MAIL ORDER RETAILERS AND COMMERCE CLAUSE NEXUS: A BRIGHT LINE RULE OR AN OPAQUE STANDARD?

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INTRODUCTION

Do you buy mail order products to avoid paying the sales tax? Chances are that you do, as do millions of other Americans.[1] Mail order retailing has grown from a cottage industry thirty years ago into a $200 billion per year enterprise today.[2] Part of this growth is due to the fact that out-of-state mail order retailers enjoy a considerable advantage over in-state retailers. Most out-of-state mail order retailers are not required to collect and remit the sales or use tax to either the state in which the retailer is physically located or the state in which the customer is located.[3]

For example, the typical mail order retailer operates in one state and has no physical presence in the forty-nine other states. It advertises by sending its catalogs nationwide and accepts orders over the phone or through the mail. Mail order retailers, under current Commerce Clause interpretation, cannot be compelled to collect any other state's use tax because the retailer does not have a "substantial nexus" with any state (aside from the one it operates in) to subject itself to any other state's sales or use taxing statutes. In contrast, the typical retailer operating in malls or other traditional retail outlets does not enjoy the same immunity from tax collection. The typical retailer, by virtue of its physical presence in the states in which it operates, must collect and remit the sales or use tax in accordance with various state and local statutes. Thus, a mail order retailer "operating" in only one state achieves a competitive advantage over retailers in forty-nine others.

The mail order retailer's advantage is significant in many ways. If a consumer has the option of choosing between two identically priced goods, one of which is offered for sale in a catalog and the other in a retail outlet, choosing the catalog good would save the consumer $100 on a $2000 purchase in a jurisdiction levying a use tax of 5%. In replacing the Articles of Confederation with the Constitution,

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1. In 1990, over 54% of Americans made a mail order purchase. *See* State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d. 203, 209 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992).

2. *See id.* In 1989, mail order sales accounted for $183 billion. This was roughly 75 times greater than in 1967. *Id.*

3. Most are familiar with a sales tax. It is a tax generally imposed on retail purchasers of goods (and sometimes services). Although it is imposed on purchasers, it is generally required to be collected by the seller and remitted to the state. A use tax is similar. It, too, is imposed on the purchaser. However, use taxes are generally imposed on the use of property within the jurisdiction. Many states avoid the problem of double taxation of the sale by allowing a credit on the use tax if a sales tax was paid. *See* Henneford v. Silas Mason Co., 300 U.S. 577 (1937). *See also* 2 CHESTER J. ANTIEAU, MODERN CONSTITUTIONAL LAW 124 (1969 & Supp. 1994).

the Framers intended to eliminate the problem of states discriminating against out-of-state businesses.[4] Ironically, it now seems as though out-of-state businesses receive some competitive advantage over in-state businesses.[5]

The mail order retailer's immunity from tax collection duties encourages consumers to purchase from the mail order retailer to "avoid the tax." Actually, consumers are not avoiding the tax as much as they are evading the tax because most states require consumers to remit a use tax to the state in which they live if they have purchased goods without paying a sales tax.[6] For budgetary reasons, state audit departments might claim it is impractical to attempt to enforce the use tax on individuals. Consequently, states are becoming more and more aggressive about requiring out-of-state mail order retailers to collect the use tax for them.[7]

There are, however, very good reasons in support of limiting states' abilities to force out-of-state retailers to collect their use taxes. First, as previously mentioned, the Framers were concerned with state protectionism and wanted to make sure that states were not penalizing out-of-state companies with burdensome regulations which would impede the flow of interstate commerce.[8] As a response to these concerns, the Framers incorporated the Commerce Clause into the Constitution.[9] Second, imagine how onerous it would be to require a retailer operating in one state to read, understand, and comply with the differing definitions, exemptions, and rates of the approximately 6500 taxing jurisdictions that exist throughout the United States.[10] Such a requirement would impose a significant burden on interstate commerce. Third, remember that the tax is not on the retailer, it is on the consumer. When the state is allowed to impose collection duties on retailers, it is shifting the large compliance burden on companies by forcing them to collect the tax on its behalf. In the case of most sales and use tax statutes, the state may simultaneously may seek payment of the tax from both the retailer and the consumer if it chooses. Therefore, if the retailer cannot be

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4. The Articles of Confederation were replaced by the Constitution for a variety of reasons. One very important reason, however, was that the states were engaging in destructive trade wars against each other. State and local governments were too responsive to local economic interests, often protecting those interests at the expense of non-local businesses and citizens. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 403-404 (2d. ed. 1988).

5. *See Henneford*, 300 U.S. at 586 (holding that a state may act to reduce this competitive advantage via taxation).

6. *See, e.g.*, IND. CODE §§ 6-2.5-3-2(a), -6 (1993); VA. CODE ANN. § 58.1-604 (Michie 1997). *See also generally* Michael C. Hamersley, *Will the* Bellas Hess *Physical Presence Requirement Continue to Protect Out-of-State Mail-Order Retailers from State Use Taxes in the* Quill *Era?* Quill Corp. v. North Dakota, 46 TAX LAW. 515, 515 & nn.4-6 (1993).

7. *See generally* W. Carl Spining, *Forcing Mail-Order Houses to Collect Use Taxes in the Wake of* Quill Corp. v. North Dakota, 60 TENN. L. REV. 1021 (1993) (arguing that the current constitutional interpretation that allows out-of-state retailers to avoid a state's use tax is unfair).

8. *See generally* THE FEDERALIST Nos. 7, 11 (Alexander Hamilton); TRIBE, *supra* note 4.

9. *Id.*

10. *See* Pamela M. Krill, Quill Corp. v. North Dakota*: Tax Nexus Under the Due Process and Commerce Clauses no Longer the Same*, 1993 WIS. L. REV. 1405, 1429 & n.149.

compelled to collect the tax because its nexus with the state is not sufficient, the state has not necessarily lost revenue from the transaction states can, and often do, collect the tax from the consumer.[11]

Today, it is clear that retailers who have no physical presence in a state cannot be compelled to collect that state's use tax.[12] It is equally clear that those retailers maintaining a continuous operation in a state can be compelled to collect that state's tax.[13] What is troublesome to retailers and state taxing authorities is the gray area in-between. How substantial must the business physical presence be in the taxing state? Will a certain number of trips to the taxing state constitute a sufficient nexus so that the state may impose collection duties on the retailers?

In *Quill Corp. v. North Dakota*,[14] the U.S. Supreme Court reaffirmed its long-standing rule that a "physical presence" was necessary for a state to impose the collection of use taxes.[15] Subsequently, in *Orvis Co. v. Tax Appeals Tribunal*,[16] the New York Court of Appeals interpreted the Court's physical presence requirement to mean that the presence must only be "demonstrably more than a slightest presence."[17]

This note examines the problem of imposing use tax collection on out-of-state mail order retailers in light of both *Quill* and *Orvis*. In an effort to understand the current state of the law, this Note summarizes the history of Supreme Court jurisprudence with regard to these problems. Second, this Note studies the majority and dissenting opinions in *Quill* and the standard they produced. Third, this note critically analyzes the *Orvis* decision and its reading of *Quill*. Finally, this Note concludes that state courts should not adopt New York's standard but, instead, interpret the plain language of the *Quill* opinion.

I. History of Limits on Use Taxation of Out-of-State Retailers

Understanding the history of sales and use tax jurisprudence is important, not only for the purpose of evaluating the *Orvis* court's reasoning and decision, but also for the dual purposes of evaluating the current status of sales and use tax jurisprudence and attempting to address its shortcomings. Historically, sales and use tax laws have been challenged when applied to out-of-state retailers on the basis that they violated both the Due Process and Commerce Clauses of the Constitution. Until *Quill*, the required nexus with the taxing state was similarly evaluated under both clauses. In *Quill*, however, the Supreme Court, for the first time, clearly distinguished between Due Process and Commerce Clause jurisprudence resulting in the latter largely subsuming the former as applied to the

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11. *See id.* at 1430-32 & nn.160-66.
12. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 301-302 (1992).
13. *See id.* at 317.
14. 504 U.S. 298 (1992).
15. *Id.* at 317.
16. 654 N.E.2d 954 (N.Y.), *cert. denied sub nom.* 116 S. Ct. 518 (1995).
17. *Id.* at 961.

states' abilities to impose collection of use taxes on out-of-state retailers.[18] Although Due Process Clause limitations are no longer a debatable issue, Commerce Clause limitations are still very controversial.[19]

Although there have been many use tax cases during the past century, in discussing the central mail order retailer problem, this Note focuses on those cases that define the limits on a state's power to force retailers to collect its use tax. The first case this Note examines is *National Bellas Hess, Inc. v. Department of Revenue*.[20] It held that some physical presence was necessary for a state to be able to require a retailer to collect its use tax.[21] In the thirty years since *Bellas Hess*, the Court has repeatedly held that one common factor in determining whether a given statute will pass Commerce Clause muster is that some physical presence has been required. Although state taxing authorities and legislatures have attempted to chip away at this requirement, the Court has continually reaffirmed its decision to require a physical presence to satisfy the Commerce Clause.

