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The Quill Corporation is a Delaware corporation that sells office supplies and equipment nationwide.1 Its annual untaxed sales to North Dakota residents are estimated at slightly less than $1 million.2 In an effort to halt this loss of tax revenue, North Dakota sought to impose a use tax3 on Quill’s sales, all of which were made through mail-order solicitations.4 Quill had no offices or sales representatives in North Dakota, and none of its employees lived or worked in North Dakota.5 If Quill could be considered to own any property in North Dakota, such ownership would be “insignificant or nonexistent.”6

Quill sells its products through direct-mail forums, such as catalogues, flyers, and advertisements in nationally distributed “card packs.”7 It also advertises in national magazines and trade journals.8 All deliveries of merchandise are made through the mail or by common carrier from sites outside North Dakota.9

North Dakota imposed a use tax, at the same rate as its sales tax, on property purchased for “storage, use, or consumption” within the

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2. 112 S. Ct. at 1907-08.
3. A use tax is a tax imposed by the consumer’s state on the use of an item that the consumer purchased through a retail outlet in another state and on which no sales or use tax has been paid. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.8, at 290 (4th ed. 1991). Use taxes are often levied together with sales taxes in an effort to prevent consumers from buying out-of-state goods instead of local goods which have been made more expensive through imposition of local taxes. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-16, at 447 (2d ed. 1988).
4. 112 S. Ct. at 1908.
5. Id. at 1907. Quill’s offices are in Illinois, California, and Georgia.
6. Id. Quill licensed a computer software program to some of its North Dakota customers that enabled them to check Quill’s inventories and prices and to place orders directly via computer. Id. at 1907 n.1. The Court stated that Quill’s interests in the software did not affect its due process analysis and that the interests did not provide the substantial nexus required by the Commerce Clause. Id.
8. 470 N.W.2d at 204.
9. 112 S. Ct. at 1908.
While the purchaser of the merchandise is responsible for paying the tax, the statute requires a "retailer maintaining a place of business" in North Dakota to collect the tax from the purchaser and remit the tax to the state. The state code was amended in 1987 to define "retailer maintaining a place of business" as including persons who regularly or systematically solicit consumers in the state through the use of direct mail; through printed, radio, or television advertising; or through telephone, computer, cable, or other communication system.

The North Dakota Administrative Code defines "regular or systematic solicitation" as "three or more separate transmittances" of any advertising during a twelve-month period.

Quill refused to collect and remit the use tax required by North Dakota law. The state Tax Commissioner sought a declaratory judgment that Quill was a "retailer" and a "retailer maintaining a place of business" in North Dakota and that Quill must collect and remit taxes on sales to purchasers in North Dakota.

Quill responded that North Dakota's use tax was unconstitutional because it violated both the Due Process Clause and the Commerce Clause of the United States Constitution. The trial court found the statute unconstitutional as applied to Quill, basing its decision principally on a 1967 United States Supreme Court case which also concerned use taxes on mail-order sales, National Bellas Hess, Inc., v. Department of Revenue. The trial court concluded there was not a sufficient nexus between Quill and North Dakota to meet the Due Process and Commerce Clause requirements of Bellas Hess. The North Dakota Supreme Court reversed the trial court. The North Dakota Supreme Court reasoned that changes in the economy, in technology, and in Commerce Clause and Due Process Clause legal doctrine made

11. 112 S. Ct. at 1908 (citing N. D. CENT. CODE § 57-40.2-07 (Supp. 1991)).
14. North Dakota, 470 N.W.2d at 205.
15. Id.
16. Id.
17. Id.
18. 386 U.S. 753 (1967). Bellas Hess invalidated a use tax on an out-of-state mail-order firm, which, like Quill, had no offices or employees in the taxing state and which communicated with its customers only by mail or common carrier. 386 U.S. at 758. For a more thorough discussion of Bellas Hess see infra notes 108-23 and accompanying text.
20. Id. at 219.
it inappropriate to follow *Bellas Hess*. Using due process analysis, the North Dakota Supreme Court found a constitutionally sufficient nexus between the state and Quill to justify the imposition of a use tax.

The United States Supreme Court struck down the tax for violating the Commerce Clause, not for any due process violation. The Court held that physical presence was no longer necessary to meet due process requirements for imposing a tax; therefore, Quill's lack of physical presence in North Dakota was not an impediment to taxation. However, a company that only had contact with a state by mail or common carrier lacked the "substantial nexus" required under the Commerce Clause for constitutional imposition of a tax. Thus, North Dakota's use tax, as applied to Quill, was an unconstitutional violation of the Commerce Clause. *Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992).

The Supreme Court itself has aptly termed its doctrines on state taxation of interstate commerce a "quagmire." These doctrines affect a variety of taxes beyond use taxes, such as severance taxes, unapportioned gross receipts taxes, and apportioned state net income tax. See generally Paul J. Hartman, *Federal Limits on State and Local Taxation* (1981); Jerome R. Hellerstein, *State Taxation* (1983).

The Court's attitude in the late 1800s was that state taxation of interstate commerce was not constitutionally permissible. The Commerce Clause prevented any state interference with the free flow of commerce.

