Washington and Lee Law Review

Volume 49 | Issue 3 Article 12

Summer 6-1-1992

National Bellas Hess, Inc.: Obsolescent Precedent Or Good Law After Quill Corp. V. North Dakota?

Catherine V. Lane

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Commercial Law Commons

Recommended Citation

Catherine V. Lane, *National Bellas Hess, Inc.: Obsolescent Precedent Or Good Law After Quill Corp. V. North Dakota?*, 49 Wash. & Lee L. Rev. 1183 (1992).

Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol49/iss3/12

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

NATIONAL BELLAS HESS, INC.: OBSOLESCENT PRECEDENT OR GOOD LAW AFTER *QUILL CORP. V. NORTH DAKOTA*?

I. INTRODUCTION

Shoppers have long taken advantage of a well-known perquisite—they do not pay sales or use taxes on goods they purchase from mail order companies that do not maintain a retail outlet or salesperson in the state. Mail order companies and states have been engaged in a heated debate over whether to end this perquisite. The issue at the core of this debate is whether statutes that force out-of-state mail order merchants to collect use taxes on goods sold to state residents are constitutional.[1] The debate is over who will collect the use tax on mail order goods purchased out-of-state and brought into the state rather than whether the taxpayer is liable for use taxes on mail order items.[2] Because it is not cost-efficient for states to keep

---

1. *See* Rita Cain, *The Taxing Problem Surrounding Mail-Order Sales*, 68 TAXES 398, 401 (1990) (deducing from recent Supreme Court statements on collection of interstate tax that reasoning and holding of *Bellas Hess*, that physical presence in state is precondition to jurisdiction to tax, are in trouble); Paul J. Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 1006 (1986) (opining that changes in communication technology and growth of mail-order industry render *Bellas Hess* reasoning outmoded); Sandra B. McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L. REV. 265, 295-96 (1985) (disputing holding of *Bellas Hess* under modern due process tax analysis and arguing that states can now enact statutes that force mail-order retailers to collect use taxes on sales to residents of state). *But see* Timothy H. Gillis, Note, *Collecting the Use Tax on Mail-Order Sales*, 79 GEO. L.J. 535, 550 (1991) (concluding that Due Process Clause still requires physical presence within state before states can impose use tax collection duties).

2. *See* McCray, *supra* note 1, at 266 n.6 (noting that while market state can legally impose use tax on residents using goods in market state ordered by mail and shipped from another state, state cannot enforce tax unless out-of-state seller collects it). The distinction between a sales tax and a use tax merits attention. A state or locality imposes a sales tax on purchases of goods made in that state or locality. A use tax is a tax imposed upon state residents for their purchases made out-of-state that come to rest in-state. *See* Miller Bros. Co. v. Maryland, 347 U.S. 340, 343 (1954) (stating that sales tax is tax upon sale of specified goods within state that is paid at time of purchase while use tax is tax on purchases made out-of-state that comes due when purchaser brings goods into state). States have designed the sales-use tax scheme to make all tangible personal property, whether acquired in or out of the state, subject to the same tax burden. *See* Halliburton Oil Well Cementing Co. v. Louisiana, 373 U.S. 64, 70 (1963) (stating that equal treatment for similarly situated in-state and out-of-state taxpayers is condition precedent for valid use tax on goods imported from out-of-state); *see also* Chris M. Amantea, Comment, *Use Tax Collection Jurisdiction: Retail Stores on a State Border Held Hostage*, 63 CHI.-KENT L. REV. 747, 749 and n.14 (1987) (describing sales-use tax distinction).

States designed the use tax to prevent state residents from purchasing goods out-of-state in order to avoid paying a state sales tax, thereby placing retailers in the state on unequal footing with out-of-state competitors. *See Miller Bros.*, 347 U.S. at 343 (observing that states

track of all items purchased out-of-state by state residents, states are looking to mail order companies to collect use taxes at the time of sale and to remit these taxes to the state.[3]

However, a 1967 Supreme Court decision has blocked state efforts to force out-of-state mail order companies to collect use taxes on sales to state residents. In *National Bellas Hess, Inc. v. Department of Revenue*,[4] the United States Supreme Court held unconstitutional the imposition of a use tax collection duty on mail order companies that did not have a physical presence[5] in the state. But despite the holding in *Bellas Hess*,[6] states have continued to pass statutes that impose a collection duty on corporations without the requisite in state physical presence under the assumption that the *Bellas Hess* rationale is outmoded.[7]

---

designed use tax structure to protect state revenues and local merchants against out-of-state competition). Purchasers of out-of-state goods pay the use tax for the privilege of using personal property that has come to rest within the state. *See* Scripto, Inc. v. Carson, 362 U.S. 207, 219 (1960) (stating that states developed use tax as device to complement sales tax in order to prevent evasion of state sales taxes by making purchases out-of-state).

3. *See* National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 555 (1977) (recognizing that states impose use tax collection on out-of-state sellers because it is impracticable for states to collect); *see also* Carol Douglas, *State Officials Determined to Tax Interstate Mail-Order Sales*, 47 TAX NOTES 1048, 1048 (1990) (describing efforts of states to estimate volume of sales made by out-of-state mail-order retailers in their state and state efforts to make mail-order companies collect use taxes due on these items); Gillis, *supra* note 1, at 537-39 (discussing conflict between out-of-state mail order firms and states over use tax collection issue).

4. 386 U.S. 753, 758 (1967).

5. *See infra* note 27 and accompanying text (explaining what constitutes physical presence in state and why physical presence is significant).

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

7. *See* ARIZ. REV. STAT. ANN. § 42-1401(5)(b) (1991) (imposing use tax collection obligation on mail-order firms that regularly or systematically solicit sales in state by mail or electronic means of communication); ARK. CODE ANN. § 26-53-121(b) (Michie Supp. 1989) (same); CONN. GEN. STAT. ANN. §§ 12-407(12)(g) & 15 (e) (West Supp. 1991) (same); FLA. STAT. ANN. § 212.0596 (2)(e) (West Supp. 1992) (same); GA. CODE ANN. § 48-8-2(3)(H) (Michie Supp. 1991) (same); KAN. STAT. ANN. § 79-3702(h)(2) (Supp. 1991) (same); LA. REV. STAT. ANN. § 47:301(4)(l) (West Supp. 1992) (same); MASS. GEN. LAWS ANN. ch. 64H, § 1 (West Supp. 1991) (same); MINN. STAT. ANN. § 297A.21, subdiv. 4(a) (West 1991) (same); MO. ANN. STAT. § 144.605(2)(a) (Vernon Supp. 1992) (same); N.C. GEN. STAT. § 105-164.8(b)(5) (1989) (same); N.D. CENT. CODE § 57-40.2-01(6) (Supp. 1991) (same); OKLA. STAT. ANN. tit. 68, § 1354.1-.5 (West Supp. 1992) (same); PA. STAT. ANN. tit. 72, § 7201(b)(3) (1990) (same); R.I. GEN. LAWS §§ 44-18-15(1)(E) & 23(c) (Supp. 1991) (same); TENN. CODE ANN. § 67-6-102(6)(J) (Supp. 1991) (same); TEX. TAX CODE ANN. § 151.107(a)(5) (West Supp. 1992) (same); UTAH CODE ANN. § 59-12-102(9)(c) & (17)(b) (Supp. 1991) (same); WASH. ADMIN. CODE § 458-20-221(2)(b)(i) (1989) and WASH. REV. CODE ANN. § 82.12.040 (West Supp. 1991) (same); ALA. CODE § 40-23-68(b)(5) (Supp. 1991) (imposing tax obligations if mail-order firm regularly solicits business in-state and benefits from in-state financial services, telecommunications, marketing activities or service facilities); CALIF. REV. & TAX CODE § 6203(f) (West Supp. 1992) (same); IDAHO CODE § 63-3611(g) (1989) (same); ILL. ANN. STAT. ch. 120, para. 439.2(4) (Smith-Hurd 1991) (same); IOWA CODE ANN. § 422.43(12)(b) (West 1990) (same); KY. REV. STAT. ANN. § 139.340 (2)(c) (Michie/Bobbs-Merrill 1991) (same); NEB. REV. STAT. § 77-2702(21)(e) (1990) (same); NEV. REV. STAT. ANN. § 372.728 (6) (Michie 1991) (same); OHIO

Facing budget shortfalls, states view the collection of use taxes on mail order sales to state residents as a palatable revenue raising alternative.[8] States have tried, with some success at the state court level, to enforce these statutes that impose use tax collection on mail order purchases.[9] State court decisions regarding the constitutionality of use tax collection statutes have been inconsistent with one another[10] and have presented a difficult choice to mail order companies:[11] Either run the risk of accruing retroactive tax liability by relying on *Bellas Hess* and refusing to comply with the statute,[12] or assume sizable compliance costs at the risk that the Supreme Court will uphold *Bellas Hess* and consequently invalidate the state statutes.[13]

II. Supreme Court Consideration of *Quill Corp. v. North Dakota*

The United States Supreme Court ended this dilemma for mail order

---

Rev. Code Ann. § 5741.01(H)(3) (Baldwin 1991) (same); Va. Code Ann. § 58.1-612(C)(6) (Michie 1991) (same); W. Va. Code § 11-15A-6a (a) (3) (1991) (same) ; Miss. Code Ann. § 27-67-3(j) (1990) (imposing tax obligations on firms that take orders by mail or solicit business in-state by catalog); N.J. Stat. Ann. § 54:32B-2(i)(1)(C) (West Supp. 1991) (same); S.C. Code Ann. § 12-36-70(2)(b) (Law. Co-op Supp. 1991) (same); N.M. Stat. Ann. § 7-9-10(A) (Michie 1990) (imposing tax obligations on firms that are attempting to exploit state's markets).