A. National Bellas Hess—*Physical Presence Required*

Bellas Hess was not the first case to strike down a state use tax statute on constitutional grounds, but it was a landmark case regarding mail order retailers. Bellas Hess was a major mail order retailer with net sales in 1961 of roughly $60 million, $2 million of which were to customers in the state of Illinois.[22] Bellas Hess' only contact with Illinois was through the U.S. mail and common carriers.[23] It regularly mailed catalogs, flyers, and other solicitations to customers throughout the United States.[24] However, Bellas Hess neither owned property in Illinois, nor did it have agents or salespersons located therein.[25]

The Supreme Court, in a 6-3 decision, struck down the Illinois statute as violative of federal constitutional limits on state taxation of interstate commerce.[26] The Court held that the Constitution requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to

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18. *See Quill*, 504 U.S. at 305. The Court stated, "Although the 'two claims are closely related,' the clauses pose distinct limits on the taxing powers of the States." *Id.* (quoting National Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 756 (1967)).

19. Commerce Clause limitations are controversial for two reasons. First, interpreting Supreme Court pronouncements is a source of contention between states and mail order retailers. Second, under the emergence of new technology and "virtual markets," where people can conduct business without leaving their homes, questions arise whether the "physical presence" distinction is appropriate given today's economic and technological realities.

20. 386 U.S. 753 (1967).

21. *See id.* at 758.

22. *See id.* at 760-61 (Fortas, J., dissenting).

23. *See id.* at 754.

24. *See id.*

25. *See id.*

26. *Id.* at 760.

tax."[27] After acknowledging situations in which the states may impose a tax on interstate commerce, the Court concluded that "[it] has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."[28]

The majority's chief rationale for invalidating the tax was that the burden it placed on interstate commerce was too high given that the company had not availed itself of the state's benefits:

> Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."[29]

The dissent, however, did not see the lack of a physical presence in Illinois as an obstacle to Illinois' attempts to impose the duty on Bellas Hess. The dissent relied heavily on the fact that Bellas Hess was a large multistate company that continuously solicited Illinois customers and used Illinois banking and credit institutions to generate income.[30] Justice Fortas believed these contacts were more than sufficient to allow Illinois to require Bellas Hess to collect and remit the use tax.[31] Despite the dissent, *Bellas Hess* is significant because the majority unequivocally required the vendor to have a physical presence in the taxing state before the state could impose on the vendor the duty to collect and remit its use tax.

B. National Geographic—*Slightest Presence Rebuked*

Ten years after *Bellas Hess*, the Supreme Court heard another use tax case.[32] In this case, California attempted to impose collection of its use tax on National Geographic Society's mail order business. The mail order business had no physical presence in California, but National Geographic had two related subsidiary

27. *Id.* at 756 (quoting Miller Bros. v. Maryland, 347 U.S. 340, 344-45 (1954)).
28. *Id.* at 757-58.
29. *Id.* at 759-60 (footnotes omitted).
30. *See id.* at 761-62 (Fortas, J., dissenting).
31. *See id.* at 762.
32. National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977).

organizations maintaining offices in California.[33] National Geographic's mail order business sold globes, atlases, maps, and books through flyers, magazine advertisements, and other direct mail mechanisms.[34] Orders were sent to National Geographic's Washington D.C. offices, and the merchandise was shipped back to the purchaser without any direct solicitation or delivery in California by National Geographic employees or agents.[35] National Geographic's California offices solicited advertising for its magazine but did not perform any activities related to the mail order business.[36]

In upholding the constitutionality of the tax on National Geographic, "[t]he California Supreme Court concluded, based on its survey of the relevant decisions of this Court, that the 'slightest presence' of the seller in California established sufficient nexus between the State and the seller constitutionally to support the imposition of the duty to collect and pay the tax."[37] The U.S. Supreme Court also upheld the state's ability to tax National Geographic, but expressly rejected California's "slightest presence" test.[38] Instead, the Court upheld the constitutionality of this tax on the rationale that National Geographic's subsidiary organizations were similar to having agents[39] or retail outlets[40] in California, which the Court had previously held to be sufficient to defeat a Commerce Clause challenge on the basis of a lack of physical presence.[41] Although the Court upheld the constitutionality of the tax, it destroyed the notion that a "slightest presence" was sufficient to satisfy the nexus requirement.

II. *QUILL*—REAFFIRMANCE OF THE PHYSICAL PRESENCE REQUIREMENT

This section of the Note first recites the facts of this landmark case and describes the district court holding. It then critiques the North Dakota Supreme

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33. *See id.* at 552.

34. *See id.*

35. *See id.*

36. *See id.* During the audit period, National Geographic also used the offices to make negligible over-the-counter sales. Taxes were paid on these sales, totaling under $3000. *See id.* at 554 n.2. Both the California Supreme Court and the U.S. Supreme Court, however, found it "unnecessary to consider these sales in determining whether sufficient nexus was shown." *Id.*

37. *Id.* at 555.

38. *Id.* at 556. The Court stated, "Our affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional nexus." *Id.*

39. *See generally* General Trading Co. v. Tax Comm'n, 322 U.S. 335 (1944) (The maintenance of agents in a jurisdiction creates a sufficient physical presence to satisfy the Commerce Clause nexus requirement.); Felt & Tarrant Trading Co. v. Gallagher, 306 U.S. 62 (1939). *See also In re* Scholastic Book Clubs, Inc. 920 F.2d 947, 958 (Kan. 1996).

40. *See generally* Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); Nelson v. Montgomery Ward, 312 U.S. 373 (1941) (holding that retail outlets in a jurisdiction constitute a sufficient physical presence to satisfy the Commerce Clause nexus requirement).

41. *National Geographic*, 430 U.S. at 556-57.

Court's holding. Finally, it analyzes the U.S. Supreme Court's majority and minority opinions.

A. *Facts and District Court Holding*

Quill Corporation was a mail order company that sold office equipment and supplies. North Dakota attempted to impose collection of its use tax on Quill for its sales to customers in that state. Quill had offices and warehouses in Illinois, California, and Georgia; however, Quill's presence in North Dakota was entirely economic in nature.[42] Although Quill sold goods to North Dakota customers, it had no salespersons or other employees located in North Dakota and its "ownership of tangible property in that State [was] either insignificant or nonexistent."[43] Quill's only contact with North Dakota was via catalogs and flyers sent through the mail, and advertisements in periodicals, and through telephone calls with persons in North Dakota.[44] During the audit period, Quill annually sold approximately $200 million in goods across the United States and almost $1 million to roughly 3000 customers in North Dakota.[45] Quill delivered all of its merchandise to its North Dakota customers via mail or common carrier from out-of-state locations. Quill's relationship to North Dakota was much like that of Bellas Hess' to Illinois: neither company had a "physical presence" in the state that was attempting to force collection of its use tax on them.

Like Illinois and California in the previously discussed cases, North Dakota required its residents to pay a use tax on personal property purchased for storage, use, or consumption in the state.[46] Although the tax was technically levied on the consumer, North Dakota required all retailers maintaining a place of business in North Dakota to collect and remit the tax when such property was sold.[47] Quill was assessed the tax under the North Dakota statute because "maintaining a place

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42. Quill Corp. v. North Dakota, 504 U.S. 298, 301 (1992). Quill's presence was economic rather than physical because it had a market presence in North Dakota via its flyers, but had no physical presence in North Dakota. *See id.*

43. *Id.* at 302.

44. *See id.*

45. *See id.*

46. *See* N.D. CENT. CODE § 57-40.2-02.1(1) (1993). The relevant portion of the statute provides: "an 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. . . ." *Id. See also* Roberta J. Loberg, *State Authority to Require Use Tax Collection from Direct Marketers:* Quill Corp. v. North Dakota, 26 CREIGHTON L. REV. 607, 609 & n.20 (1993).

47. N.D. CENT. CODE § 57-40.2-07(1) (1993). The relevant section of this statute provides:

> [E]very 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.

of business" in North Dakota included any person who distributes catalogs or otherwise advertises in North Dakota on a regular or systematic basis.[48]

Even though North Dakota acknowledged that Quill did not have a "physical presence" in the state as required by *Bellas Hess*,[49] North Dakota persisted in attempting to require Quill to collect its use tax. Quill protested, arguing that by requiring Quill to collect and remit the tax, North Dakota was violating the Fourteenth Amendment Due Process Clause and Commerce Clause because Quill lacked the required nexus with North Dakota.[50] The district court agreed with Quill and rejected the State's attempt to tax Quill.[51] The court, relying primarily on *Bellas Hess*, "held that the State had failed to establish a sufficient nexus between Quill and the State, and that . . . [the state's actions] were therefore unconstitutional as applied to Quill."[52]

B. The North Dakota Supreme Court Opinion

In spite of *Bellas Hess*, the North Dakota Supreme Court overruled the district court and found in favor of the State.[53] In doing so, that court rejected the U.S. Supreme Court mandate of requiring a physical presence to satisfy the Due Process and Commerce Clause nexus standards. The court, citing various North Dakota and U.S. Supreme Court cases for authority,[54] stated "[w]hile we necessarily begin our analysis in the context of the majority opinion in Bellas Hess, we are mindful that prior cases cannot be read in a vacuum, but must be considered in light of their relevant facts and historical context."[55] In discussing "obsolescent precedent" and its duty to consider cases "in light of their relevant facts and historical context," the court was laying the groundwork to reject a U.S. Supreme Court precedent.

