QUILL: CONFUSING THE COMMERCE CLAUSE

By Charles Rothfeld[*]

In a year in which the Supreme Court has considered an extraordinary number of constitutional challenges to state taxation,[1] perhaps the term's most important and eagerly awaited state tax decision was Quill Corp. v. North Dakota.[2] In the weeks since the Quill decision was anounced, most commentary has focused on its bald holding -- the Court's reaffirmation of the rule, first stated in National Bellas Hess, Inc. v. Department of Revenue,[3] that state and local governments may impose use tax collection obligations only on those out-of-state mail-order sellers that maintain a physical presence in the taxing jurisdiction. And most commentary has bypassed what the Court actually said, instead assessing the possibility that Congress will act to set aside the Court's rule.

Before attention shifts entirely to the legislative forum, however, it is worth pausing to consider the substance of the Court's decision in Quill. The Court there did more than reaffirm Bellas Hess. In fact, the majority set out a wholly novel and surprisingly facile means of analyzing Commerce Clause challenges to state taxation, one that leaves open significant questions about the scope of the Court's holding and that almost surely will encourage continuing litigation. That is an

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[*] *This article was originally published at* 56 TAX NOTES 487 (1992). *Reprinted with permission.*

[1] See Barker v. Kansas, 112 S. Ct. 1619 (1992); Allied-Signal Corp. v. Director, Division of Taxation, 60 U.S.L.W. 4554 (1992); Chemical Waste Management, Inc. v. Hunt, 60 U.S.L.W. 4433 (1992); Kraft General Foods, Inc. v. Iowa Department of Revenue & Finance, 60 U.S.L.W. 4582 (1992); Nordlinger v. Hahn, 60 U.S.L.W. 4563 (1992); Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 60 U.S.L.W. 4622 (1992).

[2] 60 U.S.L.W. 4423 (May 26, 1992).

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

unfortunate outcome in a case where both sides invested very considerable resources in hopes of obtaining a dispositive resolution.

A. **The Quill Decision**

In Bellas Hess, the Court invoked both the Due Process and the Commerce Clauses of the Constitution in holding that a precondition to the imposition of a use tax collection obligation is a physical "nexus" between the taxing state and the out-of-state seller; the Court drew a "sharp distinction" between "mail-order sellers with retail outlets, solicitors, or property within a state, and those who do no more than communicate with customers in the state by mail or common carrier as part of a general interstate business."[4/] The Quill case was designed to test the continuing vitality of this holding after the passage of 25 years. Although acknowledging that some sort of connection is required between the taxpayer and the taxing jurisdiction, the state maintained in Quill that this nexus need not rise to the level of physical presence. The state's argument prevailed in the state supreme court, which held that both the due process and the Commerce Clause analyses of Bellas Hess constituted "obsolescent precedent."[5/] The U.S. Supreme Court agreed in part, holding unanimously that the due process element of Bellas Hess should be overruled. But by an 8-1 vote, the Court reaffirmed its earlier conclusion that the Commerce Clause establishes a physical presence nexus requirement.

The five Justices who joined the Court's majority opinion "agree[d] with much of the State Court's reasoning"[6/] and acknowledged that "contemporary Commerce Clause jurisprudence might

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[4/] 386 U.S. at 758.

[5/] State of North Dakota v. Quill Corp., 470 N.W.2d 203 (1991).

[6/] 60 U.S.L.W. at 4423.

not dictate the same result [as in Bellas Hess] were the issue to arise for the first time today."[7] Having said that, however, the Court rather curiously went on to defend the merits of the Bellas Hess holding. It opined that "[d]espite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are animated by different constitutional concerns and policies."[8] The Court went on to elaborate: "the [Commerce Clause] 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on commerce."[9] The sole authority that the Court cited for this proposition was Kassel v. Consolidated Freightways,[10] which the Court characterized as standing for the proposition that the Commerce Clause "bars state regulations that unduly burden interstate commerce."[11]

The Court pointed to only one such "burden" here: the familiar possibility that use tax collection obligations might be imposed on direct marketers "by the Nation's 6,000-plus taxing jurisdictions," a development that presumably would place substantial administrative costs on mail order businesses that would have to determine the tax due on each mail order sale.[12] Such "[u]ndue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes," the Court explained, "but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate

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[7] Id. at 4426.