8. *See* Jeanne Dugan Cooper, *States Taxed by Catalog Issue*, Newsday, June 18, 1991, at 31 (reporting that states across country have been struggling to find new sales tax revenues to offset recession declines and want to collect proceeds from mail order sales); Edward Walsh, *States Eye Catalogues for Tax Revenue; Supreme Court to Consider Whether Mail-Order Firms Should Pay*, Wash. Post, Dec. 31, 1990, at A1 (noting that effects of persistent recession have prompted state governments to seek collection of use tax to prevent revenue shortfalls).

9. *See* Quill Corp v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (breaking from United States Supreme Court precedent and upholding North Dakota's attempts to force out-of-state marketers, without physical presence in state, to collect state use tax), *aff'd in part*, 112 S. Ct. 1904 (1992); Bloomingdale's by Mail, Ltd. v. Huddleston, No. 89-3017-II (Davidson City Ch. Ct. Mar. 8, 1991) (upholding Tennessee statute that requires mail-order retailers to collect state use tax based upon technological changes and benefits retailers obtain from states in form of waste disposal), *appeal docketed*, No. 01-S01-9016-CH-0047 (Tenn., Apr. 19, 1991). *But see* Direct Marketing Ass'n v. Bennett, No. Civ. S-088-1067, 1991 U.S. Dist. LEXIS 10736, at *1 (E.D. Cal. 1991) (granting injunction against California's efforts to force out-of-state marketer to collect use tax); SFA Folio Collections, Inc. v. Bannon, 585 A.2d 666 (Conn.) (holding that Connecticut's attempts to force out-of-state retailer to collect use tax were in violation of retailer's constitutional rights), *cert. denied*, 111 S. Ct. 2839 (1991).

10. *See supra* note 9 (describing results of state courts' consideration of use tax collection issue).

11. *See Amicus Curiae* Brief by the National Governors' Association on Petition for a Writ of Certiorari, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (noting that *Bellas Hess* casts shadow of uncertainty over current use tax collection efforts and disparity in lower court decisions adds to confusion), *aff'd in part*, 112 S. Ct. 1904 (1992); *All Parties Laud Supreme Court Decision to Review North Dakota Mail Order Case*, Daily Rep. for Execs. (BNA), Oct. 9, 1991, at G5 (stating that Supreme Court's consideration of constitutionality of use tax collection statutes will help clarify responsibilities of mail order firms).

12. *See infra* note 212 (discussing potential retroactive liability for mail order companies that rely on *Bellas Hess* and refuse to comply with use tax collection statutes).

13. *See* Gillis, *supra* note 1, at 539-41 (describing compliance burdens associated with use tax collection statutes).

retailers by redefining the level of Nexus between a mail order retailer and a state which is necessary to satisfy the due process prerequisite to asserting use tax jurisdiction. Recently, the Supreme Court considered *Quill Corp. v. North Dakota*,[14] a case on certiorari from the North Dakota Supreme Court that renounced the physical presence requirement and stood in direct contravention to the holding in *Bellas Hess*.[15] In its *Quill* decision, the Supreme Court addressed the constitutional boundaries of tax jurisdiction.[16] Although the Court did not expressly overrule *Bellas Hess*,[17] the Court did render obsolete the due process reasoning espoused in *Bellas Hess*.[18] The Court held that the Due Process Clause no longer bars enforcement of state use tax collection statutes against mail order sellers without a physical presence in the state.[19] The Court stated that:

> [i]n 'modern commercial life' it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: the requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.[20]

In analyzing the developments in due process jurisprudence and applying them to tax jurisdiction, the Court looked to cases that reflected the development in adjudicatory jurisdiction.[21] Although the holding of *Bellas Hess* was not overruled and use tax collection statutes are still unconstitutional,[22] the eradication of the due process physical presence requirement in

---

14. 112 S. Ct. 1904 (1992).

15. Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992). *See infra* notes 101-16 and accompanying text (detailing North Dakota Supreme Court's treatment of issues in *Quill*).

16. *See* Greg Henderson, *Court Debates Mail-Order Tax Case*, PROPRIETARY TO THE UPI, Jan. 22, 1992, *available in* LEXIS, Nexis Library, Current File (describing oral arguments in *Quill* and stating that Supreme Court must decide whether to overturn *Bellas Hess*).

17. 112 S. Ct. at 1916. The Court upheld *Bellas Hess* on Commerce Clause grounds. *See infra* note 22 and accompanying text.

18. *See infra* notes 24-37 and accompanying text (explaining *Bellas Hess* and relationship of Due Process Clause to physical presence test).

19. *Quill*, 112 S. Ct. at 1911.

20. *Id.*

21. *Id.* at 1910 (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *Shaffer v. Heitner*, 433 U.S. 186 (1977) and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

22. *Id.* at 1916. The Court went into a lengthy analysis of Commerce Clause tax jurisprudence and finally decided, in the interest of stability and substantial reliance on *Bellas Hess*, to rely upon precedent. *Id.* The Court reversed the North Dakota Supreme Court's rejection of *Bellas Hess* and upheld the precedent on Commerce Clause grounds. The Court noted that the underlying issue of the potential burden to interstate commerce posed by use tax collection was one Congress was better qualified, and had the power, to resolve. *Id.* Deciding that a "bright-line" test for assessing nexus under the Commerce Clause was

the context of tax jurisdiction represents a sharp break with *Bellas Hess*. However, examination of the cases that followed *Bellas Hess* and modern due process jurisprudence makes it clear that this change has been inevitable for some time.

Indeed, prior to *Quill*, state high courts had begun to address the changes that have taken place in the interstate marketplace and in tax and adjudicatory jurisdictional analysis since *Bellas Hess*.[23] To understand fully the potential change in tax analysis that will result from the *Quill* decision, it is helpful to examine *Bellas Hess* and its progeny, the lower court reasoning on the use tax collection issue and the constitutional underpinnings of *Bellas Hess*. This examination reveals both the incongruous results derived from the application of the *Bellas Hess* physical presence test to a changing economic system and the ramifications of the removal of the Due Process Clause as a barrier to use tax collection statutes.

III. *National Bellas Hess, Inc. v. Department of Revenue*

To understand the source of the due process physical presence test and the significance of its rejection, one must examine *Bellas Hess*. In *Bellas Hess*, the United States Supreme Court held that a state may not 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 United States mail.[24] The Supreme Court said that the Due Process Clause of the United States Constitution[25] requires some definite link or minimum connection between a state and the person, property or transaction that the state seeks to tax.[26] In the *Bellas Hess* analysis, a corporation's physical

---

preferable, the Court retained the physical presence requirement for Commerce Clause considerations. *Id.* Justice White disagreed, and dissented from the Court's Commerce Clause holding. *Id.* He stated that the Commerce Clause aspect of *Bellas Hess*, along with its due process holding, should be overruled. *Id.* at 1916-17.

23. *See supra* notes 57-73 and accompanying text (discussing factors Connecticut Supreme Court took into account in addressing use tax issue in *SFA Folio Collections, Inc. v. Bannon*); *supra* notes 80-92 and accompanying text (discussing factors federal district court considered in challenge to use tax collection standard in Direct Marketing Ass'n v. Bennett); *supra* notes 96-109 and accompanying text (describing North Dakota Supreme Court's assessment of factors justifying departure from physical presence test in *Quill v. North Dakota*).

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

25. U.S. Const. amend. XIV, § 1.

26. *Bellas Hess*, 386 U.S. at 756. The United States Supreme Court based its decision in *Bellas Hess* on both the Commerce Clause and the Due Process Clause. *Id.* Indeed, the Court noted that the requirements of the two clauses in the tax context were very similar. *Id.* The characterization of the constitutional basis for the *Bellas Hess* decision is significant. If the dormant Commerce Clause is the constitutional barrier to use tax collection, Congress can eliminate the barrier if it chooses to enact legislation empowering the states to enforce tax collection. *See* McCray, *supra* note 1, at 268 (noting that if Commerce Clause imposes absolute bar against state taxation of interstate sales, Congress can exercise commerce power to exempt interstate sales from effects of Commerce Clause). However, if the Due Process Clause is the bar to use tax collection, Congress cannot legislate around the barrier. *See* Hartman, *supra* note 1, at 1022 (noting decisions that held that Congress cannot enact legislation contrary to

presence within a state satisfies the due process requirement that an out-of-state seller derive some benefit from a state that justifies the use tax collection burden.[27] The due process nexus requirement ensures that an out-

---

Fourteenth Amendment, but postulating that Court might be more flexible in context of fiscal matters).