Because the North Dakota Supreme Court was ultimately reversed by the U.S. Supreme Court,[56] its reasoning may seem insignificant. However, understanding the rationales and the weaknesses of the opinion is important in understanding the history of the mail order industry, its taxation, and the latest state challenge. It is in this light that the North Dakota Supreme Court opinion is analyzed.

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48. *Id.* § 57-40.2-01(7). The relevant portion of this statute provides: "'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 other advertising." *Id.*

49. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 758 (1967).

50. State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d. 203, 205 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992).

51. *Id.* (citing the unreported decision of the state trial court).

52. *Id.* at 205-06.

53. *Id.* at 204 (reversing the unreported decision of the state trial court).

54. *Id.* at 207-08. The court cited several cases in which they believed they had been "chided' by the U.S. Supreme Court for failing to overturn "obsolescent precedent." *Id.* at 208.

55. *Id.* at 207.

56. Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992).

The North Dakota Supreme Court used several rationales to justify its decision. Chief among them was that:

> [t]he economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists, save perhaps in the fertile imaginations of attorneys representing mail order interests. In the quarter-century which has passed in the interim, "mail order" has grown from a relatively inconsequential market niche into a Goliath now more accurately delineated as 'direct marketing.'[57]

This argument has gained popularity over the decades following *Bellas Hess*.[58] Indeed, the statements regarding the growth of mail order retailing are accurate.

The fact that an industry has grown from an inconsequential one to a "Goliath" should never mean, ipso facto, that the constitutional analysis surrounding the industry should change as well. The constitutional analysis of state regulation of an industry or entity is not related to whether the actor sought to be regulated is a "Goliath" or merely a "niche" industry. Nowhere in *Bellas Hess*, or any of the other cases regarding mail order retailers, did the Court say that if the industry was larger, it would have decided differently or that a different analysis would have been used. The argument properly belongs in a congressional forum, where there can be debate about what laws are necessary to regulate a burgeoning industry.[59] To suggest, however, that the growth in the industry is a valid reason for changing the constitutional analysis surrounding it is nonsensical.

North Dakota's next rationale has a similar weakness. The court stated, "The burgeoning technological advances of the 1970s and 1980s have created revolutionary communications abilities and marketing methods which were undreamed of in 1967."[60] The court noted how infomercials, "800" numbers, home shopping channels, and the like, have allowed mail order retailers to intrude into our lives.[61]

It continued by recognizing two other changes. First, "[p]erhaps the greatest change in mail order since 1967 has been in terms of sheer volume."[62] Second,

> [w]hile in 1967 it may have generally been necessary to rely upon in-state sales personnel and inventory to successfully market a product, technology has changed the rules of the game. Today a direct marketer can communicate with his customers across the country through toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication just as effectively, and more efficiently, than if he were calling personally on each customer.[63]

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57. *Quill*, 470 N.W.2d. at 208.
58. *See infra* note 185.
59. *See generally* Krill, *supra* note 10. *See also* Hamersley, *supra* note 6.
60. *Quill*, 470 N.W.2d. at 208.
61. *See id.* at 208 n.4.
62. *Id.* at 209.
63. *Id.*

Although there have been significant technological advances in the past thirty years, what was discussed was not a revolutionary new technology, but rather the same business taking advantage of inevitable technological improvements. This was not a business created because of technology made available after 1967.[64] The court cites such advances as toll free 800 numbers and WATS lines as causing, or at least facilitating, the explosion in mail order retailing. However, these are not new technologies. They are merely pricing structures used by telephone companies. Telephone service and television advertising existed long before 1967. The principal means of advertising used by most mail order companies, direct mail advertising via catalogues and mailers, was both technologically available and in mainstream use in the United States in 1967.

The court made no attempt to square its decision with *Bellas Hess*. Rather, it concluded that *Bellas Hess* was outdated and therefore needed to be overturned.[65] In deciding the case, the court frequently spoke about the need to judicially "move ahead."[66] It stated, "We are guided by the maxim that '[w]hen the reason of a rule ceases so should the rule itself.'"[67] The court went on, quoting Justice Cardozo:

> There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.[68]

Although the court was correct in stating these general principles of common law decision making, it failed to mention the most important of all principles that a court, especially a lower court, is to follow when deciding a case in light of law previously promulgated by a higher court—stare decisis.[69]

C. The U.S. Supreme Court Opinion

The U.S. Supreme Court heard Quill's case in 1992. Although the mail order landscape had substantially changed since *Bellas Hess*, the Supreme Court upheld that case and overruled North Dakota's decision.[70] In so doing the Court established separate inquiries under the Due Process Clause and the Commerce Clause.[71] The Court held that "the Clauses pose distinct limits on the taxing

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64. 1967 is used as a reference year because that was the year *Bellas Hess* was decided.

65. *See Quill*, 470 N.W.2d at 208, 215.

66. *Id.* at 208.

67. *Id.* (quoting N.D. CENT. CODE § 31-11-05(1) (1993)).

68. *Id.* (quoting CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 151 (1921)).

69. In the past, the Court has treated a lower court's attempts to evade the mandates of Court precedent rather roughly: "Needless to say, only this Court may overrule one of its precedents." Thurston Motor Lines, Inc. v. Jordan K Rand, Ltd., 460 U.S. 533, 535 (1983) (per curiam).

70. Quill Corp. v. North Dakota, 504 U.S. 298 (1992). *See also* Lawrence A. Jegen III, *Tax Tips: 'Out-of-State' Sellers and Use Tax Collection*, 35 RES GESTAE 268 (1991).

71. *See Quill*, 504 U.S. at 305-06 (citing International Harvester Co. v. Department of the

powers of the States. Accordingly, although a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause."[72] In applying the different standards to Quill, the Court concluded that North Dakota's tax did not violate the Due Process Clause, but did violate the Commerce Clause. The Due Process Clause was not violated because Quill, although not maintaining any physical presence, did have "sufficient minimum contacts" with North Dakota.[73] The Commerce Clause, however, was violated because Quill did not have a "substantial nexus" with the taxing state.[74]

1. The Different Standards.—The Court stressed that the two inquiries are distinct for two important reasons. First, they "reflect different constitutional concerns."[75] Second, "while Congress has plenary power to regulate commerce among the States and thus may authorize state actions which burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause."[76] Understanding the significance in the difference between the clauses is an important step in understanding why a tax may be imposed or struck down in the modern era of Due Process and Commerce Clause jurisprudence.

In analyzing the Court's reasoning, this Note turns to the assertion that the clauses reflect different constitutional concerns. Due process is concerned with "traditional notions of fair play and substantial justice."[77] It concerns "the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to justify the State's exercise of power over him."[78] In comparison, Commerce Clause analysis presumes jurisdiction has already been held appropriate. In addition, it "and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy."[79] Also, "[u]nder the Articles of Confederation, State taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills."[80]

Treasury, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)).

72. *Id.* at 305 (citing Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue, 483 U.S. 232 (1987)).

73. *Id.* at 308. The Court held that for due process nexus, the relevant inquiry is "whether a defendant had minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* at 307.

74. *Id.* at 311 (relying on Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), *Bellas Hess*, and *National Geographic* for the proposition that whether the entity to be taxed had a "substantial nexus" is the relevant inquiry for Commerce Clause nexus).

75. *Id.* at 305.

76. *Id.*

77. *Id.* at 307.

78. *Id.* at 312.

79. *Id.*

80. *Id.* (citing THE FEDERALIST, *supra* note 8).

Second, the Court asserted that although Congress has plenary power to regulate under the Commerce Clause, it has no such power under the Due Process Clause. This statement stands on its own, and it is doubtful that this assertion would be seriously questioned by any court. Although the negative implications of the Commerce Clause generally prevent states from unfairly taxing interstate commerce, there is nothing to prevent Congress from expressly allowing the states to do so, or alternatively, for Congress to tax the commerce or regulate more precise boundaries on when and how states may require retailers to collect their use taxes.[81]

2. Applying the Due Process Standard—Minimum Connection Required.— The *Quill* decision settled the due process issue with regard to imposition of the duty to collect and remit use tax on out-of-state retailers. All doubt about whether a physical presence in the taxing state was required was wiped away. All that is now required is some minimum connection between the state and the entity to be taxed.[82]

The Due Process Clause standard Justice Stevens espoused in *Quill* was that "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" was necessary.[83] The analogy between the State's power to tax Quill and its power to exercise personal jurisdiction over a defendant was made clear. Practically speaking, the simple act of conducting business in a state, whether in person, through the mails or common carrier, or over the phone, is sufficient to satisfy the due process nexus requirements.[84]

The Court supported its decision by stating that its due process jurisprudence had "evolved substantially" in the twenty-five years since *Bellas Hess*.[85] The Court continued by framing the relevant inquiry as "whether a defendant had minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"[86] Instead of formally requiring a defendant's presence within a state, due process jurisprudence should hinge on "whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State."[87] Essentially, if a company sells a product or service to a customer in a given state, the Due Process Clause will not prohibit that state

81. *See The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 163 n.10. (1992).