[8] Ibid.

[9] Id. at 4426-4427.

[10] 450 U.S. 662 (1981).

[11] 60 U.S.L.W. at 4426.

[12] Id. at 4427 n.6.

taxation."[13] The physical presence rule of Bellas Hess constituted such a demarcation. And the "artificiality" of such a bright line test, the Court continued, "is more than offset by the benefits of a clear rule. Such 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."[14]

The Court concluded by inviting congressional action in this area. It noted that Congress's failure to disturb the physical presence rule may "have been dictated by respect for our holding in Bellas Hess that the Due Process Clause prohibits States from imposing such taxes, but today we have put that problem to rest. Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes."[15]

Three Justices (Scalia, Kennedy, and Thomas) concurred only in the result of the Court's Commerce Clause holding. Writing for the three, Justice Scalia stated that he "would not revisit the merits of [the Bellas Hess Commerce Clause] holding, but would adhere to it on the basis of stare decisis."[16] And Justice White -- ironically, the only member of the Bellas Hess majority still on the Court -- dissented from the Quill Commerce Clause holding. He opined that the reasoning of Bellas Hess could not be reconciled with the Court's reformulation of Commerce Clause doctrine in Complete Auto Transit, Inc. v. Brady.[17] And he criticized the Court because, "[in]stead of

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[13] Id. at 4427.

[14] Ibid.

[15] Id. at 4428.

[16] Id. at 4432 (Scalia, J., concurring in part and concurring in the judgment).

[17] 430 U.S. 274 (1977).

explaining the doctrinal origins of the Commerce Clause nexus requirement, the majority breezily announces the rule and moves on to other matters."[18]

B. **Quill's Defects**

1. The "undue burdens" analysis. On its face, the Quill majority's suggestion that the Commerce Clause is designed to vitiate "undue burdens" on interstate commerce seems reasonable enough. But when pressed, Quill's analysis appears to be premised on assumptions that are unfounded -- and to be riddled with internal inconsistencies.

At the outset, the Court undertook a significant departure in asserting that the nexus requirement was created to serve as a bulwark against structural burdens on commerce. In fact, as Justice White demonstrated in his Quill dissent,[19] the Commerce Clause nexus rule actually was borrowed wholesale from decisions involving the Due Process Clause. The nexus inquiry therefore tradionally looked to the fundamental fairness of the tax (the concern historically asociated with due process), which in turn involved the question whether the taxing jurisdiction provided the putative taxpayer "anything for which [the state] can ask return."[20] The Court applied this test repeatedly in the area of mail order sales[21] -- and did so in Bellas Hess itself, where it held that physically present taxpayers are subject to tax because they are "accorded the protections and services of the

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[18] 60 U.S.L.W. at 4429.

[19] Id. at 4429-4430. I have argued this point elsewhere at length. See Rothfeld, Mail-Order Sales and State Jurisdiction to Tax, 53 Tax Notes 1405, 1415-1417 (1991). So as to fully disclose my bias, I should note that Justice White cited this article in his sagacious Quill dissent. See 60 U.S.L.W. at 4429.

[20] Wisconsin v. J.C. Penney Co., 311 U.S. 435, 441-442 (1940).

[21] See, e.g., D.H. Holmes v. McNamara, 486 U.S. 24, 33 (1988); National Geographic Society v. State Board of Equalization, 430 U.S. 551, 561 (1977).

taxing state"[22] while absent taxpayers are immune from tax because "local jurisdictions [have] no legitimate claim to impose 'a fair share of the cost of local government'" upon them.[23]

In shifting the focus of the inquiry -- in looking to the effect of the tax upon the taxpayer rather than to the benefits provided by the state -- the Quill Court evidently was influenced by the approach it has taken in regulatory cases such as Kassel and Pike v. Bruce Church, Inc.[24] In that context, the Court has engaged in a sort of ad hoc balancing, determining the constitutionality of a state regulation by weighing its local benefits against its effect on interstate commerce. Prior to Quill, however, the Court never had used such an analysis in a tax case. And given the (largely justified) criticism of the Pike approach as a standardless and subjective means of applying the Commerce Clause,[25] it is more than a little surprising that the Court chose to expand Pike balancing into the tax area.

