54] This is because a wide range of activities short of physical presence would subject an out-of-state firm to local taxation under a "minimum contacts" rule.

[55] U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." *Id.*

[56] *See, e.g.*, THE FEDERALIST No. 11, at 88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that, without union, the "unequalled [American] spirit of enterprise . . . would be stifled . . . and poverty and disgrace would overspread [the] country"); *id.* No. 42, at 267–68 (James Madison) (arguing that the power to regulate commerce "provide[s] for the harmony

vention of 1787 was to establish a strong national economy,[57] the lack of which had contributed to the collapse of the Confederation.[58] The Court has repeatedly recognized that the Commerce Clause fosters a strong national market[59] and that the nation's Founders intended it to do so.[60] As such, something more than "minimum contacts" should be required before a state can interfere with interstate commerce by exercising its taxing power over out-of-state corporations.[61]

The Court's doctrine in this area also demonstrates that the majority in *Quill* properly struck the balance in favor of national economic concerns. Although the Court has often upheld a state's right to tax an out-of-state corporation, it has always required the corporation to have a physical presence within the state and has never adopted the extreme position advocated by North Dakota in *Quill*.[62] For example, the Supreme Court has upheld schemes that taxed out-of-state companies with a physical presence in the state, including companies with in-state agents who leased office space and solicited sales,[63] in-state retail outlets,[64] in-state traveling salesmen,[65] in-state independent contractors,[66] and even in-state offices unrelated to the

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and proper intercourse among the states" and minimizes "serious interruptions of the public tranquility").

[57] *See id.* No. 11, at 84 (Alexander Hamilton) ("The importance of the Union, in a commercial light, is one of those points about which there is least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject.").

[58] *See, e.g.*, James Madison, *Preface* to DEBATES IN THE FEDERAL CONVENTION OF 1787, at 1, 11 (Gaillard Hunt & James B. Scott eds., Int'l ed. 1920) ("The same want of a general power over Commerce led to an exercise of this power separately, by the States, [which] not only proved abortive, but engendered rival, conflicting and angry regulations. . . . [T]he States having ports for foreign commerce, taxed & irritated the adjoining States . . . . Some of the States, as Connecticut, taxed imports as from Mass[achuset]ts higher than imports even from G. B. . . . .").

[59] *See, e.g.*, American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 280 (1987) (describing free interstate trade as the "central" purpose of the Commerce Clause).

[60] *See, e.g.*, National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 760 (1967) ("The very purpose of the Commerce Clause was to ensure a national economy free from . . . unjustifiable local entanglements."); H.P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949) (arguing that "free access to every market in the Nation" was the "vision of the Founders"); McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944) ("The very purpose of the Commerce Clause was to create an area of free trade among the several States.").

[61] In the words of the *Bellas Hess* Court, "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." *Bellas Hess*, 386 U.S. at 759.

[62] *See* Brief for Respondent at 22–31, *Quill* (No. 91-194).

[63] *See* Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 64–65, 66–68 (1939).

[64] *See* Nelson v. Montgomery Ward & Co., 312 U.S. 373, 374–75 (1941); Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 362, 364–66 (1941).

[65] *See* General Trading Co. v. State Tax Comm'n, 322 U.S. 335, 337–39 (1944). *But see id.* at 338 (holding that the fact that mail-order businesses had in-state retail stores was "constitutionally irrelevant").

[66] *See* Scripto, Inc. v. Carson, 362 U.S. 207, 211–13 (1960).

goods being sold.[67] By contrast, the Court has struck down schemes that taxed out-of-state companies without a physical presence in the state, including companies that only made deliveries into the taxing state[68] and those that only sold their goods by mail order.[69] The Supreme Court has thus faithfully applied a physical presence rule in the context of state taxation challenges, both before and after *Bellas Hess*, and the rule laid down in *Bellas Hess* has even survived the challenge presented by *Complete Auto*.[70]

Several other doctrinal reasons might account for the continuing appeal of the physical presence rule in the area of state taxation. First, like all bright-line rules, the physical presence rule "firmly establishes the boundaries of legitimate state authority."[71] It also creates greater certainty in state taxation jurisprudence — an area that has been frequently plagued by "controversy and confusion"[72] — and thus the rule "reduce[s] litigation concerning [state] taxes."[73] Second, the physical presence rule promotes an "interest in stability and orderly development of the law" through its application of stare decisis.[74] Since the rule was announced in 1967 in *Bellas Hess*, it has "engendered substantial reliance and has become part of the basic framework of a sizeable industry."[75] Third, the physical presence rule draws support from constitutional presumptions in favor of a free national market in the absence of congressional action.[76] By allocating the burden on Congress to *overturn* the ban (instead of allocating the

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[67] *See* National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 554, 560–62 (1977).