82. *See Quill*, 504 U.S. at 306-08.

83. *Id.* at 306.

84. *See id.* at 308.

85. *See id.* at 307.

86. *Id.* (quoting International Shoe v. Washington, 326 U.S. 310 (1945)).

87. *Id.* at 307. The Court's modern jurisdiction analysis, as evidenced by cases such as *International Shoe v. Washington*, 326 U.S. 310 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) was finally applied to a state's power to impose use tax collection duties on an out-of-state entity with no physical presence in the taxing state in *Quill*, bringing sales and use tax due process nexus in line with "normal" jurisdictional nexus. *Id.*

from exercising personal jurisdiction over the company and imposing taxes. The state's ability to impose the duty to collect the tax will, of course, be subject to other constitutional concerns.[88]

3. Applying the Commerce Clause Standard—Substantial Nexus Required.— Unfortunately, resolution of the Commerce Clause nexus issue was not as clear as it was for the due process nexus issue. Although the Court explicitly held that a physical presence in the taxing state was necessary, exactly how much of a presence was needed to satisfy the Commerce Clause was left unaddressed by the Court. The standard adopted by the Court, or rather reinforced, was that an activity with "substantial nexus" to the taxing state was required.[89] This section of the note analyzes why the majority upheld *Bellas Hess* and then turns to Justice White's dissent to discuss the reasons why *Bellas Hess* should have been overruled.

a. The majority opinion.—The majority overruled the North Dakota Supreme Court for the following reasons: (1) the Dormant Commerce Clause prohibits the taxation at issue; (2) *Bellas Hess* is not obsolete; (3) the Commerce Clause nexus requires a higher standard than due process nexus; (4) the benefits of the bright-line "physical presence" rule warrant the physical presence standard; and (5) Congress, if it disagreed, could simply change the standard.[90] The Court began by saying "the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. The Clause, in Justice Stone's phrasing, 'by its own force' prohibits certain state actions that interfere with interstate commerce."[91] The Court discussed its own history of Dormant Commerce Clause jurisprudence, much of which has been summarized above.[92]

Second, the Court rejected the North Dakota Supreme Court's assertion that *Complete Auto Transit v. Brady*[93] rendered *Bellas Hess* obsolete.[94] In *Complete Auto*, Mississippi attempted to assert its gross income tax on Complete Auto Transit, a Michigan corporation engaged in the business of transporting vehicles

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88. Although the Due Process Clause is generally not an obstacle to determining nexus, it may prohibit other "fundamental fairness" violations such as attempts by a state to subject a company to unfair "cumulative taxation." *See generally* Oklahoma Tax Comm'n v. Jefferson Lines, 514 U.S. 175 (1995). *See also* Goldberg v. Sweet, 488 U.S. 252 (1989).

89. *See Quill*, 504 U.S. at 311. This standard is not new. *Quill* essentially affirmed the standard set out in a franchise tax nexus case, *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977).

90. *See Quill*, 504 U.S. at 309-20.

91. *Id.* at 309. The Court is describing the "negative" or "dormant" Commerce Clause. It is commonly understood that where Congress acts, regulating interstate commerce, the states may not act in contravention of Congress. Also, where Congress has failed to act, as here, the Court often interprets this as "negative" action, also restricting state activity in the interstate commerce area. *See* TRIBE, *supra* note 4, at 404; *The Supreme Court*, *supra* note 81.

92. *See Quill*, 504 U.S. at 309.

93. 430 U.S. 274 (1977).

94. *Quill*, 504 U.S. at 310. *See also Complete Auto*, 430 U.S. at 279.

by motor carrier for General Motors.[95] Complete Auto Transit transported vehicles to dealers in Mississippi.[96] The Supreme Court upheld Mississippi's ability to tax Complete Auto Transit. In its decision, the Court set out a four prong test to use in evaluating a Commerce Clause challenge to a state's tax. The test is satisfied if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[97] Because the Supreme Court phrased this test in the conjunctive, not the disjunctive, each of these four prongs must be satisfied by a state attempting to impose a tax on an out-of-state entity.

North Dakota held that this new test rendered *Bellas Hess* obsolete.[98] The U.S. Supreme Court disagreed, saying that *Complete Auto* did not automatically overrule *Bellas Hess* and that three weeks after deciding *Complete Auto*, *Bellas Hess* was cited in *National Geographic* for the proposition that "a vendor whose only contacts with the taxing state are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."[99]

Third, the Court discussed the Due Process and Commerce Clauses, their respective standards, and the reasons why the Commerce Clause nexus standard is higher than the due process nexus standard. After discussing why the standards are different,[100] the Court reviewed the origins of the Commerce Clause in the context of why it was included in the Constitution.[101] The Framers intended the Commerce Clause as a cure to the states' protectionist practices under the Articles of Confederation.[102] Accordingly, the Court reasoned, "we have ruled that [the] clause prohibits discrimination against interstate commerce . . . and bars state regulations that unduly burden interstate commerce . . . ."[103] The Court's statements, in upholding *Bellas Hess* on Commerce Clause grounds, tacitly implied that the lack of a physical presence in a taxing state makes the regulation of that entity "unduly burdensome" on interstate commerce and therefore in violation of the Commerce Clause.

Fourth, the Court attacked North Dakota's assertion that *Bellas Hess* had been rendered obsolete by the evolution of the Court's Due Process and Commerce Clause jurisprudence. The Court said, "Although we agree with the state court's assessment of the evolution of our cases, we do not share its conclusion that this evolution indicates that the Commerce Clause ruling of *Bellas Hess* is no longer

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95. *Complete Auto*, 430 U.S. at 276.

96. *See id.*

97. *Id.* at 279.

98. State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d 203, 214 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992).

99. *Quill*, 504 U.S. at 311.

100. *See id.* at 312.

101. *See id. See also* THE FEDERALIST, *supra* note 8.

102. *Quill*, 504 U.S. at 312.

103. *Id.* (citing Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Philadelphia v. New Jersey, 437 U.S. 617 (1978)).

good law."[104] Although the North Dakota Supreme Court concluded that *Bellas Hess* died with the Court's shift away from formalistic tests used in the era of *Bellas Hess*, the Supreme Court reaffirmed the "bright-line" rule promulgated by *Bellas Hess*.[105] The Court stated, "We have never intimated a desire to reject all established 'bright line' tests."[106] The Court then gave several reasons for retaining the rule. First, a bright-line rule "encourages settled expectations and, in doing so, fosters investment by businesses and individuals."[107] Second, *Bellas Hess* has "engendered substantial reliance [on the part of businesses] and has become part of the basic framework of a sizable industry."[108] Third, the doctrine of stare decisis underscores the importance of the "interest in stability and orderly development of the law."[109]

Finally, the majority opinion relied heavily on Congress' ability to overturn its Commerce Clause holding. The Court said, "No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions."[110] This indicates that Congress is free to pass legislation allowing states to tax transactions without requiring any physical presence.

b. Justice White's dissent.—Justice White, in the only dissenting opinion, attacked the majority for upholding *Bellas Hess*.[111] He agreed with the due process holding but did not agree that the Commerce Clause held states to a higher nexus standard.[112] His central disagreement stemmed from his understanding that *Bellas Hess* meant that "interstate commerce is immune from state taxation."[113] This concept, argued White, was overruled by *Complete Auto*. White further cited

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104. *Quill*, 504 U.S. at 314.

105. *See id.*

106. *Id.*

107. *Id.* at 316.

108. *Id.* at 317.

109. *Id.*

110. *Id.* at 318. In 1959, Congress reacted to a similar uncertainty in the income tax nexus area by enacting Pub. L. No. 86-272, 73 Stat. 555 (1959) (codified as amended at 15 U.S.C. § 381 (1994)). This legislation defined the nexus standard for state income tax purposes. Congress has not yet passed similar legislation in the sales and use tax area. *See generally* Brian S. Gillman, Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*: A Step out of the Definitional Quagmire of Section 381?*, 78 IOWA L. REV. 1169 (1993).

111. *Quill*, 504 U.S. at 322-23 (White, J., dissenting) (citing PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 10.8 (1981); Paul J. Hartman, *Collection of Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 1006-15 (1986); W. Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 VAND. L. REV. 961, 984-85 (1986); Sandra B. McCray, *Overturning* Bellas Hess*: Due Process Considerations*, 1985 B.Y.U. L. REV. 265, 288-90; Charles Rothfeld, *Mail Order Sales and State Jurisdiction to Tax*, 53 TAX NOTES 1405, 1414-18 (1991) to support his conclusion that *Bellas Hess* should have been overruled).

112. *See id.* at 321-22.

113. *Id.* at 323.