21. *Id.* at 213.
22. *Id.* at 216-19.
23. 112 S. Ct. at 1911, 1912.
24. *Id.* at 1911.
25. *Id.* at 1912, 1914.
interstate trade.\textsuperscript{30} State taxation was seen as just the kind of interference that the Commerce Clause was designed to stop.\textsuperscript{31}

Beginning around the late 1880s, the Court began distinguishing between "direct" and "indirect" taxation\textsuperscript{32} on interstate commerce.\textsuperscript{33} It held that direct taxation was strictly prohibited, but indirect taxation did not automatically offend the Commerce Clause.\textsuperscript{34} Finally, in a 1977 case, \textit{Complete Auto Transit, Inc. v. Brady},\textsuperscript{35} the Court abandoned the direct/indirect distinction and set out a four-part test for determining the validity of a tax impacting interstate commerce.\textsuperscript{36} A tax would be sustained if it were on an activity that had a "substantial nexus with the taxing State, [was] fairly apportioned, [did] not discriminate

\textsuperscript{30} The Commerce Clause does not explicitly restrain states from enacting laws that affect interstate commerce if those laws touch an area of interstate commerce about which Congress has remained silent. NOWAK \& ROTUNDA, supra note 3, § 8.1, at 274-75. In those circumstances, the Supreme Court may strike down a state law using the dormant or negative Commerce Clause. NOWAK \& ROTUNDA, supra note 3, § 8.1, at 274-75. The Court decides whether, under the Constitution's "affirmative grant of power" to Congress to regulate interstate commerce, the state law exceeds the bounds of permissible state regulation of interstate commerce. NOWAK \& ROTUNDA, supra note 3, § 8.1, at 274-75. Because the Court's power to review state taxation of interstate commerce arises from the negative Commerce Clause, the Court's doctrines are always subject to congressional revision. TRIBE, supra note 3, § 6-15, at 441.

\textsuperscript{31} LeLoup v. Port of Mobile, 127 U.S. 640 (1888). In LeLoup, the Supreme Court held that states could not "lay a tax on interstate commerce in any form." Id. at 648. Accord Sonneborn Bros. v. Cureton, 262 U.S. 506, 514-15 (1923).

\textsuperscript{32} An indirect tax on interstate commerce either burdened "local" activity, or the burden on interstate commerce was incidental, even though the activity subjected to the tax might be essential to interstate commerce. HARTMAN, supra note 26, § 2.13, at 62. See also HELLERSTEIN, supra note 26, ¶ 4.5, at 103.

\textsuperscript{33} HARTMAN, supra note 26, § 2.13, at 59.

\textsuperscript{34} See, e.g., Sanford v. Poe, 659 F. 546 (6th Cir. 1895), aff'd sub nom., Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 220 (1897); HELLERSTEIN, supra note 26 ¶ 4.5, at 103. The Court next shifted its focus to whether the state tax at issue posed a risk of taxation by more than one state. See, e.g., Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 256-58 (1938); HARTMAN, supra note 26, § 2.14, at 65; HELLERSTEIN, supra note 26, ¶ 4.6, at 110. However, the Court soon returned to the distinction between direct and indirect taxation to determine whether a state tax on interstate commerce could be upheld. See Freeman v. Hewit, 329 U.S. 249 (1946); HARTMAN, supra note 26, § 2.15, at 76; HELLERSTEIN, supra note 26, ¶ 4.7, at 120.

\textsuperscript{35} 430 U.S. 274 (1977). \textit{Complete Auto} involved a privilege tax based on gross sales, not a use tax. \textit{Id.} at 275. A privilege tax is a tax on carrying on a business or occupation. BLACK'S LAW DICTIONARY 1198 (6th ed. 1990). It is important to note that the Court in \textit{Complete Auto} invalidated the privilege tax in part because it had upheld other, similar taxes on interstate commerce that were not labeled privilege taxes. 430 U.S. at 286-87. Privilege taxes were considered "direct" and therefore, unconstitutional taxes on interstate commerce. \textit{Id.} at 278. Other taxes, with different labels, were sometimes upheld as acceptable "indirect" taxes on interstate commerce. \textit{Id.} at 288. This distinction, the majority said in \textit{Complete Auto}, "stands only as a trap for the unwary draftsman." \textit{Id.} at 279.

\textsuperscript{36} 430 U.S. at 288.
against interstate commerce, and [was] fairly related to the services provided by the State."\(^{37}\)

Since the creation of use taxes in 1935,\(^{38}\) the development of the law on use taxes has followed the twists and turns of the Court's holdings on state taxation of interstate commerce in general. Other than in the very early tax cases,\(^{39}\) the Court has focused on the nature of the contacts between the taxpayer and the taxing state to determine if a constitutionally sufficient nexus existed to support taxation.\(^{40}\) Physical presence, in the form of salespeople or offices, always has been enough to satisfy due process minimum contacts concerns or a concern under the Commerce Clause that the tax be fairly related to benefits the tax-paying company received from the state. The closer questions involved situations where the contact with the taxing state was more limited, such as in Quill where business was conducted by mail without the use of local offices or employees.

In Quill the Court held that due process did not require "physical presence" by a company in the taxing state.\(^ {41}\) Therefore, the following examination of earlier tax cases will focus on the development and application of the nexus requirement under the Due Process Clause and the Commerce Clause.\(^ {42}\) Cases involving taxes other than use taxes will be included since the doctrines developed there are applied in use tax

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37. *Id.* at 279. In Henneford v. Silas Mason Co., 300 U.S. 577 (1937), the Court upheld the constitutionality of use taxes per se so long as the use tax did not discriminate against interstate commerce. *Id.* at 582-83.