Some commentators hold the opinion that the Commerce Clause is the primary barrier to mail order use tax collection under *Bellas Hess* but that the Due Process Clause provides undertones that the court must considered. *See* McCray, *supra* note 1, at 268 (stating that Supreme Court's holding in *Bellas Hess* appears to be based on Commerce Clause prohibitions with due process undertones); Gillis, *supra* note 1, at 542 (stating that Court failed to specify whether constitutional ground for its holding in *Bellas Hess* was Due Process Clause, Commerce Clause, or both); *see also*, Cain, *supra* note 1, at 399 (stating that in *Bellas Hess*, Court's analysis focused primarily on Commerce Clause, although outcome was consistent with due process theory).

27. *See* Amantea, *supra* note 2, at 759 (opining that Supreme Court adopted physical presence test in *Bellas Hess* because presence indicates retailer is accorded benefits of local public services, such as police and fire protection, thus satisfying Due Process Clause and Commerce Clause considerations).

A logical question arises as to what type and amount of contacts satisfy the physical presence standard set out in *Bellas Hess*. The presence of a retail outlet within a state unquestionably gives rise to the use tax collection duty on mail-order sales to that state. *See* Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 364-66 (1941) (holding that if state extends privilege of doing business through company's in-state outlet, state can exact use tax collection burden on company's mail order sales to state); Nelson v. Montgomery Ward, 312 U.S. 373, 375-76 (1941) (holding that when mail order company operates retail outlet in state, use tax collection duty arises, regardless of type of solicitation used). A retail outlet located near the border of one state that is patronized by residents of a neighboring state does not have to collect use taxes if the retailer has no physical presence in the neighboring state, even if the retailer makes deliveries in its own trucks to the neighboring state. *See* Miller Bros. v. Maryland, 347 U.S. 340, 346 (1954) (holding that Maryland retailer who sold only to Delaware customers who came to Maryland store did not have presence in Delaware to give rise to collection duty). *But see* Good's Furniture House, Inc. v. Iowa State Bd. of Tax Review, 382 N.W.2d 145, 150 (Iowa) (finding that border retailer was responsible for use tax collection because it solicited large volume of sales in neighboring state through intensive television advertising and because it regularly serviced neighboring states' customers by delivering merchandise in employee-driven and company-owned trucks), *cert. denied*, 479 U.S. 817 (1986); *see also* Amantea, *supra* note 2, at 747 (discussing implications of *Good's Furniture* and fact that *Good's Furniture* was factually indistinguishable from *Miller Bros.*, yet reached inapposite decision).

The degree of physical presence necessary to support use tax collection liability may be slight. Even the presence of a few independent contractors working to solicit orders in a state can give rise to collection duty. *See* Scripto v. Carson, 362 U.S. 207, 213 (1960) (holding that existence of independent contractors soliciting business for mail-order company within state may suffice for requisite physical presence). Moreover, the in-state activities of a company do not have to bear any relation to the company's out-of-state mail order sales to trigger use tax collection liability. *See* National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 562 (1977) (finding that if parent company maintains office in state that is totally unrelated to its mail-order branch, tax liability is found); *see also infra* notes 38-49 and accompanying text (discussing facts and holding of *National Geographic*). *But see* SFA Folio Collections, Inc. v. Bannon, 585 A.2d 666 (Conn.) (finding that relationship of two independently incorporated subsidiaries does not give rise to collection duty), *cert. denied*, 111 S. Ct. 2839 (1991); *see also infra* note 61 (analyzing *SFA Folio* court's consideration of arguments to treat two wholly owned and separately incorporated subsidiaries as one enterprise for purposes of establishing physical presence).

of-state corporation bears only its fair share of the cost of the local government whose protection it enjoys, and that the out-of-state corporation receives something from the state before being asked to give compensation.[28]

In *Bellas Hess*, the Supreme Court analyzed whether Bellas Hess, a mail order company, received sufficient benefits from Illinois to satisfy the due process requirements for use tax jurisdiction.[29] Bellas Hess, a Delaware corporation, operated a mail order house with a principal place of business in North Kansas City, Missouri.[30] The mail order house was licensed to do business in Missouri and Delaware.[31] Bellas Hess did not maintain any offices or agents in Illinois, did not own property in Illinois and did not advertise in Illinois.[32] All of the mail order company's contacts with Illinois were via the United States mail or common carrier.[33] Because Bellas Hess did not have a retail outlet or agents within the state, it challenged the constitutionality of an Illinois statute requiring corporations to collect Illinois use tax on mail order sales to Illinois residents.[34]

In its opinion on the constitutionality of the Illinois statute, the Supreme Court reviewed prior cases in which a company's retail outlets, solicitors, or property within a state had satisfied the minimum connection or nexus necessary to impose use tax collection duty.[35] Because the contacts that Bellas Hess had with Illinois were not of the physical nature relied upon in prior cases, the Court held that Illinois had violated the Due Process Clause by imposing the tax collection duty on the mail order company.[36] By distinguishing between mere communications by mail or common carrier and the presence of retail outlets, solicitors or property in the state, the Court emphasized the importance of a corporation's physical presence within the state to the determination that the corporation derived benefits from state-provided protection.[37]

---

28. *Bellas Hess*, 386 U.S. at 756.
29. *Id.* at 758.
30. *Id.* at 754.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 755-56.
35. *Id.* at 758 (citing Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); Scripto, Inc. v. Carson, 362 U.S.207 (1960); Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); Nelson v. Montgomery Ward, 312 U.S. 373 (1941)).
36. *Bellas Hess*, 386 U.S. at 758.
37. *Id.* The relationship between the Due Process Clause and the requirement of benefits received from the state is not discussed fully in *Bellas Hess*. However, commentators analyzing this relationship hypothesize that the requirement that an entity receive benefits from a state before the state may assert jurisdiction is the manifestation of checks on a state's political obligation and legitimacy. *See* Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987) (explaining that link between jurisdictional due process and political theory is that jurisdictional issues should be analyzed in terms of state's right to exercise coercive power over individual or dispute); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 535 (1991) (discussing idea that personal jurisdiction must be based on political theory about circumstances under which government

The Supreme Court also weighed the administrative burden that would follow the imposition of tax collection duty on mail order companies.[38] The Court noted the varying rates of sales taxes and use taxes nationwide and the different compliance standards imposed by each state.[39] After considering the administrative burden and the difficult compliance requirements, the Court concluded that the complicated obligations that would result from imposition of collection duties outweighed the benefits that corporations received from various local governments.[40] Thus, *Bellas Hess* established a clear rule: A state may not impose use tax collection duties on a nonresident corporation unless the corporation has some degree of physical presence within the state.

This ostensibly clear rule evolved through application in subsequent decisions.[41] The Supreme Court's decision in *National Geographic Society v. California*[42] is illustrative of this evolution.[43] In *National Geographic*, the Court considered the constitutionality of imposing use tax collection on the mail order division of the National Geographic Society, which was headquartered in the District of Columbia, for its sales to California residents.[44]

---

may legitimately exercise coercive power). These commentators point to the fact that the Due Process Clause focuses on the limits of a state's powers over individuals and corporations to support this contention. Brilmayer, *supra*, at 294; Perdue, *supra*, at 535.

A common way for courts to justify the benefits requirement is by explaining that benefits received from the state give rise to obligations such as court appearances and tax payment. Even though the entity receiving the benefits may not actually use the benefits, their mere availability is held sufficient to invoke obligations. For instance, in *Burnham v. Superior Court*, 495 U.S. 604 (1990), the Court upheld personal jurisdiction over an individual based upon his transient stay in the state. Justice Brennan based his concurring opinion upon the benefits that a transient receives from the availability of police, fire and emergency medical services, from the state's roads and from the fruits of the state's economy. *Burnham*, 495 U.S. at 637-38 (Brennan, J., concurring). Justice Brennan was joined by three other justices. *Id.* Justice Scalia's opinion notes these benefits, but states that these benefits alone are not sufficient to uphold personal jurisdiction. *Id.* at 623.

One can reconcile the idea that jurisdictional obligations are a cost of benefits derived from a state with the concept that jurisdictional tests are a check on a state's political power. Professor Perdue opines that if a government reaches beyond the bounds of its political power and attempts to assert jurisdiction over an individual or entity, the state is depriving that actor of liberty. Perdue, *supra* at 535-39. Jurisdictional tests are a means of ensuring that a state stays within the bounds of its legitimate authority and asserts authority only over those actors who have "consented" to the assertion through acceptance of benefits. *Id.*

38. *Bellas Hess*, 386 U.S. at 759-60 n.12, 13.

39. *Id.*

40. *Id.*

41. *See* Goldberg v. Sweet, 488 U.S. 252, 263 (1989) (citing *Bellas Hess* for premise that nexus to tax requires more than brief and intangible contact with state by corporation); D.H. Holmes Co. v. McNamara, 486 U.S. 24, 33 (1988) (applying *Bellas Hess* to ascertain use tax collection responsibilities and distinguishing between corporations with in-state presence and corporations whose only contacts with jurisdiction are through mail); National Geographic Soc'y v. California, 430 U.S. 551, 559 (1977) (distilling from *Bellas Hess* importance of physical presence in state to taxation nexus).

42. 430 U.S. 551 (1977).

43. National Geographic Soc'y v. California, 430 U.S. 551 (1977).

44. *Id.* at 552.