National Geographic for the proposition that *Bellas Hess* was overruled because the Supreme Court, in *National Geographic*, held that states could impose the collection duties on out-of-state mail order businesses.[114] Although interstate commerce is no longer immune from state taxation, *Bellas Hess* did not assert such a proposition.[115] Rather, it held that an entity who had no physical presence in the taxing state could not be compelled to collect the state's use tax.[116] That is not to say that transactions or companies engaged in interstate commerce were immune from state taxation.

Additionally, in comparing *Quill* to *Bellas Hess* and *National Geographic*, White concluded that *National Geographic* overruled *Bellas Hess*, that *Quill* should be analyzed under the light of *National Geographic*, and that therefore the state should have been able to tax Quill. The biggest distinction between that facts in *Quill* and *Bellas Hess* and those in *National Geographic* was that neither Quill nor Bellas Hess had any appreciable physical presence in the taxing state. Conversely, National Geographic had a substantial, permanent, physical presence in California. Although its presence was not directly related to the mail order business, there was, nevertheless, a physical presence.

White also maintained that *Complete Auto* overruled *Bellas Hess*.[117] *Complete Auto* may be read to mean that an interstate transaction is not automatically granted immunity from state taxation. As mentioned, *Complete Auto* has four prongs that must be met before a tax on interstate commerce will be upheld.[118] One of those prongs requires the tax to be applied to an activity with "substantial nexus" in the taxing state. This language does not prohibit the state from enforcing its tax on interstate commerce, but rather from enforcing it against an entity that has no "substantial nexus" with the taxing state. As the majority suggests, *Complete Auto* can not be read to have overruled *Bellas Hess*, but rather to have continued the distinction between entities with some physical presence; for example, those with a physical presence, like National Geographic, and those without any physical presence, like Quill and Bellas Hess.

Finally, White attacks the majority opinion regarding the physical presence requirement for "perpetuating a rule that creates an interstate tax shelter for one form of business—mail order sellers—but no countervailing advantage for its competitors."[119] This is probably the best argument in favor of requiring out-of-state retailers to collect the tax at the bequest of the taxing state.

White's argument, however, is not immune from criticism. First, the tax is not on the business; it is on the consumer. The state is only trying to make its collection job *easier* by requiring commerce to collect the tax rather than having to collect from the consumer. The question arises: Why should businesses with no physical presence in a given state be coerced into complying with burden of

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114. *See id.* at 323-24.
115. *See id.*
116. *See* discussion *supra* Part I.A.
117. *See Quill*, 504 U.S. at 322-23 (White, J., dissenting).
118. *See supra* note 97 and accompanying text.
119. *Quill*, 504 U.S. at 329 (White, J., dissenting).

collection taxes on behalf of the state taxing authorities? The administrative burden on those companies would be enormous. Second, even if the states cannot compel out-of-state retailers to collect their use taxes, the states may (and many do) collect the tax directly from individual citizens of their state.[120]

c. *Summary of the Commerce Clause holding.*—Two important points are demonstrated by *Quill.* First, "substantial nexus" remains undefined. The Court never addressed its meaning. Second, the Court invited Congress to resolve this dispute in their opinion by enacting legislation.[121] To date, Congress has not taken action to remedy the situation.

Quill's chief weakness was that it did not adequately define the Commerce Clause nexus standard.[122] "Substantial nexus" is too vague to function as a bright-line rule. The Court unequivocally stated that the bright-line test was important, but did little to state what or where the bright-line was.[123] In order to more accurately characterize the line, this section reviews the holdings of the major cases. First, physical presence of some sort is a necessity. The Court went out of its way to uphold *Bellas Hess'* physical presence requirement.[124] Second, the standard is not the "slightest presence." This language was explicitly rebuked in *National Geographic.*[125] The questions then are, "How much of a physical presence equals a substantial nexus?" Is it a "substantial physical presence," or merely more than a "slightest presence"? Is the substantial nexus standard really a bright-line test? These questions were raised in *Orvis* and will continue to play an important role in the ongoing battle between states and mail order retailers until more specific direction is comes from the Supreme Court.

An alternative remedy would have been for Congress to legislate the standard it deemed appropriate.[126] Congress, however, took no action in the wake of *Quill.* Predictably, this issue would again be litigated between businesses and state taxing authorities. In 1995, the most recent challenge to a state's power to require out-of-state retailers to collect its use tax was brought before the New York Court of Appeals. The State of New York audited two Vermont businesses, Orvis Co. and

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120. When a retailer has "substantial nexus" with the taxing state, the state may choose from whom to collect the tax. If the business mistakenly believes it does not have "substantial nexus" and therefore does not collect the state's taxes, the individual is responsible for the tax. Additionally, if the state can convince a court that the entity had "substantial nexus," the retailer is also responsible for the tax. This permits the state to "double dip" by collecting the tax from both taxpayers.

121. *See generally* Gillman, *supra* note 110.

122. One compelling argument that *Quill* was not specific enough for the states and the retailers is that *Orvis* was appealed to the Supreme Court three years after *Quill* was handed down. *See infra* note 153 and accompanying text.

123. *See Quill*, 504 U.S. at 314-15.

124. *See id.* at 314.

125. *See* National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 556 (1977).

126. *See* Loberg, *supra* note 46, at 635 & n.297 (citing Amicus Curiae Brief for the Direct Marketing Ass'n in support of Quill Corp.).

Vermont Information Processing (VIP), and assessed them for failing to collect and remit use tax on sales to New York customers. The New York Court of Appeals, in a controversial opinion, upheld the constitutionality of the statute as applied to these taxpayers.[127] The decision was appealed to the U.S. Supreme Court and, equally surprising, the Court denied certiorari on November 30, 1995.[128]

III. Analysis of New York's Position

The *Orvis* case presents interesting factual scenarios that do not fit neatly into the fact scenarios of earlier cases like *Quill*, *Bellas Hess*, and *National Geographic*. This section first presents the facts and the court's holding as applied to those facts. Then, this section analyzes the court's rationale in arriving at its decision.

A. *Facts and Holding*

Orvis and VIP were both headquartered in Vermont with no rentals, property, or salespersons located in New York.[129] Their case presented an important and interesting problem because the facts of the case fall within that gray area between the "slightest presence" that insulates retailers from a state's use tax imposition and that solid, continuing "physical presence" that subjects one to a state authority's use tax collection power.

During the audit period, Orvis' annual sales to New York customers, both wholesale and retail, were between $1 million and $1.5 million.[130] There was conflicting evidence as to the number of times and for what purposes Orvis' salespersons entered New York. In an unsworn letter responding to a request for information, Orvis' treasurer stated, "Some salesmen who reside in Vermont travel into New York to call on non-Orvis owned stores."[131] Later, in an affidavit, Orvis' president asserted that they entered New York twelve times for the purpose, not of making sales calls, "but only to discuss problems such as concerning shipping and to check on how Orvis products were displayed."[132] The court, however, concluded that there was evidence "that Orvis' substantial wholesale business in this State was generally accomplished by means of its sales personnel's direct solicitation of retailers through visits to their stores in New York, subject only to approval of all orders in Vermont."[133] Also, the Tax Tribunal claimed that "the affidavits of Orvis' officers described the trips to New York of Orvis personnel as

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127. Orvis Co. v. Tax Appeals Tribunal, 654 N.E.2d 954 (N.Y. 1995), *cert. denied sub nom.* 116 S. Ct. 518 (1995). *See also* Brown's Furniture, Inc. v. Wagner, 665 N.E.2d 795 (Ill. 1996).

128. Vermont Info. Processing, Inc. v. Commissioner of N.Y. Dep't of Taxation & Fin., 116 S. Ct. 518 (1995) (mem.).

129. *Orvis*, 654 N.E.2d at 955.

130. *Id.* at 961.

131. *Id.*

132. *Id.*

133. *Id.*

'in a loop,' suggesting systematic visitation to all of its as many as 19 wholesale customers on the average of four times a year."[134]

Vermont Information Processing similarly had no property, rentals, or salespersons located within New York. Evidence of VIP's visits to New York was equally unclear. According to the court, VIP's "president testified that it is not [VIP's] ordinary practice to travel to its customers' places of business, and that on-site visits are only made to approximately 5% of [VIP's] customers for the purpose of correcting persistent or difficult problems, or occasionally to install software or train employees."[135] The court noted:

> Evidence was submitted from which the Tribunal could reasonably infer that VIP's hardware and software sales agreements obligated it to provide a charge-free visit of a VIP computer software installer at its beverage-distributor customer's site in New York if problems necessitating the visit occurred within the first 60 days of installation. Moreover, VIP's invoices showed charges for travel expenses to its New York customers' locations on 41 occasions . . . during the three-year audit period, in which VIP had 154 taxable transactions in New York.[136]

If each of these visits related to a different transaction, slightly more than one-quarter of VIP's transactions with New York customers involved a visit to New York. If VIP's president is to be believed, most transactions resulted in no visits and the remaining transactions resulted in multiple site visits to fix the problem. In any event, it is unclear whether the forty-one visits were separate trips or whether two or more employees may have traveled together making the actual customer visits appear lower in number.