[68] *See* Miller Bros. v. Maryland, 347 U.S. 340, 341, 345–47 (1954).

[69] *See* National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 758–60 (1967).

[70] *See, e.g.*, Goldberg v. Sweet, 488 U.S. 252, 263 (1989) (citing *Bellas Hess* for the proposition that the termination of an interstate phone call does not in itself amount to a "substantial nexus"); D.H. Holmes Co. v. McNamara, 486 U.S. 24, 33 (1988) (citing *Bellas Hess* for the proposition that contact by mail or common carrier does not amount to a "substantial nexus"); *National Geographic*, 430 U.S. at 559 (citing *Bellas Hess* for the proposition that there is a constitutionally significant difference between mail-order firms and those firms with in-state retail outlets, solicitors, or property).

[71] *Quill*, 112 S. Ct. at 1915.

[72] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959), *superseded by* Pub. L. No. 86-272, 73 Stat. 555 (1959) (codified at 15 U.S.C. § 381 (1988)).

[73] *Quill*, 112 S. Ct. at 1915.

[74] *Id.* at 1916 (quotation omitted)

[75] *Id.*

[76] *See, e.g.*, Dennis v. Higgins, 111 S. Ct. 865, 871 (1991) ("The Court has often described the Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation."); Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (noting that interstate commerce is a "right[] of constitutional stature"); Crutcher v. Kentucky, 141 U.S. 47, 57 (1891) ("To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States . . . .").

burden on Congress to *implement* the ban), the *Quill* majority properly recognized the significant forces of inertia that often prevent Congress from acting consistently with these free-market ideals.[77] By invalidating the North Dakota tax, the Court ensured full enforcement of the policies underlying the Commerce Clause, even if Congress ultimately reverses the Court.

Finally, economic policies favor a strict presumption against a state's power to tax entities not present in its jurisdiction.[78] First, the physical presence rule prevents the imposition of significant and wasteful administrative costs on out-of-state businesses.[79] Without such a rule, an out-of-state firm might be required to calculate and to pay taxes under 6500 different taxation schemes,[80] to keep multiple records of the firm's assets under many different income regimes,[81] and to collect taxes from customers in a large number of jurisdictions who fail to pay the correct amount of tax.[82] By contrast, an in-state firm would operate only under a single taxation scheme. Second, the physical presence rule prevents the unnecessary distortion of prices for a given good. Without the rule, a single good might have up to 6500 different prices — each price depending solely upon where a consumer lives. Because these differentials are non-cost based (that is, they are based not upon a company's production costs, but rather upon the location of the company's customers), consumer choice will be distorted.[83] That is, not all consumers will have the

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[77] *See* Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 952–54 (1992) (arguing that because of congressional inertia, the courts should act as a check — if they must act at all — on the state burdening of interstate commerce). *See generally* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 592–94 (discussing congressional inertia).

[78] *See, e.g.*, Shaviro, *supra* note 77, at 897 ("Absent congressional action, the courts should more consistently and coherently bar discrimination against outsiders or interstate commerce and attempted tax exportation, and should attach less weight to the countervailing concern for state and local government autonomy."). It should be noted that these economic policies also provide arguments as to why *Congress* should decline to overturn *Bellas Hess* by statute.

[79] Application of the "minimum contacts" rule would likely result in a local tax burden for the corporation in every jurisdiction where it has a customer. *See* Brief for Petitioner at 39–44, *Quill* (No. 91-194).

[80] This is because there are approximately 6500 taxing jurisdictions in the United States, *see id.* at 39 (quoting ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE AND LOCAL TAXATION OF INTERSTATE MAIL ORDER SALES 2 (Aug. 26, 1985) (Executive Summary)), and because the "minimum contacts" rule would likely impose taxes in each jurisdiction in which the corporation has a customer. It is not inconceivable that a national mail-order company could have at least one customer in each of those jurisdictions.

[81] *See* Shaviro, *supra* note 77, at 920–21.

[82] *See* Brief for Petitioner at 40, *Quill* (No. 91-194).

[83] *See, e.g.*, John C. Mowen, Joshua Wiener & Clifford Young, *Consumer Store Choice and Sales Taxes: Retailing, Public Policy, and Theoretical Implications*, 66 J. RETAILING 222, 238 (1990) ("[T]he absence of a sales tax caused consumers to shift their buying patterns.").

same level of willingness to pay for an extra unit of an identical good.[84]

Despite the foregoing historical, doctrinal, and economic arguments in favor of the physical presence rule, two general objections might be raised. First, the physical presence rule might be seen as unfair; it allows out-of-state firms to escape untaxed while forcing in-state firms to pay, thus placing the in-state firms at a competitive disadvantage. Second, the rule might lead to greatly diminished revenue for the states as technology improves and physical presence becomes a less important factor in doing business.