Moreover, even granting the applicability of Pike "burdens" analysis to taxation, Quill offered a most peculiar setting for its invocation. In the regulatory context, the Court has looked at a particular state's rule and determined whether, considered in isolation, the benefits provided by the rule justify the restrictions it imposes on interstate commerce.[26] But a use tax collection obligation imposed upon sellers by a single jurisdiction surely would not place an undue burden on commerce;

22/ 386 U.S. at 757.

23/ Id. at 759-760.

24/ 397 U.S. 137 (1970).

25/ See, e.g., CTS Corp. v Dynamics Corp. of America, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment); Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986).

26/ The Court did this in Pike and Kassel themselves. See 397 U.S. at 145-146; 450 U.S. at 671-678 (plurality opinion).

such a levy would be no more burdensome than are sales taxes that universally are understood to be constitutional. And were ease of collection somehow assured, no undue burden would follow from the payment of use taxes to every jurisdiction in the nation; the taxes plainly would not be duplicative or malapportioned.[27] In Quill, then, the Court held that the administrative expense and inconvenience of complying with a tax in many jurisdictions may render the levy unconstitutional -- even though the tax itself is inoffensive.

That conclusion, however, cannot be reconciled with prior decisions of the Court, while also suffering from serious logical flaws. In fact, the Court consistently has held that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."[28] The Court's

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[27] While superficially similar, the situation here thus is different in kind from cases involving taxes that fail the Court's so-called "internal consistency" test. Under the Court's landmark Complete Auto formula, a state tax is constitutional if (1) there is a nexus between the taxpayer and the taxing jurisdiction; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) there is a fair relationship between the tax and the taxpayer's in-state activities. See, e.g., Trinova Corp. v. Michigan Department of Treasury, 111 S. Ct. 818, 828 (1991); Complete Auto, 436 U.S. at 279, 287. The Court has analyzed challenges under the second prong of this formula by asking, among other things, whether the tax is "internally consistent" -- whether, in other words, the tax is "structured so that if every State were to impose an identical tax, no multiple taxation would result. * * * Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute." Goldberg v. Sweet, 488 U.S. 252, 261 (1989). A tax will fail this test when, while facially neutral, it effectively taxes out-of-state businesses at rates higher than those imposed on in-state firms. That was so, for example, in American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 286 (1987), where a flat tax on trucks was found "plainly discriminatory" because it applied to trucks traveling in interstate commerce at a per mile rate five times as heavy as that applied to local trucks. Here, in contrast, there could not be any suggestion that use taxes are discriminatory or duplicative; as the Court itself has noted, the same tax cannot be imposed by another jurisdiction because the levy actually falls on the purchaser. National Geographic, 430 U.S. at 558. Indeed, Quill involved not the second prong of Complete Auto but the first.

[28] Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). The Court made the quoted statement in rejecting the contention that firms should be relieved of the burden of themselves paying nondiscriminatory and fairly apportioned taxes; it is difficult to see why the

reason for taking this approach is plain. There always will be costs to complying with tax laws in more than one state; a firm that has income-producing divisions in several jurisdictions will, for example, have to file several state income tax returns, and may as a consequence be forced to create a larger tax compliance department than those maintained by comparable firms that conduct business in only one state. But those sorts of compliance costs -- which inevitably will be higher for businesses with multistate operations than for those that operate only intrastate -- never have been thought to invalidate state income taxes on multistate companies.

The situation in Quill seems no different in principle. Indeed, in the use tax setting the Court long ago rejected a constitutional challenge grounded on administrative burden arguments identical to those found persuasive in Quill, holding the "cost and inconvenience" of collecting a use tax constitutionally irrelevant.[29/] The rationale for such a holding is easily understood: a contrary rule either would grant multistate enterprises complete state tax immunity or would require courts to make standardless judgments about "acceptable" levels of administrative expense that, in similar contexts, the Court has deemed to be beyond their competence.[30/] Quill failed to come to terms with these decisions through the simple expedient of ignoring them.