New York audited both companies in order to impose on them the duty to collect and remit use tax. Orvis was audited between September 1977 and August 1980,[137] and VIP was audited between December 1983 and November 1986.[138] The Tax Tribunal's proposed audit adjustments after all administrative hearings was $223,559 for Orvis[139] and $73,275 for VIP,[140] net of interest and penalties. In *Orvis*, the New York Supreme Court, Appellate Division held that Orvis' "sporadic activities in New York do not satisfy the 'substantial nexus' requirement articulated in *Quill* . . . ."[141] In *Vermont Information*, the court similarly found for VIP, holding that the company had adequately demonstrated it had no "substantial

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134. *Id.* at 962.

135. Vermont Info. Processing, Inc. v. Tax Appeals Tribunal, 615 N.Y.S.2d 99, 100 (N.Y. App. Div. 1994), *aff'd as modified sub nom.* 654 N.E.2d 954 (N.Y. 1995).

136. *Orvis*, 654 N.E.2d at 962.

137. Orvis Co. v. Tax Appeals Tribunal, 612 N.Y.S.2d 503, 505 (N.Y. App. Div. 1994), *aff'd as modified*, 654 N.E.2d 954 (N.Y. 1995).

138. *Vermont Info. Processing*, 615 N.Y.S.2d at 99.

139. *Orvis*, 612 N.Y.S.2d at 504.

140. *Vermont Info. Processing*, 615 N.Y.S.2d at 100.

141. *Orvis*, 612 N.Y.S.2d at 506.

'physical presence' within New York."[142]

The New York State Commissioner of Taxation and Finance appealed both the judgments which struck down New York's use tax statute as it applied to the two companies.[143] The New York Court of Appeals reversed the appellate division, holding that *Quill* did not require a substantial physical presence but only "demonstrably more than a 'slightest presence'" to satisfy the Commerce Clause nexus requirement.[144] The majority opinion criticized the lower court for applying a standard requiring "substantial physical presence."[145] After stating that "substantial physical presence" was not required, the opinion spent several pages discussing *Quill*, "considering the case in the context of its position in the evolution of Supreme Court doctrine limiting the authority of a state to assess or impose a duty to collect taxes arising out of the economic activity of a foreign business engaged in interstate commerce."[146] Supreme Court cases preceding *Bellas Hess* were discussed from the perspective that the test used by the Court was: if the tax was a "direct" tax on interstate commerce, the Court would prohibit the tax,[147] but if it was indirect, the Court would uphold it.[148] *Complete Auto*, however, replaced this standard with the four pronged test that is valid today.[149] The New York court, after briefly discussing *National Geographic*, turned to *Quill*.[150]

Unlike the North Dakota Supreme Court in *Quill* where the bulk of the opinion was spent supporting the conclusion that *Bellas Hess* was obsolete, the New York court did not attempt to distinguish *Quill* or to say that *Quill* was outdated. To the contrary, it embraced *Quill*. The court examined all the cases preceding *Quill*, looked at *Quill* itself, and decided that *Quill's* bright-line test mandated a standard of substantial nexus that allowed state use tax collection imposition on any retailer whose activities were "demonstrably more than a 'slightest presence'" in the taxing state.[151] It then concluded that the Administrative Law Judge could have found that this standard was met in each case (Orvis and VIP) and the court found for the state.[152]

The U.S. Supreme Court denied certiorari of this case and will not hear the

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142. *Vermont Info. Processing*, 615 N.Y.S.2d at 101.

143. *Orvis*, 654 N.E.2d at 955.

144. *Vermont Info. Processing* was reversed; *Orvis* was remitted. *See id.* at 960-61.

145. *Id.* at 956.

146. *Id.*

147. *See, e.g.*, Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951); Freeman v. Hewitt, 329 U.S. 249 (1946). *But see* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (overruling the direct v. indirect standard).

148. *See Complete Auto*, 430 U.S. at 274.

149. *See* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 183 (1995) (citing *Complete Auto's* four pronged test with approval).

150. *Orvis*, 654 N.E.2d at 958.

151. *Id.* at 961.

152. *See id.* at 961-62.

arguments set forth above by the New York Court of Appeals.[153] Undoubtedly, other states will now step up their efforts to bring out-of-state retailers within their taxing jurisdiction, making the Supreme Court's reasoning and physical presence standard all the more important to understand.

B. Analysis of Orvis

The New York court concluded that the Supreme Court's "substantial nexus" requirement for Commerce Clause nexus was intended to be satisfied by that level of physical presence that is "demonstrably more than a slightest presence."[154] In so deciding, the court supported its decision in four ways. First, it relied on the Supreme Court's apparent reluctance to uphold *Bellas Hess*. Second, it supported its decision with two reasons the Supreme Court gave for requiring a physical presence in *Quill*. Third, it concluded that *Quill's* bright-line mandate could only be fulfilled by its own *Orvis* standard. Fourth, it read *National Geographic* to mean that the physical presence need only be "demonstrably more than a 'slightest presence.'"

1. The Supreme Court's Apparent Reluctance to Uphold Bellas Hess.—*Orvis* appeared to rely on *Quill's* reluctance to uphold *Bellas Hess* as a reason to use a "lower" standard of physical presence, rejecting the taxpayers' assertion that a "substantial physical presence" was necessary. In so doing, the *Orvis* court quoted the only three places in *Quill* where the Supreme Court hinted at being reluctant to require a *Bellas Hess*-type standard physical presence. The first such statement was "[h]aving granted certiorari . . . we must either reverse the State Supreme Court or overrule *Bellas Hess*. While we agree with much of the State Court's reasoning, we take the former course."[155] The second was "[w]hile 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*."[156] Finally, the third was "[a]lthough we agree with the state court's assessment of the evolution of our cases, we do not share its conclusion that this evolution indicates that the Commerce Clause ruling of *Bellas Hess* is no longer

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153. *See* Vermont Info. Processing, Inc. v. Commissioner of N.Y. Dep't of Taxation & Fin., 116 S. Ct. 518 (1995) (mem.). Unfortunately, we will not know what the Supreme Court thinks of the *Orvis* court's analysis of *Quill*. Nor will we know whether the Supreme Court would have adopted the "demonstrably more than the slightest presence" test, the "substantial physical presence" test, or some test in between. Although many states will undoubtedly interpret the Supreme Court's denial as a signal of approval, there are, as with every denial of certiorari, several plausible readings of the denial. One, as previously stated, is that the Court agrees that the standard should only be demonstrably more than the slightest presence and that it believes that Orvis and VIP factually exceeded those thresholds with their visits to New York. Another is that the Supreme Court disagrees with the standard, but thinks the activity, viewed in the light most favorable to the state, meets their "physical presence" standard of "substantial nexus."

154. *Orvis*, 654 N.E.2d at 961.

155. *Id.* at 958 (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 301-02 (1992)).

156. *Id.* at 959 (quoting *Quill*, 504 U.S. at 311).

good law."[157]

These statements were certainly more than passing comments within the Supreme Court's opinion. They were not, however, the crux of the opinion, nor did they imply that the only reason, or even the most important reason, the court upheld *Bellas Hess*, a twenty-five year old case, was that it was bound by stare decisis. It is telling, however, that the *Orvis* majority felt compelled to quote this language to support its opinion that only a nominal presence was required to satisfy the Commerce Clause nexus requirement. These quotations, especially the first two, may be reasons to strike any physical presence requirement from the test, but because *Quill* went out of its way to uphold the *Bellas Hess* physical presence requirement, reliance on the statements seems tenuous at best.[158]

2. Quill's Reasons for Requiring a Physical Presence.—According to the *Orvis* court, *Quill* only upheld the *Bellas Hess* physical presence requirement for two reasons.[159] First, the *Orvis* court said *Quill* retained the bright-line rule because it "benefits national commerce by avoiding the litigation-provoking controversy and confusion of imprecise constitutional standards, and fosters investment by settling expectations."[160] Second, the court said *Quill* upheld *Bellas Hess* because doing so satisfied stare decisis:[161] "[t]he *Bellas Hess* rule has engendered substantial reliance and has become part of a basic framework of a sizable industry. The 'interest in stability and orderly development of the law' that undergirds the doctrine of stare decisis . . . therefore counsels adherence to settled precedent."[162]

This characterization of *Quill's* rationale for retaining a physical presence test makes it much easier to find that only a nominal presence "demonstrably more than a slightest presence" should be required to satisfy the Commerce Clause nexus requirement. This characterization, however, is incomplete. The New York Court of Appeals omitted several rationales that *Quill* used in requiring a "physical presence" in the taxing state for the state to impose collection of its use tax.

First, *Orvis* said nothing about *Quill's* "other" rationale for using a bright-line test—that of limiting state governments.[163] The Court reasoned a bright-line test is preferable because

> [s]uch a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves

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157. *Id.* (quoting *Quill*, 504 U.S. at 314).

158. *See* discussion *supra* Part II.C.3.a. The *Quill* Court recited several reasons for upholding *Bellas Hess*.

159. *Orvis*, 654 N.E.2d at 959.

160. *Id.* (citing *Quill*, 504 U.S. at 315).

161. *Id.* (citing *Quill*, 504 U.S. at 317).

162. *Id.* (quoting *Quill*, 504 U.S. at 317).