39. In Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934), the Supreme Court upheld a use tax on gasoline in an opinion that discussed the Commerce Clause but not the Due Process Clause. Donald P. Simet, *The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes*, 73 NW. U. L. REV. 112, 114 (1978). In Felt & Terrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939), the Court used its *Monamotor* reasoning to uphold a statute requiring out-of-state companies to collect a use tax on goods sold in California. *Id.* at 67-68. The out-of-state Felt & Terrant Company had an office in California from which two salesmen solicited orders. *Id.* at 64. Payments for the goods, which were manufactured in another state, were sent directly to the company's offices in Illinois. *Id.* at 65. All shipments of goods to California customers originated outside the state. *Id.* The Court did not directly address the company's contention that its in-state activities did not create a sufficient nexus for taxation under the Due Process Clause. Simet, *supra*, at 115. The case did establish that an out-of-state company which maintained an office and sales agents in-state could constitutionally be required to collect a use tax. *Id.*


41. Quill Corp. v. North Dakota, 112 S. Ct. at 1911.

42. It is worth noting that some commentators believe there is no nexus requirement under the Commerce Clause. See Charles Rothfeld, *Mail-order Sales and State Jurisdiction to Tax*, 53 *Tax Notes* 1405 (1991).
decisions.

Nexus and due process concerns were at the forefront in the 1940 corporate income tax case, *Wisconsin v. J. C. Penney Co.* Wisconsin sought to force foreign corporations licensed to do business in the state to pay a tax on dividends derived from earnings generated from property held in Wisconsin or from business transacted in Wisconsin. The Court found that the tax did not violate due process. Justice Frankfurter wrote for the Court that the test of constitutionality is "whether property was taken without due process of law, . . . whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." Justice Frankfurter opined that a state may levy a tax if it were in relation to opportunities, protection, or benefits it has provided "by the fact of being an orderly, civilized society."

Regarding the nexus requirement, the Court noted that the fact a tax was contingent on events that occurred outside the state did not "destroy the nexus between such a tax and transactions" inside the state for which the tax was paid. These concepts of nexus and of a relationship between a tax and the benefits received later resurfaced as the first and fourth parts of the *Complete Auto* test, a test discussed by the Court in *Quill.*

The Court again considered use taxes in *Nelson v. Sears, Roebuck & Co.* The issues in that case were whether separate in-state retail stores constituted a sufficient nexus to permit a use tax on mail-order sales filled outside the state, and whether the imposition of the tax constituted an impermissible burden on interstate commerce. Sears, a New York corporation, did business in Iowa through local retail

43. 311 U.S. 435 (1940).
44. Id. at 441-42.
45. Id. at 444-45.
46. Id. at 444.
47. Id.
48. Id. at 445.
49. Id. at 445.
51. *Quill,* 112 S. Ct. at 1912.
52. 312 U.S. 359 (1941).
stores. But some Iowa customers made purchases by mailing orders to Sears' mail-order department, which was located out-of-state and which handled only mail orders. The mail-order department was separately administered from the retail stores. These mail orders were filled by shipments directly to the consumers from out-of-state Sears outlets.

The Court rejected Sears' arguments that the use tax was an unacceptable burden on interstate commerce and that it violated due process because it was unrelated to any local activity. The Court found a sufficient nexus for the tax, stating that the mail order sales were not unrelated to Sears' overall course of business in the state and that the tax did not equal an impermissible burden. The Court concluded that Sears could not avoid taxation by departmentalizing its business.

In *General Trading Co. v. State Tax Commission*, the Court upheld Iowa's imposition of a use tax on an out-of-state company whose only activity within the state was the presence of traveling salesmen. In dicta, the Court compared this case to the Sears case and wrote that the presence of Sears' retail stores in-state was "constitutionally irrelevant" to Iowa's right to collect a use tax on goods sent into Iowa from out of state.

The Court again explored nexus/minimum contacts to sustain

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54. 312 U.S. at 362.
55. Id.
56. Id. at 367 (Roberts, J. dissenting). While Sears' employees in Iowa did not solicit mail orders, some of them helped process the orders. Hartman, *supra* note 53, at 998.
57. 312 U.S. at 362 (Roberts, J. dissenting).
60. 312 U.S. at 364.
61. 322 U.S. 335 (1944).
62. *General Trading*, 322 U.S. at 337-38. The company did not have an office in the state and never qualified to do business as a foreign corporation there. *Id.* at 337. *But cf.* McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944). McLeod was a sales tax case with facts very similar to the General Trading use tax case. However, the Court invalidated an Arkansas law attempting to collect a sales tax on sales made by Tennessee businesses which used salesmen to solicit orders in Arkansas. McLeod, 322 U.S. at 330. The Court stated that the differences between a sales tax and a use tax mandated different outcomes in the two cases. *Id.* at 330-31. The Court said it was immaterial that an Arkansas use tax levied on the same goods would survive constitutional scrutiny. *Id.* at 330-32. *See also* Hartman, *supra* note 53.
63. *Id.* at 338.
64. One year after General Trading, the Court decided the first of a series of due process cases that impacted state taxation of interstate commerce. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Court considered whether Washington should have in personam jurisdiction over a foreign corporation and should be able to make it pay Washington state unem-
taxing jurisdiction in a 1951 case, *Norton Co. v. Department of Revenue*, which concerned a gross receipts tax levied on all business that a Massachusetts corporation conducted in Illinois, including mail orders sent to Chicago and then forwarded to Massachusetts for filling. The Court held that local activities which are important to generating or keeping an interstate market or sales constituted a sufficient nexus. Under *Norton*, to escape taxation, a company must show that the local operations were "dissociated from the local business and interstate in nature." Sufficient nexus for due process requirements was not found in *Miller Bros. Co. v. Maryland*, where the Court rebuffed an attempt by Maryland to force a Delaware company to collect a use tax on goods sold to Maryland residents. The company, a furniture store in Wilmington, regularly made deliveries in Maryland of goods that had been purchased over-the-counter at its Delaware store. The company made the deliveries mainly in its own trucks; but it also used common carriers. The Court concluded there was not sufficient nexus, or minimum contacts, between the company and Maryland to justify imposition of a use tax by Maryland. The Court created a distinction between regular and aggressive solicitation of business within a state and employment taxes. The corporation had no offices or merchandise in Washington, but it did have sales employees who resided there. The Court stated, "[i]t is no longer debatable that Congress, in the exercise of the commerce power may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." *Id.* at 315. The Court, in frequently quoted language, also wrote that due process requires only that a foreign corporation "have certain minimum contacts" with the forum state such that "traditional notions of fair play and substantial justice" are not offended by finding in personam jurisdiction or jurisdiction to tax. *Id.* at 316. A state may not acquire in personam jurisdiction against a corporation if the corporation has no "contacts, ties, or relations" with the state. The Court equated in personam jurisdiction and jurisdiction to tax. Therefore no greater contacts were needed for one than for the other. See *McCray*, *supra* note 49, at 279.