Quill's "undue burdens" analysis is inconsistent with more than the Court's prior decisions; it is implicit in the very physical presence rule affirmed by Quill that the administrative expense of compliance cannot render a tax unconstitutional. Under the Bellas Hess approach -- and the Court's

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principle should not apply as well to the claim that firms should be relieved of the lesser burden flowing from the requirement that they collect a use tax from others.

[29/] Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 365 (1941). See also Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941).

[30/] See, e.g., Commonwealth Edison Co. v. Montana, 453 U.S. 609, 628 (1981).

decisions in National Geographic, Sears, and Quill itself -- states may impose use tax collection obligations on firms that fortuitously have a physical presence in the jurisdiction. Under that rule, national retailers such as Sears, Roebuck & Co., and Montgomery Ward & Co., as well as mail order sellers like the National Geographic Society that maintain other forms of far-flung physical operations, must collect use tax on mail order sales in practically every jurisdiction in the nation. Yet entities such as Sears, Montgomery Ward, and National Geographic face precisely the same administrative burdens as do Quill and other physically absent direct marketers in calculating and collecting use taxes.[31/] The Quill Court made no attempt to resolve this tension in the doctrine.

2. Questions left unanswered by Quill. Doctrinal niceties avowedly were not the Court's concern in Quill, however. In invalidating the North Dakota tax and affirming the physical presence requirement, the Court instead reasoned that, however "artificial at its edges" the Bellas Hess rule might appear, it is useful as a bright line test that "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes."[32/] But the Quill decision failed to accomplish even that goal. In fact, Quill did maintain a physical presence of sorts in North Dakota: it retained ownership of computer software that it licensed to a few of its in-state clients. Although the Court recognized that this "title to 'a few floppy

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[31/] As it happens, the Court has held each of these entities liable for the collection of use taxes in states where they maintained a physical presence. National Geographic, 430 U.S. at 562; Nelson v. Sears, Roebuck & Co., supra; Nelson v. Montgomery Ward & Co., supra. In the Court's view, moreover, that physical presence did not in any way alleviate the administrative burden of collecting the use tax. The Court assumed in Sears and Montgomery Ward that the local retailing operation on the one hand, and the national mail order business on the other, were "separately administered." National Geographic, 430 U.S. at 560. See Sears, 312 U.S. at 364-365; Montgomery Ward, 312 U.S. at 375. And the Court in National Geographic held it irrelevant that the taxpayer's in-state activities were wholly unrelated to the mail order business. 430 U.S. at 560-562; see id. at 554 n.2.

[32/] 60 U.S.L.W. at 4427.

diskettes' present in a State might constitute some minimal nexus," it conclusorily held, without elaboration, that "Quill's licensing of software in this case does not meet the 'substantial nexus' requirement of the Commerce Clause."[33]

It is at this point that the doctrinal incoherence of Quill assumes more than theoretical importance. We know from the Court's prior decisions that maintaining a single full-time salesperson in-state will support the imposition of a tax,[34] and from Quill that "a few floppy diskettes" are insufficient to establish nexus. But are a thousand floppy diskettes enough? What about one mainframe computer? And if a full-time salesperson in-state will do the trick, what about one who spends half the year in the taxing jurisdiction -- or is there only one day out of the year? Quill offers no clue on how to go about answering these questions.

If these issues were analyzed as a matter of due process -- as both parties in Quill thought was appropriate -- the nature of the inquiry would be clear. Taxing authority then would turn on "whether a defendant had minimum contacts with the jurisdiction 'such that the maintenance of the [tax] does not offend "traditional notions of fair play and substantial justice."'"[35] In answering that question, a court would look to "whether the state has given anything for which it can ask return"[36] and whether the taxpayer had "'fair warning that [its] activity may subject [it] to the jurisdiction of

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[33] Id. at 4427 n.8.

[34] See Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560, 562 (1975). In Quill itself the Court noted that nexus may be provided by "the presence in the taxing State of a small sales force, plant, or office." 60 U.S.L.W. at 4427.

[35] Quill, slip op. 7, quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), in turn quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940).