These objections are not persuasive. First, the physical presence rule is fair because in-state businesses benefit more directly from state services than out-of-state businesses.[85] For example, only in-state businesses benefit directly from tangible services such as police and fire protection and state-subsidized utilities. Because these services are unavailable to out-of-state businesses, in-state businesses should bear the greater burden of tax collection.[86] Second, the physical presence rule will not lead to greatly diminished revenue, because *Quill* does not forbid the states from collecting use taxes *themselves*.[87] That is, individual states can always collect use taxes from their residents *directly*, as opposed to shifting this burden on out-of-state corporations.[88] The administrative cost on the states is likely to be much less than the cost on out-of-state businesses. For example, states can impose the tax in conjunction with their existing income tax collection systems.

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[84] Taken to its extreme, this argument might appear to call for the abolishment of all state and local excise taxes; that is, *all* excise taxes result in some distortion of a product's true price. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 479–80, 481–84 (4th ed. 1992). This solution would be obviously unrealistic; local governments need income to pay for the services that they provide. Thus, the economic argument in favor of the physical presence rule serves merely to prevent the *additional* unnecessary distortion of prices, and not to abolish state and local excise taxes in general.

[85] Some economists have described the taxation of local businesses as the imposition of "user fees" for the direct cost of doing business in a given locality. Wallace E. Oates & Robert M. Schwab, *The Allocative and Distributive Implications of Local Fiscal Competition*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 127, 128, 140 (Daphne A. Kenyon & John Kincaid eds., 1991). By contrast, the taxation of out-of-state businesses fails to reflect any such user fees.

[86] *See id.* at 140 ("The community best promotes its interests . . . by taxing local businesses *only to pay for the benefits provided by local public services to these firms.*") (emphasis added).

[87] *See, e.g.*, Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1937) (holding that a state may tax the subsequent use of a good within the state by the purchaser, even if the good originally involved an out-of-state transaction).

[88] *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 13.6, at 277 (2d ed. 1992) (arguing that states have tried to "simplify the administration" of use taxes by shifting the burden of collection on out-of-state vendors).

Thus, the *Quill* Court properly acted in accordance with the history, doctrine, and economic policies behind the Commerce Clause to give meaning to the abstract verbal formulation of *Complete Auto*'s "substantial nexus" test. In so doing, the Court brought its state taxation jurisprudence closer in line with the ideals that have inspired the Commerce Clause for over two centuries.

B. Constitutional Structure

Federalism — Compelling States to Enact and Administer Federal Regulations. — Few areas of constitutional jurisprudence have proven as volatile during the last two decades as the judicial review of federalism claims. In its 1976 decision in *National League of Cities v. Usery*,[1] the Supreme Court, for the first time since the New Deal, invoked federalism to strike down a Commerce Clause[2] enactment, and held that it displaced the states' freedom to structure their operations in areas of "traditional governmental functions."[3] Less than nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,[4] a deeply divided Court overruled *National League of Cities* and held that the judiciary generally should not enforce any limits that federalism might place on Congress's commerce power.[5] In dissent, then-Justice Rehnquist and Justice O'Connor vowed to revisit this issue,[6] and many commentators have assumed that *Garcia*'s holding would not long endure.[7]

Last Term, in *New York v. United States*,[8] the Court, although not expressly overruling *Garcia*, again struck down part of a congressional act for infringing upon state sovereignty. These pronounced vacillations in federalist jurisprudence stem primarily from the Court's focus on the Tenth Amendment[9] rather than the Guarantee Clause[10]

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[1] 426 U.S. 833 (1976) (5–4 decision) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968)), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[2] The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3.

[3] *National League of Cities*, 426 U.S. at 852. The Court's last such invalidation before *National League of Cities* was in Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[4] 469 U.S. 528 (1985) (5–4 decision) (overruling *National League of Cities*).

[5] *See id.* at 531, 556–57 (holding that protection of the states from congressional regulation should be left primarily to the national political process).

[6] *See id.* at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

[7] *See, e.g.*, D. Bruce La Pierre, *Political Accountability in the National Political Process — The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 632 (1985).

[8] 112 S. Ct. 2408 (1992).

[9] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[10] The Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government." *Id.* art. IV, § 4.