66. *Id.* at 536.
67. *See id.* at 538.
68. *Id.* at 537. This kind of thinking reiterated the departmentalization viewpoint of *Sears* which found a mere splitting up of business insufficient to destroy nexus. *Sears*, 312 U.S. at 364.
70. *Id.* at 347.
71. *Id.* at 341.
72. *Id.* The furniture company also placed advertising that, while not directed at Maryland consumers, nevertheless managed to reach Maryland residents. *Id.* at 341-42. The company did, however, mail some advertising flyers to Maryland residents. *Id.* at 342.
73. *Id.* at 344-45.
74. The analysis that led to this distinction has been criticized. See *Simet*, *supra* note 39, at 118. For a comparison with *General Trading*, see Hartman, *supra* note 53, at 1002.
the occasional delivery of merchandise bought outside the taxing state "with no solicitation other than the incidental effects of general advertising."\(^7\)

The Court, following cases involving in personam jurisdiction over nonresidents,\(^7\) wrote in *Miller* that due process in tax cases required "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."\(^7\)

The Court in its next use tax case, *Scripto, Inc. v. Carson,\(^7\)* expanded its idea of what constituted a sufficient nexus for taxing jurisdiction. In *Scripto*, the Court upheld a Florida use tax imposed on a Georgia corporation that used independent contractors, all of whom were Florida residents, to sell its products in Florida.\(^8\) In addition to having no regular employees in Florida, *Scripto* did not have any offices or stock of merchandise there.\(^9\) Here the Court found the minimum connection needed to justify jurisdiction for taxing purposes.\(^10\) It wrote that the distinction between regular employees and independent contractors was "without constitutional significance."\(^11\)

The Court again considered due process minimum contacts in the area of taxation in *Northwestern States Portland Cement Co. v. Minnesota.\(^12\)* In this case, Minnesota sought to impose a net income tax on the part of a foreign corporation's net income that was derived from interstate commerce business activities carried on within the taxing state.\(^13\) The Court held that such income from interstate activities may be taxed as long as the tax was not discriminatory, was apportioned to activities within the taxing state, and was supported by a sufficient nexus.\(^14\) These requirements for valid taxation later appeared in the

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75. *Miller Bros.*, 347 U.S. at 347.
76. See supra note 64.
78. 362 U.S. 207 (1960).
79. *Id.* at 208.
80. *Id.* at 209.
81. *Id.* at 211.
82. *Id.* The Court reaffirmed its language in *General Trading*, 322 U.S. 335 (1941), that states may not tax "the privilege of doing interstate business." *Scripto*, 362 U.S. at 212. The Court nevertheless intimated that interstate commerce could be made to pay a fair share of the costs of benefits. *See General Trading*, 322 U.S. at 338.
83. 358 U.S. 450 (1959). This case was consolidated with Williams v. Stockham Valves & Fittings, Inc., on certiorari to the Supreme Court of Georgia, argued October 14-15, 1958. 358 U.S. at 450.
84. *Id.* at 452.
85. *Id.*
The Court found sufficient nexus between Northwestern and the taxing state based on Northwestern's "regular and systematic course of solicitation of orders," and its maintenance of an office and salesman in the taxing state. The company carried on "substantial income-producing activity in the taxing States." The Court also held that the net income taxes did not violate the Commerce Clause because they did not discriminate against interstate commerce nor subject it to an undue burden. The Court repeated the idea that interstate commerce may be made to pay "its fair share of the costs of state government in return for the benefits it derives" from the taxing state.

The nexus analysis in the preceding cases was under the Due Process Clause. In 1964, the Court decided a case that one commentator described as the only precedent supporting the existence of a nexus requirement under the Commerce Clause. In that case, General Motors Corp. v. Washington, an unapportioned gross receipts tax was upheld as applied to all General Motors vehicles, accessories, and parts that GM delivered in Washington to local dealers who then resold the items to consumers. Manufacturing, order processing, and dispatching of deliveries all were made from locations outside the state. However,
GM had various employees who were Washington residents. The Court found sufficient nexus to justify imposition of a tax. It described "the bundle of corporate activity" as "the test here," and concluded that GM's activities were "enmeshed in local connections." The Court examined the local incidents to see if the tax could be "fairly related" to in-state activities. Quoting from Norton, the Court opined that in order to avoid taxation, the corporation must demonstrate that the business sought to be taxed was "dissociated from the local business and interstate in nature." One commentator, who later filed an amicus brief for the state in Quill Corp. v. North Dakota, analyzed the General Motors case as a decision that was a "conventional" Commerce Clause opinion until the Court began discussing minimum contacts. In discussing the search for "local incidents," under Commerce Clause analysis, the Court quoted the Miller Bros. due process test requiring "some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax." The commentator contended that the minimum contacts language in this case merged a Commerce Clause local incidents requirement, which prohibited direct taxation of interstate commerce, with the due process jurisdiction-to-tax standard. The commentator wrote that this language in General Motors "appears to be the origin of the Commerce Clause nexus requirement."