The mail order division's only contacts with California were through the mail.[45] However, National Geographic maintained two offices in California that solicited advertising copy in the range of one million dollars annually for National Geographic's magazine, which was a separate division of the company.[46] The advertising work performed in the California offices had no relation to the Society's mail order business performed exclusively in the District of Columbia.[47] A California statute required all retailers engaged in business in the state to collect a use tax from purchasers in lieu of the sales tax imposed upon local retailers.[48] National Geographic paid the amount of use tax owed under protest, then sued for a refund.[49] The California Supreme Court held that the slightest presence of the seller in California established a sufficient nexus between the state and the seller to allow the imposition of the duty to collect and pay the use tax.[50]

The United States Supreme Court upheld the California Supreme Court's holding that a sufficient nexus existed, but explicitly rejected the lower court's slightest presence standard.[51] The Court found that the one million dollars in annual sales established more than a slight presence,[52] and justified the collection duty by noting National Geographic's continuous physical presence through its California offices.[53]

In *National Geographic*, the Court clarified the prior confusion as to whether the in-state activities of an out-of-state vendor unrelated to its mail order operation would satisfy the requirements that due process exacts of jurisdiction to tax. The Court's holding indicated that a nexus need only exist between the corporation and the state, and not necessarily between the corporation's mail order activities and the state.[54] As a result of the holding of *National Geographic*, unrelated in-state company activities that derive benefit from state police and fire protection justify forcing mail order vendors to collect use taxes.[55]

National Geographic highlights the incongruity that developed as the Court applied *Bellas Hess* to facts involving an increasingly interstate

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 553.
49. *Id.* at 554 n.2.
50. *Id.* at 555.
51. *Id.* at 556.
52. *Id.* In *National Geographic*, the Supreme Court's emphasis on substantial presence (the corporation had an office in the state doing over $1 million in sales) and the Court's rejection of the slightest presence standard imply that the amount of business done in a state is a factor in evaluating the nexus. *Id.* However, the Court's emphasis on National Geographic's physical presence in the state, through agents and an office, indicated that economic presence alone is not sufficient to satisfy due process nexus requirements. *Id.*
53. *Id.* at 562.
54. *See* McCray, *supra* note 1, at 292 n.117 (suggesting that *National Geographic* rejects requirement of transactional nexus and looks for any connection between seller and state).
55. *See supra* note 27 (describing types of physical presence that give rise to collection duty).

economy and an expanding mail order sales market. The Court's willingness to transfer benefits from one division of a corporation to justify compliance with tax collection in another division demonstrates that the Court stretched the physical presence test beyond the facts of *Bellas Hess*. Thus, prior to the Court's decision in *Quill*, the physical presence requirement still stood as an impediment to use tax collection statutes. The erosion of the physical presence requirement began at the state court level, and an examination of state court decisions reveals how the underlying rationale of the physical presence test began to unravel.[56]

IV. Recent Cases Addressing The *Bellas Hess* Issue

An examination of recent state court decisions and a district court decision considering the *Bellas Hess* rationale sheds light on the arguments presented to the Supreme Court in *Quill* for and against upholding the physical presence test. Both the state courts and the district court considered the constitutionality of use tax collection statutes. The ways in which these courts addressed the arguments for and against the utility of the physical presence test in an increasingly interstate economy foreshadowed that the Supreme Court's revision of the physical presence requirement in Quill.

A. SFA Folio Collections, Inc. v. Bannon

Several state courts have followed *Bellas Hess*'s physical presence test and have held unconstitutional statutes that require out-of-state mail order retailers to collect use taxes in the state. In January 1991, the Supreme Court of Connecticut decided *SFA Folio Collections, Inc. v. Bannon*,[57] which followed the *Bellas Hess* holding.[58] *SFA Folio* involved an attempt by the Commissioner of Revenue of Connecticut to force SFA Folio, a mail order retailer, to begin collecting use taxes on its sales to Connecticut residents.[59] The Commissioner initiated these collection attempts pursuant to a statute that imposed collection liability on companies engaged in business in the state.[60] SFA Folio did not operate any retail store or maintain any office, warehouse, or other place of business in Connecticut.[61] The

56. *See infra* notes 101-16 and accompanying text (discussing *Quill* court's consideration of use tax collection issue and repudiation of physical presence test).

57. 585 A.2d 666 (Conn.), *cert. denied*, 111 S. Ct. 2839 (1991).

58. SFA Folio Collections, Inc. v. Bannon, 585 A.2d 666 (Conn.), *cert. denied*, 111 S. Ct. 2839 (1991).

59. *Id.* at 668-69.

60. *Id.* at 668 (citing Conn. Gen. Stat. § 12-407 (15) (West Supp. 1991)).

61. *Id.* at 669. The facts of this case present an analytical twist. Although SFA Folio had no operations in Connecticut, the company was a wholly-owned subsidiary of Saks & Company, the owner of Saks-Stamford, a corporation that operated a retail store in Stamford, Connecticut. *Id.* Although the two entities shared a number of common directors, the companies had separate corporate existences and maintained separate management for day to day operations. *Id.* SFA Folio maintained the "SFA" trademark as part of its corporate name, with Saks & Company's consent. *Id.* The retail operation in Stamford received extra copies

company distributed mail order catalogs and flyers to Connecticut residents and received orders either through the mail or by telephone.[62] SFA Folio delivered purchases to Connecticut buyers both through the mail and common carriers.[63] Factually, *SFA Folio* was indistinguishable from *Bellas Hess*.[64]

Connecticut, however, claimed that SFA Folio's contacts with Connecticut were greater than those of the taxpayers[65] in *Bellas Hess* and, therefore, constituted a physical presence.[66] Connecticut based this assertion upon the large number of catalogs that SFA Folio mailed to Connecticut residents,[67] the operation of a toll-free "800" number for customer use, the placement of advertisements in magazines that ultimately reached Connecticut residents, and the shipping of catalogs sent to the Saks-Stamford store in the state.[68]

The *SFA Folio* court rejected Connecticut's interpretation of the physical presence test, stating that SAF folio's contacts with Connecticut did not constitute evidence of physical presence. The court stated that once delivered, the catalogs became the property of the Connecticut residents, not SFA Folio.[69] The court also decided that the toll-free number was not a sufficient nexus.[70] The *SFA Folio* court discounted the significance of the advertisements, because the mail order company did not create the advertisements in Connecticut, nor did it place the advertise-

---

of SFA Folio catalogs in order to inform store employees of current trends. *Id.* Both SFA Folio and the retail store in Stamford accepted the Saks & Company charge card, and Folio often included advertising in the form of bill inserts in the charge card bill received by Saks & Company customers. *Id.*

In support of the collection duty, the commissioner argued that the relationship between SFA Folio and Saks-Stamford supplied a sufficient nexus to sustain the imposition of use tax collection, and that the court should treat the two entities as one enterprise. *Id.* at 671-72. After examining the facts, the Connecticut Supreme Court concluded that Saks & Company had not intermingled the corporate assets and had not ignored the formalities of separate corporate procedure. The court found that the relationship of SFA Folio and Saks-Stamford was not comparable to that of a retail operation and catalog operation which are divisions of the same company. *Id.*; *see* Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 364 (1941) (holding that company which operated retail store within state could not avoid use tax collection liability on mail-order sales made to state residents through compartmentalization of operations). The SFA Folio court said that the attempt to treat the separately incorporated entities as one enterprise showed a misunderstanding of the corporate structure and the taxpayer's right to arrange their affairs to minimize their tax liabilities. *SFA Folio*, 585 A.2d at 673-74.

62. *SFA Folio*, 585 A.2d at 669.

63. *Id.*

64. *Id.* at 671.

65. The *SFA Folio* court used the word "taxpayer" interchangeably with the name of the mail order company, SFA Folio. *See Id. passim.*

66. *Id.* at 671.

67. *Id.* at 671 n.5. SFA Folio mailed 649,000 catalogs to Connecticut residents in 1986 and 733,000 catalogs in 1987. *Id.*

68. *Id.* at 671.

69. *Id.*

70. *Id.*

ments in magazines published within the state.[71] The court also discounted the significance of the catalogs sent to Saks-Stamford because the retail store did not use the catalogs to solicit SFA Folio sales from Connecticut residents.[72] The Connecticut Supreme Court held that SFA Folio's contacts were insufficient to justify requiring the company to collect use taxes on sales to Connecticut residents.[73]

Connecticut also asserted that, in light of the developments in both due process analysis and the mail order industry since the Supreme Court decided *Bellas Hess*, a nexus based on economic presence, rather than actual physical presence, within a state should suffice to uphold jurisdiction to tax.[74] The state urged the court to follow the trend set by cases involving adjudicatory jurisdiction, where contacts by mail and telephone or the distribution of products for sale in a foreign state serve as a sufficient basis for asserting use tax jurisdiction.[75] The Connecticut Supreme Court rejected this argument and stated that the nature of the jurisdiction the parties seek determines the kind and degree of in-state activity and presence that is necessary to satisfy the requirements of due process.[76] The court also rejected Connecticut's economic presence theory,[77] explaining that the degree of due process required for a state to exercise personal jurisdiction over a defendant is not necessarily the same as that required to justify a state tax on an out-of-state seller.[78] The Connecticut Supreme Court also emphasized that the United States Supreme Court had reaffirmed the physical presence test after the *Bellas Hess* decision and that, as a direct result of the Supreme Court's reaffirmation, the Connecticut court would adhere to the physical presence test.[79] Unfortunately, the *SFA Folio* opinion does not offer a rationale as to why the physical presence test is the best way to ensure a state's compliance with federal due process standards in determining its jurisdiction to tax nonresident mail order companies. Instead, the Connecticut Supreme Court's decision resulted from an application of the *Bellas Hess* decision to the facts before the court under the principle of *stare decisis.*

The United States Supreme Court denied certiorari to *SFA Folio.*[80] Some commentators speculate that the Court denied review in SFA folio order to consider *Quill*, because the North Dakota Supreme Court's consideration of the use tax collection issue provided a clearer set of facts for review.[81] While the denial of certiorari did not send a clear message

---

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 674-75.