163. *See Quill*, 504 U.S. at 315.

much room for controversy and confusion and little in the way of precise guides to the States in the exercise of the indispensable power of taxation."[164]

This does not contradict *Orvis'* reasoning (support for which followed this quote in the *Quill* opinion) but is important because it emphasized that the Court desired the bright-line rule because it worked to constrain the states in their desire to tax out-of-state retailers.

Second, the New York court completely omitted any mention of the policy reasons *Quill* gave supporting the Commerce Clause's restrictions on a state's ability to tax interstate commerce. One of the Supreme Court's rationales for restricting a state's ability to impose the duty on retailers without substantial nexus has been that to do so unduly burdens interstate commerce.[165] The Court stated that "[u]ndue burdens on interstate commerce may be avoided . . . by the demarcation of a discrete realm of commercial activity that is free from interstate taxation."[166] This policy reason is not an idle, passing thought in the U.S. Supreme Court's opinion, but rather is one of the central reasons the Constitution was chosen to replace the Articles of Confederation and a central policy reason throughout the history of Commerce Clause jurisprudence.[167] Although the New York court recognized that the Supreme Court has cited this policy in *Quill* and *Jefferson Lines*,[168] it wholly ignored the possibility that *Quill* relied on this policy in upholding *Bellas Hess* and limiting states to taxing entities with a physical presence.

Third, the New York opinion makes no mention of the so-called Dormant Commerce Clause in analyzing why the *Quill* Court felt that *Bellas Hess'* physical presence requirement should be upheld. In ignoring the Dormant Commerce Clause, *Orvis* undermines *Quill's* holding because the Supreme Court concluded that a physical presence was required and that if Congress desired to lessen the standard, they could simply legislate it away.[169]

Once the New York Court of Appeals concluded that (1) *Quill* only reluctantly upheld *Bellas Hess'* physical presence requirement and only made it more than the "slightest" presence and (2) upheld it only because it was a bright-line test and

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164. *Id.* at 315-16 (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457-58 (1959)).

165. *See id.* at 314-15. *See also* THE FEDERALIST, *supra* note 8.

166. *Quill*, 504 U.S. at 314-15.

167. *See* THE FEDERALIST, *supra* note 8.

168. Orvis Co. v. Tax Appeals Tribunal, 654 N.E.2d 954, 956, *cert. denied sub nom.* 116 S. Ct. 518 (1995).

169. *See Quill*, 504 U.S. at 316 & n.9 (discussing Congress' legislation regarding income tax nexus, 15 U.S.C. § 381 (1994)). Significantly, if the Court looked to Congress' actions on this separate but related subject, the test for income tax nexus appears more stringent than that for sales and use tax. The relevant portion of the statute states: "a State may not impose a net income tax on any person if that person's 'only business activities within such State [involve] the solicitation of orders [approved] outside the State [and] filled . . . outside the State.'" *Id.*

stare decisis required it, deciding against the taxpayers became a relatively simple task. The *Orvis* court used the broadest standard that did not directly contradict the U.S. Supreme Court, holding that the physical presence test meant "demonstrating more than a slightest presence." The *Orvis* court then found that the contracts which both Orvis and VIP had within New York, when taken in the light most favorable to the state, were substantial enough to meet that test.

3. Is New York's Standard the Only One That Fulfills Quill's *Intent?*—The New York Court of Appeals concluded that its standard, "demonstrably more than a slightest presence," was the only standard that could fulfill *Quill's* bright-line rule mandate.[170] It expressly rejected any reading of *Quill* that would "elevate" the standard to a "substantial physical presence."[171] The majority supported its decision with questionable readings of the Supreme Court's opinions in *Quill* and *Oklahoma Tax Commission v. Jefferson Lines, Inc.*

First, it said "*Quill* simply cannot be read as equating a substantial physical presence of the vendor in the taxing State with the substantial nexus prong of the *Complete Auto* test, as the Appellate Division's interpretation would require."[172] Although this may have been the Supreme Court's intent, it is hardly a forgone conclusion. Nowhere in *Quill* did the Supreme Court refute or embrace that terminology; the Court never even mentioned it.

Next, it concluded that acceptance of the standard of "substantial physical presence" would "destroy the bright-line rule the Supreme Court in *Quill* thought it was preserving in declining completely to overrule *Bellas Hess*."[173] The New York court argued that the adoption of that standard would "[i]nevitably . . . require a 'case-by-case evaluation of the actual burdens imposed' on the individual vendor involving a weighing of factors such as number of local visits, size of local sales offices, intensity of direct solicitations, etc., rather than the clear-cut line of demarcation the Supreme Court sought to keep intact by its decision in *Quill*."[174] In so stating, the court has implied that its interpretation does not require a case-by-case analysis. There are two major problems with the reasoning New York used to reach this conclusion. First, despite its conclusion to the contrary, New York's standard obviously invites a "case-by-case" analysis. Second, New York relies on *Jefferson Lines* for support of a proposition not at issue in that case.[175]

New York first alleged that the lower court's "substantial physical presence" requirement interpretation would destroy *Bellas Hess'* bright-line rule by requiring a "case-by-case" analysis and therefore should be rejected. Although a "substantial physical presence" standard invites a case-by-case analysis, so does almost any interpretation of phrase "substantial nexus." In declaring the standard to be "demonstrably more than a slightest presence," the court is still permitting reasonable minds to differ about what level of activity is "demonstrably" more

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170. *Orvis*, 654 N.E.2d at 960.

171. *Id.*

172. *Id.* at 959.

173. *Id.* at 960.

174. *Id.* (quoting *Quill*, 504 U.S. at 315).

175. *See* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

than a slightest presence and what level of activity constitutes only the "slightest presence." By its very nature, the Supreme Court's refusal to further define the standard of "substantial nexus" engenders a discussion of what activity is "substantial" enough to satisfy the nexus requirement.

Second, the New York court relies on the most recent Supreme Court case in the sales and use tax area, *Jefferson Lines*, to undermine *Quill's* adherence to the physical presence requirement. The New York court said

> [f]inally, confirmation that the Supreme Court never intended to elevate the nexus requirement to a substantial physical presence of the vendor can be found in [*Jefferson Lines*] . . . . In that case, the Court did not apply a substantial physical presence test, but instead strictly utilized the substantial nexus prong of the *Complete Auto* test without even passing reference to the substantiality of the physical presence of the vendor (an interstate bus company) in the taxing State.[176]

There is an excellent reason that the physical presence of *Jefferson Lines* was not given even a "passing reference" by the Supreme Court. Jefferson Lines' physical presence was not in dispute. Even a cursory reading of the case reveals that Jefferson Lines sold tickets for interstate bus travel in Oklahoma.[177] It had both personnel and property (buses) in the state.[178] It would have been frivolous to argue that Jefferson Lines lacked the requisite physical presence to satisfy the Commerce Clause. Therefore, *Jefferson Lines* was irrelevant to *Orvis'* analysis of what level of physical presence[179] constitutes "substantial presence."

4. Reliance on National Geographic's Standard.—*Orvis* relied on *National Geographic* in its conclusion that the appropriate amount of physical presence should be "demonstrably more than a slightest presence." The court stated that "[w]hile a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence.'"[180] This, however, is not what *National Geographic* stated. The relevant language from *National Geographic* is "[o]ur affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional nexus."[181] The *National Geographic* Court did not say

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176. *Orvis*, 654 N.E.2d at 960.

177. *Jefferson Lines*, 514 U.S. at 184

178. *Id.*

179. Moreover, the *Orvis* decision ignores an obscure part of *Quill*. Quill did have property in North Dakota, its licensed software. The Supreme Court stated that presence would not constitute a substantial nexus. *Quill*, 504 U.S. at 215 n.8. Evidently, there are some instances where a physical presence cannot constitute a substantial nexus. The *Orvis* court effectively converted the rule in *Quill* which is that no collection duties could be imposed on an out-of-state retailer without physical presence into a rule that where there is more than the slightest physical presence, there is necessarily a substantial nexus justifying the imposition of collection duties.

180. *Orvis*, 654 N.E.2d 960-61 (quoting National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 556 (1977)).

181. *National Geographic*, 430 U.S. at 556.

how much more of a presence was required than the slightest presence. Rather, it simply dismissed California's "slightest presence" standard without comment.

5. *Summary of New York's Standard.*—In summary, the New York court has come as close as possible to overruling the Supreme Court in *Quill* while still maintaining that it is upholding the Supreme Court's intent. More significantly, the result of the New York decision, that Orvis and VIP must collect New York's use tax, is defensible under either the "demonstrably more than a slightest presence" standard the court adopted or the "substantial physical presence" standard the court despises.

The reason the decision is justifiable under either of the standards is that any decision inevitably turns on a factual characterization[182] of the level of physical presence that Orvis and VIP have in New York. In VIP's case, the fact that there were forty-one trips to New York for the roughly 150 transactions during the audit period is probably enough to characterize VIP's presence as substantial in relation to the number of transactions. Of course, as VIP and Orvis argue, it is also plausible that their presence was not "substantial." Likewise, under New York's purported test, it is arguable that Orvis' twelve visits to New York were either de minimis or a "slightest presence" or, conversely, that they were "demonstrably more than a slightest presence." What is this beginning to sound like? It sounds like both tests degenerate into a fact-based case-by-case analysis that the New York court and the Supreme Court purported to remove with their standards.