In 1967 the Court declared in National Bellas Hess, Inc., v. De-

95. Id. at 445.
96. Id. at 447-48.
97. Id. at 447 (citing Norton, 340 U.S. at 537).
98. Id. at 441.
99. Id. (quoting Norton, 340 U.S. at 537).
102. Rothfeld, supra note 42, at 1416.
103. "Local incidents" means the "taxpayer's business activities within the state." General Motors, 377 U.S. 436, 441.
104. Id. at 447-48 (quoting Miller Bros., 347 U.S. at 344-45).
105. In Freeman v. Hewit, 329 U.S. 249 (1946), the Court relied on a distinction between "direct" and "indirect" taxes on interstate commerce to invalidate an Indiana gross receipts tax. Id. at 250-51. The state tried to tax proceeds from a sale in New York of stock held in Indiana. Id. While the holder of the stock was an Indiana resident who was clearly subject to state taxing jurisdiction, the Court nevertheless said the tax was a direct one "on the very process of interstate commerce," and was therefore invalid. Id. at 253-54. Freeman set out "a blanket prohibition against any state taxation imposed directly on an interstate transaction." Complete Auto, 430 U.S. at 279.
106. Rothfeld, supra note 42, at 1416.
107. Rothfeld, supra note 42, at 1416.
that similar tests were used to determine whether a state tax violated the Commerce Clause or ran afoul of due process requirements. The Court apparently determined that the tax at issue failed both tests. The fact situation of National Bellas Hess was nearly identical to the Quill case. National Bellas Hess was a mail order business which was incorporated in Delaware and had its main office in Missouri. It maintained neither outlets nor salespeople in Illinois. Its only contacts with Illinois were through the United States mail or common carrier. Under an Illinois statute, Bellas Hess was classified as a retailer "'maintaining a place of business' " in the state and was therefore required to collect a use tax and remit it to the state.

In its due process analysis, the Court concluded that states may not require out-of-state mail order companies to collect use taxes from in-state purchases if the companies had no physical presence in the taxing state. Permitting state taxation without a physical presence would violate the Due Process Clause, the Court indicated. The Court recited the "minimum connection" requirement for taxation from Miller Bros. It also repeated the language from Wisconsin v. J.C. Penney Co.: the "simple but controlling question is whether the

109. Id. at 756.
110. Id. at 758-59. Some commentators remain uncertain whether Bellas Hess was decided on Commerce Clause or Due Process grounds. See Timothy H. Gillis, Note, Collecting the Use Tax on Mail Order Sales, 79 Geo. L.J. 535, 542. The Court in Quill wrote that the Bellas Hess decision was based on both the Commerce and Due Process clauses. Quill, 112 S. Ct. 1904, 1909 (1992).
111. Bellas Hess, 386 U.S. at 753-54.
112. Id. at 754.
113. Id. at 758.
114. Id. at 755 (quoting Ill. Rev. Stat. ch. 120 § 439.2 (1965)). The company would mail catalogues and advertising flyers to Illinois customers, who would then mail their orders to the Missouri office. Id. at 754-55. Merchandise was sent to customers via mail or common carrier. Id. at 755. The company did not have a telephone listing in Illinois, and it did not advertise its products in newspapers, on billboards, or on radio in Illinois. Id. at 754.
115. Id. at 758.
116. See id.
117. Id. at 756 (quoting Miller Bros., 347 U.S. at 344-45). See supra text accompanying note 77. While the Court in Bellas Hess was unable to find nexus on the basis of systematic mailings into a state, it later found sufficient minimum contacts where a company had but a single employee in a state. In Standard Pressed Steel Co. v. Washington, 419 U.S. 560 (1975), the Court upheld an unapportioned gross receipts tax and rejected the assertion that the in-state activities were too "thin and inconsequential" to sustain the tax. Id. at 561. The employee was an aerospace engineer who did not take any purchase orders for the company, did not have an office, and who spent most of his time consulting with his employer's major client in the area. Id.
state has given anything for which it can ask return."\(^{118}\) The Court observed that it never had held that a State could impose a use tax on a company "whose only connection with customers in the State is by common carrier" or through the mail\(^{119}\) and stated that it would not "obliterate" the distinction for tax purposes between firms that have "retail outlets, solicitors or property" inside a state, and those firms that merely interact with customers via mail or common carrier "as part of a general interstate business."\(^{120}\)

With respect to Commerce Clause concerns, the Court quoted a portion of an earlier decision\(^{121}\) which held that state taxation of interstate commerce was permissible only if it were designed to make commerce "bear a fair share of the cost of the local government whose protection it enjoys."\(^{122}\) The Court expressed a fear that if the Illinois use tax were upheld, other states and other political subdivisions would impose use taxes and "the resulting impediments upon the free conduct of ... interstate business would be neither imaginary nor remote."\(^{123}\)

Then in 1977 in *Complete Auto Transit, Inc. v. Brady*,\(^{124}\) the Court announced a four-part test for determining the validity of a tax\(^{125}\) which burdens interstate commerce.\(^{126}\) For a tax to be valid,

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118. *Bellas Hess*, 386 U.S. at 756 (quoting Wisconsin v. J.C. Penney, 311 U.S. 435, 444 (1940)).