75. *Id.* at 675; *see infra* notes 128-37 and accompanying text (outlining adjudicatory jurisdiction nexus requirements).

76. *SFA Folio*, 585 A.2d at 675.

77. *Id.*

78. *Id.* at 676.

79. *Id.*

80. *See* SFA Folio Collections, Inc. v. Bannon, 111 S. Ct. 2839 (1991) (denying certiorari).

81. *See States Still Expect the Supreme Court to Hear their Mail-Order Tax Plea*, WALL

on the Court's position regarding the use tax collection issue, the Connecticut Supreme Court's approach to the use tax collection issue indicated deference to the precedential value of *Bellas Hess* rather than agreement with *Bellas Hess*' reasoning.

B. Direct Marketing Association v. Bennett

The United States District Court for the Eastern District of California considered the constitutionality of use tax collection statutes and also adhered strictly to the *Bellas Hess* physical presence rule. The court addressed the use tax collection issue in *Direct Marketing Ass'n v. Bennett*.[82] After facing enforcement of a statute requiring use tax collection, a group of mail order sellers belonging to the Direct Marketing Association filed an action under Section 1983 of Title VII of the United States Code (section 1983) against individual members and officers of the California Board of Equalization seeking declaratory and injunctive relief.[83] In opposing the tax, the plaintiffs relied upon the analysis used in *Bellas Hess*.[84] Direct Marketing based the section 1983 action on the assertion that the California statute violated both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause.[85] The parties stipulated that Direct Marketing members did not have offices, stores, warehouses, stocks of goods, real property or employees in California.[86]

California contended that Direct Marketing members' relationship with the state satisfied the physical nexus requirements imposed by the Due Process Clause. The state argued that Direct Marketing members' acceptance of credit cards issued by California financial institutions, catalogs and advertisements sent to state residents, toll-free telephone numbers, debt collection in the state, and mail order shipments using state highways all constituted physical presence.[87] The district court relied on *Bellas Hess*

ST. J., June 19, 1991, at A1 (stating that while Court refused to hear *SFA Folio* appeal, Court would be likely to accept *Quill* for consideration because it presented better basis for review); Linda Greenhouse, *Court Won't Review Mail-Order Tax Ban*, N.Y. TIMES, June 18, 1991, at D1 (noting that Court was more likely to accept *Quill* for consideration than *SFA Folio* because *Quill* represented first time state's highest court had rejected *Bellas Hess*).

82. No. Civ. S-88-1067, 1991 U.S. Dist. LEXIS 10736, at *1 (E.D. Cal. 1991).

83. Direct Mktg Ass'n v. Bennett, No. Civ. S-88-1067, 1991 U.S. Dist. LEXIS 10736, at *1 (E.D. Cal. 1991). The statute at issue in this case required out-of-state corporations that maintained substantial and recurring solicitations of California customers and accepted credit cards issued by California financial institutions to collect a use tax from California customers. *Id.* at *1.

84. *Id.*

85. *Id.*

86. *Id.* at *4.

87. *Id.* at *4-*5. California asserted that mail order vendors do benefit, if indirectly, from the state. *Id.* For instance, California argued that (1) the in-state financial institutions used by mail order retailers benefit from state laws and regulation; (2) state residents must dispose of the retailers' catalogs in state landfills; (3) any debt collection undertaken by mail order retailers uses the state court system; and (4) mail order deliveries used roads which

and stated that these contacts by California were not comparable to the maintenance of retail outlets, employees or property within the state.[88] The district court further reasoned that a retailer's use of the claimed contacts did not satisfy the physical presence requirement at the time *Bellas Hess* was decided, and should not satisfy the requirement now.[89]

In another effort to demonstrate that the mail order vendors derived benefits from the state, California argued that the Direct Marketing members' policy of offering the right to return unsatisfactory goods amounted to sale on approval.[90] If the sales to state residents were on approval, title to the merchandise would remain with the mail order company until approved by the customer.[91] Under this theory, Direct Marketing members received the benefit of fire and police protection from California until title passed to the customer.[92] The court explicitly rejected this argument by referring to Section 2-236 of the Uniform Commercial Code[93] which provides that mail order transactions such as those under scrutiny did not qualify as sales on approval.[94] The court decided that title passes to the purchaser upon completion of the sales transaction and that, therefore, the mail order company derived no benefit from state fire and police protection.[95]

In addition to its arguments that the Direct Marketing members' contacts with the state satisfied the physical presence test, California also urged a reassessment of the due process tax collection nexus. The state stressed the need to bring the nexus to tax in line with the nexus to assert adjudicatory jurisdiction.[96] The district court found these arguments unpersuasive and issued an injunction prohibiting California from enforcing the collection statute.[97] The district court further emphasized the distinction between the minimum contacts test applied for the exercise of personal jurisdiction and the nexus test for taxation.[98]

---

benefit from state maintenance. *Id.* Therefore, California argued that Direct Marketing members benefitted from the state without actual physical contacts. *Id.*; *see* McCray, *supra* note 1, at 295 (describing how nonresident mail order business consistently soliciting in state received benefits from state); Gillis, *supra* note 1, at 552-53 (outlining types of benefits nonresident mail order company derives from states).

88. *Direct Mktg*, 1991 U.S. Dist. LEXIS 10736, at *5-*6.

89. *Id.* at *6.

90. *Id.* at *7.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at *6-*7.

97. *Id.* at *7-*8.

98. *Id.* at *6-*7. California argued that the minimum contacts test established by *International Shoe* should apply to both taxing and adjudicatory jurisdiction. *Id.* In *International Shoe*, the out-of-state corporate defendant had agents present within the taxing state, and the court found both tax and adjudicatory jurisdiction proper. *See infra* notes 137, 141, (discussing holding in *International Shoe* and relation to jurisdiction to tax). Although both

The district court's issuance of an injunction created further confusion as to the constitutionality of state statutes requiring mail order vendors to collect use taxes. As did the Connecticut Supreme Court, the *Direct Marketing* court rejected arguments that the type of contacts mail order vendors have with states are in fact physical and thus satisfy the test set out in *Bellas Hess*.[99] By refusing to accept these contacts as evidence of physical presence under the *Bellas Hess* analysis, these courts indicated that the only way to uphold jurisdiction to tax over mail order vendors would be to accept economic contacts as an element of nexus. As did the Connecticut court in *SFA Folio*, the *Direct Marketing* court noted that it still felt bound by the *Bellas Hess* decision and refused to recognize that economic contacts could establish nexus.[100]

V. THE NORTH DAKOTA SUPREME COURT'S CONSIDERATION OF *QUILL CORP. V. NORTH DAKOTA*

In contrast to *SFA Folio* and *Direct Marketing*, both of which upheld the physical presence test espoused in *Bellas Hess*, the North Dakota Supreme Court found *Bellas Hess* an "obsolescent precedent."[101] In *Quill Corp. v. North Dakota*, the court reasoned that the economic, social and commercial landscape upon which Bellas Hess was based no longer exists, and thus the *Bellas Hess* rule is no longer controlling.

The facts upon which the North Dakota Supreme Court based its decision were similar to the facts of *Bellas Hess*. Quill sold office supplies, stationery and equipment by mail.[102] Quill was a Delaware corporation with offices and warehouses in Illinois, California and Georgia.[103] Quill sent over 230,000 separate pieces of mail each year into North Dakota and advertised in national periodicals and trade journals.[104] Thus, Quill had no more contacts with North Dakota than Bellas Hess had with Illinois.[105] However, in assessing the constitutionality of North Dakota's statute imposing use tax collection liability on Quill, the North Dakota

---

tax and adjudicatory jurisdiction were proper in *International Shoe*, the *Direct Marketing* Court emphasized that this interchange is limited to the specific facts of *International Shoe*. *Direct Mktg.*, 1991 U.S. Dist. LEXIS 10736, at *7.

99. *See supra* notes 74-79, 87-95 and accompanying text (describing evaluation of out-of-state mail order retailers' contacts with state under *Bellas Hess* test).

100. *Direct Mktg.*, 1991 U.S. Dist. LEXIS 10736 at *7.

101. Quill Corp. v. North Dakota, 470 N.W.2d 203, 207 (N.D. 1991), *aff'd in part*, 60 U.S.L.W. 4423 (U.S. May 26, 1992).