Although the U.S. Supreme Court has provided many clues as to what will create a "substantial nexus," it is still debatable as to whether activity described as creating a "substantial physical presence" is required or whether activity described as "demonstrably more than a 'slightest presence'" is required. Under either standard, a lot of activity could legitimately be argued as either meeting or not meeting the standard. The two standards are merely shifts in the line either in favor of taxpayers or in favor of the states.

It was inevitable that in the aftermath of the Supreme Court's denial of certiorari of *Orvis*, other state courts would move to expand their definitions of "substantial nexus" in line with New York's "demonstrably more than the 'slightest presence'" standard in order to capture more revenue.

The first state to adopt verbatim, the New York standard was Illinois. In *Brown's Furniture, Inc. v. Wagner*,[183] the Illinois Supreme Court held that a substantial nexus existed when a Missouri furniture retailer, located close to the Illinois border, made 942 deliveries to Illinois customers in one year using its own trucks and employees.

The court, undoubtedly seeing the Supreme Court's denial of certiorari as a green light to expand its taxation powers, held that "[t]he Orvis court stated—correctly, we believe, the rule regarding substantial nexus."[184]

Of course, what is truly noteworthy about *Brown's Furniture* is that the

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182. This is true of many dormant Commerce Clause cases. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

183. 665 N.E.2d 795 (Ill. 1996).

184. *See id.* at 802.

furniture retailer's presence in the state was overwhelming. Unlike VIP, who made an average of 17 trips to New York a year and Orvis who made between 12 and 76 visits to New York per year, Brown's Furniture made 942 deliveries to customers in Illinois in one year! This is an average of almost three deliveries per day. To say that three deliveries per day is not regular and systematic enough to satisfy *Quill's* substantial nexus test is to ignore entirely the *Quill* opinion. The Illinois court certainly did not need to adopt *Orvis'* erroneous, overreaching, standard to find that Brown's Furniture had a substantial nexus with Illinois.

IV. How Should *Quill's* Physical Presence Standard Be Applied?

Should, as in *Orvis*, *Quill's* physical presence be construed to mean "demonstrably more than a slightest presence?" No. Requiring an entity to have a "physical presence" is not the same as requiring the entity to have "demonstrably more than a slightest presence." *Orvis* adopted a reading of *Quill's* standard close to the standard the Supreme Court rejected in *National Geographic.*[185] Although activity that constitutes a "physical presence" can rightly be described as "demonstrably more than a slightest presence," the converse is not necessarily true. Instead of relying on certain rationales discussed in *Quill* to frame new rules on the fringe of the standard, state courts should consider whether, given the facts before them, the retailer's activities could reasonably be described as constituting a "physical presence" in the taxing state.

In determining whether a given taxpayer's activities reasonably constitute a "physical presence," courts should be guided by *Quill's* examples of the activities that would constitute a physical presence. *Quill's* example of an activity that would satisfy the physical presence requirement was the presence in the taxing state of a "small sales force, plant, or office."[186] Courts should also look at other activities that would reasonably indicate that a retailer has a physical presence in the taxing state. These might include telephone listings indicating a local number, business cards with an in-state address, retail outlets, and others.

However, the courts should refrain from attempting to redefine the physical presence requirement in the light most favorable to state taxing authorities. As previously mentioned, *Quill* discussed several reasons for requiring a physical presence that do not support redefining "physical presence" as "demonstrably more than a slightest presence." Additionally, it is not unfair or inequitable to deny states the power to make out-of-state retailers collect their use taxes.

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185. Recall that *National Geographic* flatly rejected California's "slightest presence" standard in 1977. *See supra* Part I.B. *But see* Multistate Tax Commission, *Nexus Guideline for Application of a Taxing State's Sales and Use Tax to a Remote Seller (DRAFT)*, <http://www.http://www.aimnet.com/~software/industry_issues/home> (Jan. 25, 1995). The MTC's draft encourages a broad reading of activities creating a physical presence and encourages the adoption of a "deemed physical presence" as being sufficient to constitute "substantial nexus."

186. Quill Corp. v. North Dakota, 504 U.S. 298, 315 (1992).

A. Quill's *Rationales*

Although *Quill* gave several reasons for upholding the physical presence requirement, two of those do not support characterizing *Quill's* physical presence standard in the way that favors state governments at the expense of interstate commerce. First, *Quill* retained the physical presence standard to prevent states from placing undue burdens on interstate commerce.[187] Second, Quill made it clear that Congress, not the states, could change the standard or remove the barriers to taxation if it desired. Each of these reasons is discussed in turn.

1. Prohibiting Undue Burdens on Interstate Commerce.—In increasing the states' power to tax retailers with less physical presence than the Supreme Court's standard indicates, courts will increase the burdens on out-of-state retailers. These burdens will naturally affect smaller businesses more than established retailers, creating barriers to entry in the mail-order retailing markets and burdening small business.[188] For a small business to have to comply with the complexities of the differing state and local sales and use tax laws of the roughly 6500 tax jurisdictions in the United States is more than burdensome; it can be cost prohibitive.[189] In addition to complying with the taxing statutes of those jurisdictions, retailers are faced with the daunting task of complying with the more than ninety different sales and use tax rates imposed by those jurisdictions.[190] Requiring businesses to hire full time tax advisors to investigate, read, understand, and comply with these statutes or risk substantial penalties and interest is unduly burdensome and will discourage even the most optimistic entrepreneurs.

Additionally, under New York's standard, retailers may be concerned with how many trips they make to a state. If a customer needs assistance with the seller's product, the retailer must now face the uncertainty of wondering whether this trip is the one that will make its activity "demonstrably more than a slightest presence." Using *Quill's* examples as an analogy, however, sporadic trips to a state would not constitute a substantial nexus because no physical presence would be *maintained* in the taxing state.

Amid aggressive state taxation, businesses must ponder whether a competitor is gaining an advantage by not charging use tax to its customers. Simultaneously, they must legitimately be concerned that if they do not collect the tax, they might be subject to a court's interpretation that their presence was (under the New York standard) "demonstrably more than a slightest presence" and that they may be forced to pay heavy penalties and interest, plus the taxes that were not collected.

Requiring a "physical presence," as defined in *Quill* by the presence of an

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187. *Id.* at 314-15.

188. *See* Loberg, *supra* note 46, at 626 & n.208. Quill, which sells $200 million a year in products, was one of the country's largest mail order retailers. However, 94% of mail order retailers have sales of less than $12.5 million annually. *Id.*

189. *See generally* Krill, *supra* note 10.

190. *See* Loberg, *supra* note 46, at 626-27 & nn.210-12. In 1967, when *Bellas Hess* was decided, there were only eight different rates. In 1992, when *Quill* was decided, over 90 different rates existed. *Id.*

actual plant or office or a small sales force in a given state, will alleviate these concerns. When a retailer opens an outlet in a state or maintains a sales force there, it is not as burdensome on that retailer to require the collection of the state's use tax. Under those circumstances, the retailer must comply with a myriad of other state and local laws, not just sales and use tax collection laws. The retailer who does not have an office in that state, however, is not nearly as prepared to deal with these same regulations.

2. *Only Congress Can Allow States to Burden Interstate Commerce.*—A second reason the *Quill* decision should not be read in a way that reflects a bias in favor of state governments is that the Court made it clear that Congress, *and not the states,* could legislate away *Quill's* holding if Congress thought the standard was unfair to the states. If states are concerned that they are not able to impose the duty to collect their use tax on retailers, they are not without remedy. They simply need to turn to Congress and argue for laws they think will allow them to force retailers to collect their taxes. As mentioned, Congress passed legislation regarding income tax nexus when it saw fit.[191] If Congress is convinced that *Quill* is too restrictive on the states, it can similarly pass use tax collection legislation.

B. State Governments' Other Option

Until the Supreme Court issues a more definitive ruling or until Congress issues guidelines allowing a state to force out-of-state retailers to collect its use tax, the states are not without remedies. They can directly collect the tax from the consumers. Although some states may argue that this is too difficult, several have begun collection efforts. In fact, Maine has been quite successful in its attempts to collect the use taxes from its residents and has incurred only nominal enforcement costs.[192] In any case, the fact that the tax is not easy to collect from consumers should not be an overriding factor in determining how broad a state's taxing powers should be under the Commerce Clause.

CONCLUSION

The U.S. Supreme Court, in *Quill*, upheld *Bellas Hess'* physical presence requirement for Commerce Clause nexus. Its standard, however, does not provide mail order retailers and states the bright-line rule it proclaims. Until the Court revisits the issue and issues a more definitive ruling, or until Congress legislates on the issue, uncertainty over the standard will increase the costs of business for those retailers in the gray area and litigation with aggressive states will continue to plague the industry.

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191. *See* Gillman, *supra* note 110.

192. *See* Krill, *supra* note 10, at 1431 & nn.159-62.