119. 386 U.S. at 758.

120. *Id.* Justice Fortas, who dissented with two other justices, would have upheld the tax because he considered the catalogue and other mailings to be a "large scale, systematic, continuous solicitation and exploitation of the Illinois consumer market . . ." which created a sufficient nexus for taxation. *Id.* at 761 (Fortas, Black, Douglas, JJ. dissenting). In addition, Justice Fortas contended that *Bellas Hess* did enjoy benefits provided by the state "as fully as if it were a retail store or maintained salesmen therein." *Id.* at 762.


123. *Id.* at 759. Interstate business could become entangled in requirements to pay use taxes to many different local jurisdictions which had "no legitimate claim" to impose an equitable share of the cost of local government services. *Id.* at 759-60.


125. The tax was a privilege tax on engaging in business within the state and was based on a business's gross sales. *Id.* at 275.

126. *Id.* at 279. *Complete Auto* overruled *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602 (1951), which found that the privilege tax at issue was a direct tax on interstate commerce and was therefore unconstitutional. *Complete Auto*, 430 U.S. at 289. *See Spector Motor*, 340 U.S. at 608. The Court noted that a tax in the same amount, but structured differently so that it was not a privilege tax, could be upheld even if the extent of the economic burden on interstate commerce was the same. *Id.* The Court wrote that whether a state may "validly make interstate commerce pay its way depends . . . upon the constitutional channel through which it attempts to do so." *Id.* In *Complete Auto*, the Court said *Spector* was one of a line of cases that "reflects an underlying philosophy that interstate commerce should enjoy a sort of 'free trade'
there must be a substantial nexus\textsuperscript{127} between the taxpayer and the taxing state;\textsuperscript{128} the tax must be fairly apportioned; the tax must not be discriminatory in nature, and it must bear a fair relation to services provided by the state.\textsuperscript{129}

The Quill opinion left the Complete Auto test intact. However, Quill overruled other tax decisions, including Bellas Hess,\textsuperscript{130} insofar as they held that due process requires a company to have some physical presence in a state before the state can impose the duty to collect a use tax.\textsuperscript{131} But the Court salvaged the Commerce Clause portion of Bellas Hess, which held that a company who only had contacts with the taxing state by common carrier or by mail did not have the "substantial nexus" required by the Commerce Clause to justify imposition of a

\textsuperscript{127} Later in 1977, the Court again focused on the nexus requirement in use tax cases when it decided another case dealing with mail-order businesses, National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977). The Court appeared to lump together nexus under the Due Process and Commerce Clauses. \textit{Id.} at 554. In this case, the Society maintained advertising offices in California, but all mail-order sales for California were handled by the Society's Washington D.C. headquarters. \textit{Id.} at 552. The Court upheld California's imposition of a use tax on the mail-order sales. \textit{Id.} at 556. It reasoned that the in-state advertising offices provided the nexus required under both the Due Process and Commerce Clauses. \textit{Id.} The Court rejected the Society's argument that nexus should exist only when there both is a relationship between the taxing state and the seller and "between the activity of the seller sought to be taxed and the seller's activity within the State." \textit{Id.} at 560. The Court said the Society's continuous presence in the state meant that the Society enjoyed state-provided benefits such as police and fire protection for which the state could expect something in return. \textit{Id.} at 561-62. The Court also said there were sufficient minimum contacts to impose a tax without offending due process. See \textit{id.} at 555-56.

\textsuperscript{128} The taxpayer did not contend that there were insufficient minimum contacts to sustain the tax. Complete Auto, 430 U.S. at 277-78, 287. The taxpayer was an out-of-state corporation which had trucks and employees in the taxing state. \textit{Id.} at 276.

\textsuperscript{129} \textit{Id.} at 279. See Trinova Corp. v. Michigan Dept. of Treasury, 111 S. Ct. 818, 828 (1991) (involving a business tax, in which the Court said the Complete Auto test is responsive to both Commerce Clause and Due Process Clause concerns); D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988) (applying the Complete Auto test to uphold a use tax on catalogues, concluding that the tax did not violate the Commerce Clause); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (utilizing Complete Auto test to uphold severance tax on coal mined in Montana but sold outside the state).

\textsuperscript{130} The Court in Quill stated that the Bellas Hess holding relied on both the Due Process and Commerce Clauses. Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1909 (1992).

\textsuperscript{131} \textit{Id.} at 1911. See generally Simet, supra note 39; McCray, supra note 49. See Rothfeld, \textit{supra} note 42, at 1408-15; Hartman, \textit{supra} note 53, at 1009-11.
The Court used this reasoning to invalidate the use tax at issue in Quill.\textsuperscript{133}

In its discussion of due process, the unanimous portion of the Court's opinion noted the evolution of its due process jurisprudence in the twenty-five years since the \textit{Bellas Hess} decision.\textsuperscript{134} The Court cited its previous holdings on in personam jurisdiction: if an out-of-state corporation "purposely avails itself of the benefits of an economic market" in a state, the corporation may be subject to the state's in personam jurisdiction even if it had no physical presence in the state.\textsuperscript{135} Quoting \textit{Burger King Corp. v. Rudzewicz},\textsuperscript{136} the Court stated that so long as a corporation's efforts were "'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."\textsuperscript{137} The Court concluded that, under this evolution of due process reasoning, due process was not offended by imposing a use tax collection duty on a mail-order business that engaged in "continuous and widespread solicitation" inside a state.\textsuperscript{138}