102. *Id.* at 204.

103. *Id.*

104. *Id.*

105. *See* Brief for Petitioner, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (observing that *Quill* and *Bellas Hess* are factually indistinguishable and have similar levels of sales and advertising), *aff'd in part*, 112 S. Ct. 1904 (1992). *But see* Brief for Respondent, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (arguing that Quill's practice of sending computer disks into North Dakota to assist customer orders satisfies physical presence test), *aff'd in part*, 112 S. Ct. 1904 (1992).

Supreme Court echoed the dissent in *Bellas Hess* and urged the repudiation of the physical presence standard for tax jurisdiction.[106]

The *Quill* court embraced a new concept of due process nexus for taxation jurisdiction. The North Dakota court first addressed the change in volume and scope of the mail order sales industry that had taken place since 1967, the year the United States Supreme Court decided *Bellas Hess*.[107] The court compared the 2.4 billion dollars of mail order sales in the United States in 1967 with the 183.3 billion dollars of mail order sales in the United States in 1989.[108] The court found that while reliance upon in-state sales personnel and inventory may have been necessary in 1967, technological innovations such as toll-free lines, efficient computer systems and fax machines have removed any necessity for physical presence in a state to market merchandise.[109] Because physical presence in a state was no longer necessary to complete large volumes of sales, the court reasoned that physical presence should no longer serve as the test for judging whether the corporation has received the benefits that due process demands to uphold tax jurisdiction.[110]

The *Quill* court also traced a series of United States Supreme Court cases decided after *Bellas Hess* that addressed the issue of taxation of interstate commerce.[111] From an examination of these cases, the *Quill* court found further support for its conclusion that the use tax jurisdiction test should be based on economic presence in the state rather than exclusively physical presence.[112] In order to find an analytical framework to substitute for physical presence, the *Quill* court looked to adjudicatory jurisdiction cases which recognize contacts that are not physical, such as telephone

---

106. *Quill*, 470 N.W.2d at 207.

107. *Id.* at 208-09.

108. *Id.* at 209.

109. *Id.*

110. *Id.* at 215.

111. *Id.* at 211.

112. *Id.* The *Quill* court first examined *D.H.Holmes Co. v. McNamara*, 486 U.S. 24 (1988). *See infra* notes 197-98 and accompanying text (describing facts and holding of *D.H. Holmes*). The Supreme Court mentioned D.H. Holmes' significant economic presence in Louisiana in its analysis of the benefits the corporation received from in-state activities. 486 U.S. at 33. The *Quill* court implied from this reference that economic presence was the due process standard to be applied in the area of tax jurisdiction. *Quill*, 470 N.W.2d at 211. The court then examined *Tyler Pipe Indus., Inc. v. Washington*, 483 U.S. 232 (1987). *Id.* at 211. In *Tyler*, the Supreme Court assessed whether the activities of an independent contractor soliciting business in a state on behalf of a corporation gave rise to tax jurisdiction. 483 U.S. at 248-51. The Court found that tax jurisdiction was proper. *Id.* at 250-51. The Court held in *Tyler* that the crucial factor governing nexus is whether the activities performed in a state by or on behalf of a corporation are significantly associated with the taxpayer's ability to establish and maintain a market in the state for the sales. *Id.* at 250. The *Quill* court noted that contractual relations, a market for goods in the state and sales to state residents were taken into account by the Supreme Court in its analysis of jurisdiction to tax in *Tyler*. *Quill*, 470 N.W.2d at 211-12. From the types of contacts used in the Supreme Court's approach to tax jurisdiction in *Tyler* and *D.H. Holmes*, the *Quill* court derived an expanding concept of nexus relative to jurisdiction to tax. *Id.* at 212.

calls and mail directed toward the state, in assessing the due process nexus.[113] The North Dakota Supreme Court reasoned that because physical presence in a state is no longer a prerequisite for satisfying due process concerns in the context of adjudicatory jurisdiction, physical presence should no longer be a due process requirement for tax jurisdiction.[114] In addition, the *Quill* court noted that the United States Supreme Court had adapted its jurisprudence to accommodate technological changes in the past and thus concluded that it was appropriate for the North Dakota court to do so with regard to use tax collection.[115] Under the new analytical framework for use tax jurisdiction, the North Dakota court upheld tax jurisdiction over *Quill* and found its use tax statute to comply with the requirements of due process.[116]

By refusing to follow *Bellas Hess*, the North Dakota Supreme Court challenged the United States Supreme Court to address and clarify the use tax collection issue.[117] *Quill* provided the United States Supreme Court with an opportunity to evaluate the constitutional restraints on a state's taxing power in the context of mail order sales, in the context of a mail order industry that had undergone significant changes subsequent to the *Bellas Hess* decision in 1967.[118]

VI. The Due Process Clause and Constraints on the State's Power

In order to appreciate the due process principles that shape the debate over what contacts should give rise to jurisdiction to tax and to understand the implications of the *Quill* decision for tax analysis, it is necessary to examine the history of the Due Process Clause as it relates to the exercise

---

113. *Quill*, 470 N.W.2d at 212.

114. *Id.* at 212, 213; *see infra* notes 132-46 and accompanying text (discussing changes in adjudicatory jurisdiction and required nexus under Due Process Clause).

115. *Quill*, 470 N.W.2d at 213. The *Quill* court cited Goldberg v. Sweet, 488 U.S. 252 (1989) and Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1984), as support for the proposition that the Supreme Court had adapted other jurisdictional analysis to recognize new technology. *Id.* In *Goldberg*, the Supreme Court adapted the apportionment formula for taxation to accommodate the realities of interstate telecommunications technology. *Goldberg*, 488 U.S. at 264-65; *see infra* notes 199-200 (discussing reasoning and significance of *Goldberg*. In *Burger King*, the Supreme Court recognized the amount of business transacted across state lines and stated that legal theory must be flexible to account for societal changes and the vast technological explosion of recent years. *Burger King*, 471 U.S. at 476.

116. *Quill*, 470 N.W.2d at 219.

117. *See State Taxes: All Parties Laud Supreme Court Decision to Review North Dakota Mail Order Case*, Daily Rep. for Execs., (BNA), Oct. 9, 1991, at G5 (quoting director of state tax policy at Price Waterhouse, speculating that *Quill* was written to challenge reasoning in *Bellas Hess*).

118. *See* Brief for Respondent, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (noting that direct marketing industry has grown from sales of $2.4 billion per year at time of *Bellas Hess* to $130.4 billion per year today, with resulting $3.08 billion per year use tax loss for states from uncollectible use taxes), *aff'd in part*, 112 S. Ct. 1904 (1992).

of state jurisdiction. Historically, the Supreme Court conducted jurisdictional analysis of state authorities to tax, regulate and exercise adjudicatory power over corporations in terms of "doing business."[119]

The doing business analysis was a judicially crafted means to obtain jurisdiction over foreign corporations desiring to operate within a state.[120] This judicial formulation provided a method for exercising control over corporations which were previously subjected to jurisdiction only in their state of incorporation and in the state where they were physically present.[121] The doing business requirement offered a means for courts to define a corporation's presence in states in which the corporation had no legal identity.[122] Use of the doing business test required a quantitative analysis of a corporation's course of conduct within a state, as manifested through the presence of real property and agents in a state due to the fact that a corporation has no physical existence of its own.[123]

---

119. *See* McCray, *supra* note 1, at 269-71 (analyzing history of doing business standards). *See generally* William A. Holby, *"Doing Business": Defining State Control Over Foreign Corporations*, 32 VAND. L. REV. 1105 (1979) (describing evolution of doing business test); Elcanon Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925) (discussing problems associated with gaining jurisdiction over foreign corporations and describing constitutional rationale for doing business standards).

120. *See* Holby, *supra* note 119, at 1108-110 (explaining that courts adopted quantitative doing business standard in order to assert jurisdiction over foreign corporations in increasingly national economy); McCray, *supra* note 1, at 269-71 (discussing various levels of doing business standards and use of doing business standards to assess compliance with due process requirements for exercise of jurisdiction).

121. *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839) (holding that corporation can exist only within limits of sovereignty which created it and may act elsewhere only through presence of agents); *see also* Holby, *supra* note 119, at 1107-08 (describing conflict between traditional notion that foundation of jurisdiction is physical power and concept of corporation as artificial person existing only within territorial confines of sovereignty in which corporation is incorporated); Oretta D. Small, Comment, *"Doing Business": Jurisdiction, Qualification and Taxation Applications*, 11 UCLA L. REV. 259, 260 (1964) (explaining that physical presence is traditional basis of jurisdiction and courts derived physical presence test from notion of state sovereignty).

122. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating that because corporate personality is fictional, presence is used merely to symbolize those activities of corporation's agents within state which courts will deem to be sufficient to satisfy demands of due process); International Harvester Co. v. Kentucky, 234 U.S. 579, 583 (1914) (stating that corporation is deemed to be resident of state of creation and is only present in another state through agents authorized to transact its business in state); Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141-42 (2d Cir. 1930) (stating that corporate presence must be evidenced by continuous dealings or substantial business in state, either of which involves agents or property in state); Holby, *supra* note 119, at 1109 (explaining that Supreme Court recognized artificiality of physical presence concept as applied to corporations rather than natural persons, so Court held that service could only be made upon corporate agent). *Compare* Pennoyer v. Neff, 95 U.S. 714, 734-36 (1878) (holding that touchstone of jurisdiction is physical presence within state for persons and corporations alike), *overruled by* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) *with* Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) (holding that in-state earnings were sufficient to support tax jurisdiction where taxing power bears fiscal relation to protection, opportunities and benefits given by state).