[36] J.C. Penney, 311 U.S. at 441-442.

a foreign sovereign."[37] As the Court recognized in Quill, these requirements are satisfied when "a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State."[38]

But how is one to gauge the adequacy of the physical presence when constitutionality turns on the burden imposed by the tax upon the taxpayer? It seems apparent that the burden of compliance with a jurisdiction's taxing scheme will be identical whether the taxpayer has 10 sales personnel in-state, or one full-time salesperson, or one employee who is there only part-time; where use taxes are involved, the difficulty of calculating the tax due on individual purchases made by mail -- the "undue burden" that concerned the Quill Court -- is entirely unaffected by the number of employees or the value of the property maintained by the taxpayer in-state. The magnitude of the taxpayer's in-state physical presence is related to the burdens imposed by taxation only in the sense that ratcheting up the minima necessary to support taxation arbitrarily reduces the number of jurisdictions entitled to tax, and thus the burden on the taxpayer. But the point at which the ratcheting stops (at 1000 floppy diskettes, at 100, or at 10) cannot be determined by taxpayers or taxing officials because it is not based on any real principle.

This is a serious practical problem that bred litigation and uncertainty even prior to the Quill decision. Some state courts, for example, had held that in-state visits by cutomer service representatives did not establish taxing jurisdiction, while others held that similar visits supported

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[37] Quill, 60 U.S.L.W. at 4425, quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in the judgment) (bracketed material added by the Court).

[38] Ibid.

taxing authority;[39] some had held that the out-of-state lessor of goods to an in-state lessee may be required to pay, while others reached a contrary conclusion;[40] some had held local advertising insufficient to justify taxation, while others listed it as significant support for a levy.[41] Quill will provide no useful guidance when these questions arise in the future.

The incoherence of the Quill rationale also creates difficulties in discerning the scope of the Court's holding. There is a temptation to read Quill as establishing physical presence as a prerequisite for the imposition of any type of tax. In terms, however, the Court reaffirmed only the "physical-presence requirement that Bellas Hess established for sales and use taxes."[42] What happens, then, when a state attempts to impose an income or franchise tax on an out-of-state financial institution, arguing that the in-state presence of the bank's credit card customers establishes the requisite nexus? Because a Citibank or Chase Manhattan Bank with a nationwide credit card base may have cardholders in every jurisdiction in the nation, the burden of complying with state (and, if any, local) taxation would not be trivial. On the other hand, such taxpayers would be required to pay annually, and not (as would Quill and other direct marketers) to compute the tax due

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[39] Compare L.L. Bean, Inc. v. Department of Revenue, 516 A.2d 820, 823, 825-826 (Pa. Commw. Ct. 1986) (no jurisdiction) with Proficient Food Co. v. New Mexico Taxation & Revenue Department, 758 P.2d 806, 807, 808-809 (N.M. Ct. App. 1988) (jurisdiction).

[40] Compare Boswell v. Paramount Television Sales, Inc., 282 So.2d 892. 893, 896-897 (Ala. 1973) (tax constitutional) with Cally Curtis Co. v. Groppo, 572 A.2d 302, 303, 306 (Conn.), cert. denied, 111 S. Ct. 77 (1990) (tax unconstitutional).

[41] Compare Book-of-the-Month Club, Inc. v. Porterfield, 268 N.E.2d 272, 274 (Ohio 1971) (tax unconstitutional), with SFA Folio Collections, Inc. v. Bannon, 585 A.2d 666, 674-675 n.12 (Conn.), cert. denied, 111 S. Ct. 2839 (1991) (local advertising may support tax).

[42] 60 U.S.L.W. at 4427.

on thousands of individual sales. Is that distinction enough to support such taxes on financial institutions? Quill does not say -- meaning that litigation on the point probably is inevitable.