In another unanimous portion of the opinion, the Court concluded that even if a tax met the minimum contacts necessary to uphold it under the Due Process Clause, the tax could still be invalid under the Commerce Clause.\textsuperscript{139} If there were sufficient minimum contacts between the state seeking to impose the tax and the business it sought to tax, the tax may be upheld against due process objections.\textsuperscript{140} However, if this same tax placed an impermissible burden on interstate commerce, it would not survive a Commerce Clause challenge.\textsuperscript{141}

The Court further observed that while Congress had "plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce," Congress does not have the power to sanction violations of the Due Process Clause.\textsuperscript{142} Thus, by removing the Due Process Clause impediment, the Court cleared the
way for Congress to permit states to "burden" interstate mail-order businesses with use taxes. 143

Part IV of the Quill opinion, which was joined in by only five justices, 144 concerned the "negative" or "dormant" Commerce Clause. 145 The justices opined that the nexus requirements of the Due Process and Commerce Clauses were not the same. 146 Due process focused on fundamental fairness and "notice" to the individual or corporation. 147 By contrast, the Commerce Clause "and its nexus requirement" were concerned with how state regulation affected interstate commerce throughout the nation as a whole. 148

The five justices, responding to the North Dakota Supreme Court's contention that Complete Auto undercut the Commerce Clause portion of the Bellas Hess decision, 149 explained that the Complete Auto test embodied the same Commerce Clause concerns evinced by Bellas Hess 150 and also encompassed due process concerns. 151

The justices wrote that the second and third parts of the Complete Auto test, 152 which concerned fair apportionment and non-discrimination, were aimed at prohibiting an unfair amount of taxes on interstate commerce. 153 The first and fourth parts of the test required a substantial nexus and some relationship between the tax and services provided by the state. 154 The test was designed to ensure that states could not unduly burden interstate commerce. 155 The justices wrote that the substantial nexus requirement, unlike due process' "minimum contacts," is not "a proxy for notice," but instead is a means of limiting the burdens

143. Id. at 1916. Chief Justice Rehnquist, Justices Stevens, Blackmun, O'Connor, and Souter made this observation in Part IV of the Quill opinion, in which only they joined.

144. Chief Justice Rehnquist, Justices Stevens, Blackmun, O'Connor, and Souter.

145. 112 S. Ct. at 1911. See NOWAK & ROTUNDA, supra note 3, § 8.5, at 281; PAUL HARTMAN, FEDERAL LIMITS ON STATE AND LOCAL TAXATION § 2.17, at 21 (Supp. 1992) [hereinafter HARTMAN Supp.].

146. 112 S. Ct. at 1913. See NOWAK & ROTUNDA, supra note 3, § 8.11, at 303.

147. 112 S. Ct. at 1913.

148. Id.

149. Id. at 1912.

150. Id.

151. See supra note 64.

152. For discussions of Complete Auto, see HARTMAN Supp., supra note 145, § 10.6, at 611; HARTMAN, supra note 26, § 10.4, at 597; TRIBE, supra note 3, § 6-15, at 441; HELLERSTEIN, supra note 26, ¶ 4.13, at 155.


154. Id.

155. Id.
which a state may impose on interstate commerce.\footnote{156} Therefore, the justices concluded, a company may have sufficient minimum contacts with a taxing state under due process analysis, yet still lack a "substantial nexus" with that state as mandated by the Commerce Clause.\footnote{157}

The justices argued that \textit{Bellas Hess} was not descended from a now-rejected line of cases that decided the constitutionality of taxes according to rigid formalism. Therefore, \textit{Bellas Hess} was not inconsistent with \textit{Complete Auto} or other later cases.\footnote{158}

In addition, the justices explained that the "bright-line rule" of \textit{Bellas Hess}—which exempted from use taxation those firms whose contact with the forum state was limited to mail or common carrier—promoted certainty in the law and tended to limit undue burdens on interstate commerce by marking out a "discrete realm" immune from this kind of taxation.\footnote{159} The Court therefore rejected the urging of Justice White to overrule \textit{Bellas Hess} in its entirety.\footnote{160}

Justice White concurred in overruling the due process portion of \textit{Bellas Hess} but believed the "physical presence" portion should have been overruled as well.\footnote{161} Justice White contended that the majority was without foundation in its opinion that it was possible for a tax to have sufficient contacts for due process purposes, but have insufficient contacts to satisfy the Commerce Clause.\footnote{162} He asserted that the nexus requirement in the \textit{Complete Auto} test was grounded in due process and not Commerce Clause concerns, citing opinions prior to \textit{Complete Auto} which described the nexus requirement as a due process concern.\footnote{163}

Justice White believed there was no relation between the physical presence/nexus rule the majority salvaged from \textit{Bellas Hess} and the "Commerce Clause considerations that allegedly justify it."\footnote{164} Because of technological advances that enable a large volume of business to be transacted nationwide without physical presence, Justice White asserted that retaining any form of physical presence requirement as necessary for taxation of mail-order firms did not recognize that mail-or-

\footnotesize{\begin{itemize}
\item \footnote{156} \textit{Id.}
\item \footnote{157} \textit{Id.} at 1913-14.
\item \footnote{158} \textit{Id.} at 1912.
\item \footnote{159} \textit{Id.} at 1914.
\item \footnote{160} \textit{Id.} at 1916.
\item \footnote{161} \textit{Id.} at 1916-17 (White, J., concurring).
\item \footnote{162} \textit{Id.} at 1919.
\item \footnote{163} \textit{Id.} at 1919-20.
\item \footnote{164} \textit{Id.} at 1920.
\end{itemize}}
der businesses receive benefits from the states where their customers reside. Those benefits include banks, the court system, and waste disposal. Retaining the physical presence rule was out of touch with economic reality and was illogical since it created "an interstate tax shelter" for the mail-order business.