123. *See* Holby, *supra* note 119, at 1110 (describing quantitative approach to determine

Depending on the type of jurisdiction asserted, different levels of activity satisfied doing business standards.[124] For instance, to impose adjudicatory jurisdiction upon a corporation, the business transacted by the corporation needed to indicate presence within the state.[125] To subject a corporation to taxation for doing business, the in-state transactions needed to indicate that the corporation was both present and active.[126] To require a corporation to submit to regulatory jurisdiction under qualification statutes, the corporation needed to be present and active and its activity needed to be continuous.[127] Due process analysis has differentiated between the level of corporate activities necessary for the assertion of various types of jurisdiction since courts began grappling with the concept of corporations, and the distinctions between levels of doing business are a reflection of this differentiation.[128] The level of activity required reflects a balance between the state's interest in jurisdiction over a particular activity and the burden on the party over which the state seeks to assert jurisdiction.[129] Constitutional limitations were also a factor in determining the amount of activity required to constitute doing business.[130] However, all levels of the doing business test sought some level of physical presence within the state in order for the state to assert jurisdiction over the corporation.[131]

---

if corporation is present by doing business in state); *see also* International Harvester Co. v. Kentucky, 234 U.S. 579, 585-86 (1914) (holding that when corporation was involved in on-going solicitations in state through authorized agents, corporation was doing business and subject to jurisdiction).

124. *See* Holby, *supra* note 119, at 1106-07 (explaining different categories of doing business); *infra* notes 124-30 and accompanying text (describing how Court differentiates between level of contacts needed for various types of jurisdiction).

125. *See* Isaacs, *supra* note 119, at 1045 (observing that foreign corporation must transact amount of business that gives inference that corporation is present in order to permit service of process).

126. *See id.* (noting that to subject corporation to taxation for doing business, corporation's transactions must show corporation was active as well as present).

127. *See id.* (stating that to require corporation to qualify for business in state, corporation activities must be present, active and continuous).

128. *See* Travelers Health Ass'n v. Virginia, 339 U.S. 643, 653 (1950) (Douglas, J., concurring) ("It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process."); Henry M. Day & Co. v. Schif, Lang & Co., 278 F. 533, 535 (S.D.N.Y. 1922) (highlighting differences between doing business for purposes of taxation, doing business for qualification and doing business to justify service of process, and confusion created through use of same phrase).

129. *See* Isaacs, *supra* note 119, at 1019 (describing burdens that states imposed on out-of-state corporations in order to do business in state and constitutional limitations upon burdens); Small, *supra* note 121, at 262 (noting that amount of activity required to constitute doing business and bring presence of corporation within state varies with state's desired purpose).

130. *See* Small, *supra* note 121, at 262 (stating that amount of activity necessary to qualify as presence and doing business varies with constitutional limitations involved).

131. *See infra* note 133 and accompanying text (describing physical presence requirement for doing business standard for jurisdiction over person); *infra* notes 147-49 and accompanying text (describing physical presence requirement for doing business standard for jurisdiction to tax); *infra* note 175 (describing physical presence requirement for jurisdiction to regulate).

A. *Jurisdiction to Adjudicate*

Prior to the development of modern due process analysis for adjudicatory jurisdiction,[132] states required an individual's presence within the state to assert adjudicatory jurisdiction over that person.[133] To establish adjudicatory jurisdiction over a foreign corporation, states often required corporations to appoint an agent within the state to accept service of process as a precondition of doing business in the state.[134] States also obtained jurisdiction over out-of-state corporations by demonstrating that the corporations were engaged in sufficient in-state activities to constitute presence and satisfy due process nexus requirements.[135]

In *International Shoe Co. v. Washington*,[136] the United States Supreme Court moved away from the presence-based, doing business analysis in the context of adjudicatory jurisdiction and adopted a "minimum contacts" standard.[137] The minimum contacts test requires that a corporation purposefully direct its activities toward a state and receive benefits therefrom in order for the state to assert jurisdiction.[138] Although physical presence in the state was initially a prerequisite to finding minimum contacts, the test

---

132. *See infra* notes 137-46 and accompanying text (describing modern due process analysis for adjudicatory jurisdiction).

133. *See* Pennoyer v. Neff, 95 U.S. 714, 743 (1878) (holding that state's adjudicatory jurisdiction cannot run beyond its own territory), *overruled by* Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

134. *See* St. Clair v. Cox, 106 U.S. 350, 356 (1882) (stating that corporation of one state cannot do business in another state without latter state's consent and that consent may be accompanied by such conditions as state may think proper to impose).

135. *See* International Harvester Co. v. Kentucky, 234 U.S. 579, 585-86 (1914) (examining corporation's course of conduct in state and amount of business performed in order to assess propriety of adjudicatory jurisdiction); Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930) (stating that out-of-state corporation establishes presence in state by continuous dealings within state which make it reasonable to bring out-of-state corporation before court).

136. 326 U.S. 310 (1945).

137. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In *International Shoe*, the Supreme Court considered the reach of a state's adjudicatory jurisdiction and tax jurisdiction under the Due Process Clause. *Id.* at 311. The State of Washington had attempted to collect unemployment tax from the out-of-state employer of sales representatives working in the state. *Id.* at 313-14. The employer, International Shoe, did not have a warehouse or retail outlet in Washington, but the salesmen did rent rooms occasionally in Washington in order to display samples. *Id.* at 314. In analyzing the state's power to serve process on the nonresident corporate defendant, the Court rejected jurisdictional tests which required the state to demonstrate the presence of the nonresident defendant in the state. *Id.* at 315. The Court adopted a minimum contacts standard of analysis for adjudicatory jurisdiction which assessed the nonresident defendant's contacts with the forum state to see if the defendants contacts with the state made it reasonable to impose jurisdiction. *Id.* at 316. Applying the minimum contacts standard, the Court held that adjudicatory jurisdiction over International Shoe was reasonable. *Id.* at 320-21. The Court also held that tax jurisdiction was proper because the activity being taxed had taken place within the state. *Id.* at 321.

138. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (holding that defendant must purposefully avail itself of privilege of conducting activities within state, invoking benefits and protection of its laws, to sustain jurisdiction); *International Shoe*, 326 U.S. at 316 (holding that due process requires nonresident defendant to have certain minimum contacts with forum).

evolved to accept contacts that did not require the defendant to enter the state physically.[139] In the context of adjudicatory jurisdiction, a nonresident defendant's contacts with a state by telephone or the mail are now comparable to physical presence in the state and will satisfy the nexus requirement of the Due Process Clause.[140]

Thus, the Supreme Court has developed adjudicatory jurisdiction analysis from the application of artificial tests, such as appointment of an agent or establishing presence through a doing business evaluation, to a minimum contacts analysis that takes into account the changing face of the United States economy.[141] However, the criteria now used to assess minimum contacts—a purposeful direction to the state[142] and the reasonableness of calling the defendant to suit out-of-state[143]—are not so very different from the requirements for presence, in that the analysis is often quantitative.[144] The most significant change in the area of adjudicatory jurisdiction is the recognition that the Court should take correspondence with persons in the state through the mail or by telephone into consideration in jurisdictional analysis.[145] In *Quill*, the Supreme Court accepted mail and telephone contacts into the nexus evaluation for jurisdiction to tax.[146]

---

139. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (holding that when one deliberately reaches out beyond state lines and makes contact with another state, contacts by phone and by mail may suffice to uphold adjudicatory jurisdiction); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (holding that adjudicatory jurisdiction may be obtained over out-of-state company with no other activities or presence within state when suit is based on contract within state, and state has strong interest in suit).

140. *See supra* note 139 (describing how interstate economy has influenced changes in adjudicatory nexus requirements).

141. Because corporations are a fiction that is intended to be acted upon as though it were a fact, courts resorted to legal fiction to imply presence or required consent to service and suit to maintain adjudicatory jurisdiction over corporations. *See International Shoe*, 326 U.S. at 316, 318 (stating that corporate personality is fictional and can only be manifested by activities carried on in its behalf by those authorized to act for it). In *International Shoe*, the Court sought to move from artificial or mechanical standards for determining adjudicatory jurisdiction to an assessment of the quality and nature of the activity in the state relative to the fair administration of laws which due process was designed to ensure. *See id.* at 319 (explaining rationale for adopting minimum contacts standard). However, Justice Scalia has noted that corporations still pose a problem in jurisdictional analysis, which is based primarily upon *de facto* power over the defendant's person. *See* Burnham v. Superior Ct., 495 U.S. 604, 610 n.1 (1990) (discussing special jurisdictional problems that arise with out-of-state corporations).

142. *See supra* note 138 (explaining requirement that defendant direct activities toward state in order to support jurisdiction).

143. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 113-14 (1987) (stating that court must assess reasonableness of personal jurisdiction over out-of-state defendant); *supra* notes 126-44 and accompanying text (outlining requirements of modern due process analysis for adjudicatory jurisdiction).