3. The politics of Quill. That the Court chose to open this can of Commerce Clause worms is made the more peculiar by its willingness to overrule outright the due process aspect of Bellas Hess.[43] The Court took that step, it explained, because "[o]ur due process jurisprudence has evolved substantially in the 25 years since Bellas Hess, particularly in the area of judicial jurisdiction."[44] But that is not really so. Long before the Bellas Hess decision, the Court already had held in cases involving in personam jurisdiction that mailings into a state support the exercise of jurisdiction against an out-of-state firm.[45] And as Justice Scalia noted in his Quill concurrence, the Court had held "[e]ven before Bellas Hess * * * that state regulatory jurisdiction could be asserted on the basis of contacts with the State through the United States mail."[46] Quill's due process holding barely required an extension of these old precedents. In contrast, it is in the area of the Commerce Clause, where the Court's watershed 1977 decision in Complete Auto worked a dramatic change in the law, that the more significant evolution in doctrine has occurred. Yet the Court overruled the due process aspect of Bellas Hess while leaving the decision's Commerce Clause holding intact.

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[43] Although it is not entirely clear that the Bellas Hess Court in fact meant its holding to rest on the Due Process Clause (see Rothfeld, supra, 53 Tax Notes at 1409 & nn. 49-51), the Court asserted in Quill that "our holding in Bellas Hess relied on both the Due Process Clause and the Commerce Clause." Slip op. 5.

[44] 60 U.S.L.W. at 4424.

[45] McGee v. International Life Insurance Co., 355 U.S. 220, 222, 223-224 (1957).

[46] 60 U.S.L.W. at 4431 (Scalia, J., concurring in part and concurring in the judgment), citing Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643, 646-650 (1950).

The likeliest explanation of this seeming paradox is that the Court approached Quill essentially as a political decision. As both the majority and the concurring opinions made clear, the Court was troubled by the possible practical -- and, from the Court's perspective, largely indeterminate -- consequences that might follow from overruling Bellas Hess.[47] At the same time, however, the Court plainly recognized that Bellas Hess stated a questionable rule that stands in considerable tension with more recent decisions. The Court therefore split the baby by keeping the physical presence rule in place under the Commerce Clause while, by sweeping away Bellas Hess's due process underpinnings, making clear that Congress has the authority to discard the rule. This understanding explains the rhetorical peculiarity of an opinion that defends the merits of Bellas Hess even while noting that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today": by purporting to find value in the "undue burdens" analysis, the Court was able to justify leaving the Bellas Hess Commerce Clause holding in place while scrapping a due process ruling that (though no more vulnerable on the merits) stood as an obstacle to action by Congress.

This suggests, perhaps, that the Court did not mean its stated rationale for Quill to be taken very seriously. And just three weeks after Quill was handed down, the Court presented a very different justification for the Commerce Clause nexus requirement: while citing both Quill and Miller Bros. Co. v. Maryland,[48] a decision upon which Bellas Hess had relied, the Court offered it as the "self-evident" reason for the requirement that "in a Union of 50 States, to permit each State

[47] See 60 U.S.L.W. at 4428 & n.10 (noting both "substantial reliance" of the direct marketing industry on Bellas Hess and the "thorny questions" involving retroactive application of use taxes enacted prior to Quill); id. at 4432 (Scalia, J., concurring in part and concurring in the judgment).

[48] 347 U.S. 340, 344-345 (1954).

to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation."[49] Yet the danger of duplicative taxation has nothing to do with concerns about the very different kind of administrative burden that was said in Quill to underlie the nexus requirement. It is worth adding that the prospect of duplicative taxation itself is a questionable justification for the nexus rule that is incorporated in the first prong of the Complete Auto test, since duplicative levies fail the second prong of Complete Auto without regard to nexus.

But whatever its rationale, the Quill decision left in place a deeply flawed rule. The physical presence requirement is defensible only as an arbitrary solution to the practical problem of compliance with disparate use tax collection requirements: a business that is large enough to have a physical presence in many jurisdictions, and therefore that may be subjected to heavy compliance costs under Bellas Hess, likely can afford to comply; smaller firms, which might have difficulty absorbing heavy administrative costs, generally are immunized from taxation because they will not have a widespread physical presence. But there is no similar rough justification for exempting from taxation the direct marketing behemoths like Quill and L.L. Bean, which is a necessary corollary of the Court's rule. Action by Congress therefore plainly is in order. And meanwhile, the Quill Court's rooting about for a Commerce Clause nexus rationale has placed on the books a confusing and potentially disruptive analysis that is likely to confuse Commerce Clause doctrine for some time to come.

[49] Allied-Signal, Inc. v. Director, 60 U.S.L.W. at 4556.