Justice Scalia's concurrence asserted that the Court would be ill-advised to follow Justice White's suggestion of overruling the physical presence portion of Bellas Hess because people have relied on this test, adding, "we ought not visit economic hardship upon those who took us at our word."

*Quill* is significant primarily because it removes the due process impediment to states' collections of use taxes on mail-order businesses. Since Congress has plenary power over commerce, it may sanction state use taxes if it so desires. Congress may not, however, authorize due process violations. If Congress decides that use taxes would be permissible burdens on interstate commerce, then mail-order houses will find no relief at the Supreme Court; the Court will not second-guess Congress where Congress has a clear grant of power in a specific area.

The Court's declaration that there is a nexus requirement in the Commerce Clause, greeted with such skepticism by Justice White, will likely add to the "quagmire" in this area of the law. Under the Commerce Clause analysis of *Bellas Hess* and *Quill*, a company that actively and regularly solicits business by mailing twenty-four tons of catalogues and flyers into a state each year and by taking out almost $1 million in sales revenues—but which has no physical presence in the state—does not have a "substantial nexus" with the state sufficient to meet the Complete Auto test and allow imposition of a tax under the Commerce Clause. If Justice White's prediction is correct, the Court's retention of a nexus/physical presence requirement under the Commerce Clause as necessary for imposition of use taxes will result in

165. *Id.*
166. *Id.*
167. *Id.* at 1920-21.
168. Justices Kennedy and Thomas joined with Justice Scalia. *Id.* at 1923 (Scalia, J. concurring).
169. *Id.* at 1924.
171. 112 S. Ct. at 1909.
172. *Id.* at 1908.
173. *Id.* at 1912.
years of litigation over exactly what "physical presence" means in this context.\textsuperscript{174} Justice White believed that whether Quill had sufficient presence in North Dakota under this standard was not clear in this case.\textsuperscript{176} The majority’s failure to set out a “bright-line” rule made it “a sure bet that the vagaries of ‘physical presence’ will be tested to their fullest in our courts.”\textsuperscript{176} While \textit{Quill} holds that mailing twenty-four tons of catalogs will not equal physical presence for Commerce Clause purposes, it does not give further guidance on when physical presence might arise. In earlier Commerce Clause cases, the existence of actual offices or employees in the taxing state would meet the Commerce Clause concern that a tax be fairly related to the benefits the taxing company received from that state. The presence of an office or of employees will undoubtedly meet the “substantial nexus” requirement of \textit{Quill}, but it is uncertain where “physical presence” arises in the continuum of activity between having offices in a state and mailing twenty-four tons of catalogs into a state.\textsuperscript{177} In \textit{Quill}, the Court said substantial nexus was not established by Quill’s licensing of a computer software program to North Dakota customers that enabled consumers to check Quill’s inventories and to place orders directly.\textsuperscript{177}

Under Due Process Clause analysis, the Court still will be searching for “minimum contacts”—minimum contacts which now may be found in mail-order houses’ “continuous and widespread solicitation of business within a State.”\textsuperscript{179}

It is certain that physical presence—whether it is a single employee\textsuperscript{180} or offices with no relation to the company’s mail order business\textsuperscript{181}—in the taxing state will always equal minimum contacts under the Due Process Clause. Under \textit{Quill}, “purposefully” directing activi-

\begin{itemize}
  \item \textsuperscript{174} \textit{Id.} at 1921 (White, J., concurring).
  \item \textsuperscript{175} \textit{Id.}
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} In Goldberg v. Sweet, 488 U.S. 252 (1989), the Court upheld an Illinois tax on interstate telecommunications. \textit{Id.} at 259. “Telecommunications” was defined to include phone calls, computer exchange services, paging services, or any transmission by “wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities.” \textit{Id.} at 256 n.5. The tax imposed was on interstate calls that originated or terminated in Illinois or that were charged to an Illinois service address, regardless of where the call was billed or paid. \textit{Id.} at 256, 263. All parties to the litigation agreed that Illinois had a substantial nexus under the Commerce Clause to tax the interstate calls, and the Court did not discuss the nexus issue in depth. \textit{Id.} at 260.
  \item \textsuperscript{178} 112 S. Ct. at 1907 n.1.
  \item \textsuperscript{179} \textit{Id.} at 1911.
  \item \textsuperscript{180} Standard Pressed Steel Co. v. Washington, 419 U.S. 560 (1975).
  \item \textsuperscript{181} National Geographic Soc’y v. California Board of Equalization, 430 U.S. 551 (1977).
\end{itemize}
ties at residents of the taxing state at a magnitude comparable to those of the Quill Corporation will be "more than sufficient" to meet the minimum contacts requirements for due process purposes even if the taxpayer has no physical presence in the state.\(^{182}\) The courts will have to determine the point at which the magnitude of activity directed at the taxing state becomes too small to support the duty to collect a use tax under the Due Process Clause.

If these remaining questions did not ensure years of litigation, the amount of money at stake does. The direct mail sales industry has grown from $2.4 billion in sales in the \textit{Bellas Hess} era to current sales of $130.4 billion.\(^{183}\) The 1991 uncollected use tax loss from mail order sales was estimated to be $3.08 billion, and the projected tax loss for 1992 was $3.27 billion.\(^{184}\) States searching for additional revenues will undoubtedly be seeking to persuade Congress to permit them to impose use taxes, while the mail-order businesses will attempt some persuasion of their own.

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\textsuperscript{182} 112 S. Ct. at 1911.
\textsuperscript{184} \textit{Id.}

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