144. *See supra* notes 134-35 and accompanying text (describing requirements of consent and presence to establish adjudicatory jurisdiction).

145. *See supra* note 139 and accompanying text (discussing loosening of physical presence requirement for adjudicatory jurisdiction).

146. Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1910-11 (1992).

B. Jurisdiction to Tax

Like adjudicatory jurisdiction, states originally derived jurisdiction to tax from a person's or entity's physical presence within the state.[147] Originally, tangibles were only taxable in the state of their permanent situs, and intangibles were only taxable at the domicile of their owner.[148] This meant that only one state could have the nexus to tax either a tangible or intangible item. As the American economy became increasingly dependent upon interstate commerce, the fact that only one site could serve as a nexus for taxation presented a problem for states wishing to tax all transactions and goods having a relationship with the state.[149] In order to address the problems arising from the interstate market, the Supreme Court established that an entity could be doing business in more than one state and that all of the states in which a corporation was doing business could have a nexus to tax the entity.[150] The Court found that the Due Process Clause required the overall tax assessed to the corporation to be apportioned to approximate the amount of business done within that particular state.[151]

The doing business standard for taxation required that a state establish an interstate actor's presence by looking at both the amount of revenue derived in the state and the amount of business transacted within a state.[152] The touchstone for the Due Process Clause analysis was whether a tax formula fairly apportioned the tax to the commerce carried on within the state[153] and whether an entity received the benefits and protection conferred

---

147. *See* Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385, 398 (1903) (recognizing general rule that power of state to tax is limited to subjects within its jurisdiction or over which it can exercise dominion).

148. *See* Holby, *supra* note 119, at 1130 (describing evolution of taxation nexus standard).

149. *See id.* at 1130 (describing changes in tax jurisdiction theory as economy became increasingly interstate).

150. *See* Curry v. McCanless, 307 U.S. 357, 367-69 (1939) (establishing possibility that corporation may have nexus with several states).

151. *See* Standard Oil Co. v. Peck, 342 U.S. 382, 383 (1952) (holding that tax on revenues earned within state by company engaged in interstate commerce satisfied requirements of Due Process Clause if tax was fairly apportioned to commerce carried on within state); International Harvester Co. v. Evatt, 329 U.S. 416, 419-21 (1947) (holding that tax formula which approximated amount of intrastate sales and business performed by interstate company did not violate Due Process Clause); Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 86 (1948) (noting that Due Process Clause was not obstacle to tax when state apportioned tax and taxed entity's property was in taxing state). The Commerce Clause also requires fair apportionment of a tax to reflect only intrastate activities. *See e.g.,* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 282-87 (1977) (detailing evolution of apportionment under Commerce Clause); Spector Motor Serv. v. O'Connor, 340 U.S. 602, 609-10 (1951) (explaining principle that under Commerce Clause, state may tax interstate taxpayer's in-state business by applying tax rate to fair proportion of taxpayer's overall business), *overruled by* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1976); *International Harvester* 392 U.S. at 421-23 (holding that statute designed to arrive at fair conclusion as to value of intrastate business of interstate actor did not violate Commerce Clause).

152. *See* Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment, 347 U.S. 590, 600-01 (1954) (examining amount of revenue derived by airline from in-state

by the taxing sovereignty.[154] The Supreme Court both affirmed and clarified this test in *Wisconsin v. J.C. Penney Co.*.[155] In *Wisconsin*, the Supreme Court held that a state can tax consistently with the Constitution if the tax relates to opportunities given by the state, to protection the state has afforded to the taxed entity and to benefits that the state has conferred by the fact of ensuring an orderly, civilized society.[156] The test espoused in *Wisconsin* is the same test found in the due process prongs of the current tax jurisdiction test.[157]

The current tax jurisdiction test, set out in *Complete Auto Transit, Inc. v. Brady*,[158] encompasses both Due Process Clause and Commerce Clause concerns.[159] In applying the due process test found in *Complete Auto*, courts have continued to look for actual physical presence and activity in the state before extending jurisdiction to tax in the context of mail order sales.[160] The taxation of nonresident insurance companies represented the one exception to the physical presence standard.[161] However, courts have limited

---

service, frequency of service to state and airlines' facilities in state to determine that state had fairly apportioned tax under Due Process Clause); *see also* Small, *supra* note 121, at 273 (discussing determination of presence for purposes of jurisdiction to tax tangible and intangible items).

153. *See supra* note 151 and accompanying text (noting relationship between Due Process Clause and apportionment of taxes levied upon interstate business).

154. *See* Curry v. McCanless, 307 U.S. 357, 368 (1939) (holding that when entity carries on business in several states, each state provides protection and benefits and has power over subject matter).

155. 311 U.S. 435, 444 (1940). In *Wisconsin*, the Court considered the constitutionality of a statute that imposed a general corporate income tax on earnings of out-of-state corporations attributable to their Wisconsin activities, in addition to a tax on the privilege of declaring and receiving dividends derived from property located and business transacted in Wisconsin. *Id.* at 441. J.C. Penney challenged the tax on dividends, which delayed payment until the corporation received the dividends, as a violation of the Due Process Clause of the Fourteenth Amendment. *Id.* The Court stated that the label of a tax was immaterial to analysis of jurisdiction—the critical factor to analysis is the way in which the tax operates. *Id.* at 443-44. Asking if Wisconsin had given anything for which it could ask return, the Court decided that the incidence of the tax was tied to earnings which the state had made possible, and the tax was justified. *Id.* at 445-46.

156. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).

157. *Compare supra* notes 155-56 and accompanying text (describing due process requirements set out by *Wisconsin*) *with infra* note 192 and accompanying text (describing due process elements of current tax jurisdictional test).

158. 430 U.S. 274 (1977). *See infra* note 192 and accompanying text (discussing *Complete Auto* test).

159. *See infra* note 194 and accompanying text (stating that Commerce Clause test for jurisdiction to tax set out in *Complete Auto* encompasses due process concerns).

160. *See supra* notes 42-56 and accompanying text (discussing *National Geographic*); *see infra* notes 197-98 (discussing *D.H. Holmes Co.*).

161. *See* McCray, *supra* note 1, at 286-88 (discussing judicial analysis of mail-order sales of insurance and jurisdiction to tax). Due to the strong state interest in the health and safety of state citizens, courts have treated mail order insurance companies without a physical presence in the state differently from mail order companies purveying goods. Early cases required some form of physical presence to impose tax collection. *See* Allgeyer v. Louisiana, 165 U.S. 578,

this exception to mail order insurance companies and have emphasized that the exception is justified by the strong state interest in regulating and taxing insurance company activities.[162]

Thus far, tax jurisdiction had not experienced a loosening of physical presence standards akin to the changes in adjudicatory jurisdiction.[163] The essence of tax jurisdiction analysis is a search for the protection, benefits and control afforded to the taxed entity.[164] There is no apparent reason why an entity engaging in significant sales within a state without a physical presence in the state could not obtain protection, benefits and control from the state.[165] The *Quill* decision recognized this fact.[166]

Courts traditionally have subjected tax jurisdiction to different standards than adjudicatory jurisdiction.[167] The due process test for adjudicatory

---

593 (1897) (holding that Louisiana could not regulate contract that company had made beyond territory and involved company which was not doing business in state); St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346, 349 (1922) (holding that while states may regulate activities of foreign corporations within state, they cannot regulate or interfere with what these corporations do outside); Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 80-81 (1938) (holding that Due Process Clause denies state power to tax or regulate corporation's property and activities elsewhere). However, courts have recently extended tax and regulatory jurisdiction over companies with no physical presence within the state. *See* Ministers Life & Casualty Union v. Haase, 141 N.W.2d 287, 294-95 (Wis. 1966) (noting that while public interest alone is not sufficient to give state jurisdiction over foreign insurance companies, great concern and public interest do add significance to contacts with state which might not otherwise be sufficient to meet standards of Due Process Clause); People v. United Nat'l Life Ins. Co., 427 P.2d 199, 209-10 (Cal. 1967) (holding that continuous solicitation of state residents by mail coupled with substantial state interest in regulating insurance is sufficient to support jurisdiction to tax and regulate mail order insurance companies). While the insurance company in *Ministers Life & Casualty* had group leaders—uncompensated representatives of groups interested in purchasing a group policy—who assisted in sales within the state, *Ministers Life & Casualty*, 141 N.W.2d at 290, the insurance company in *United Nat'l Life Ins. Co.* had no physical connection to the state. *United Nat'l Life Ins. Co.*, 427 P.2d at 202. The California and Wisconsin supreme courts decided both of these cases prior to the United States Supreme Court's decision in *Bellas Hess*, which reaffirmed the importance of the physical presence test. *See supra* notes 18-23 and accompanying text (discussing *Bellas Hess* physical presence test). Moreover, the substantial state interest in taxing and regulating the insurance industry was a dispositive factor in both state supreme court cases. *See United Nat'l Life Ins. Co.*, 427 P.2d at 209 (noting that state interest in regulating and taxing insurance transactions with state residents was obvious); *Ministers Life and Casualty Union*, 141 N.W.2d at 291 (stating that insurance business is permeated with public interest).

162. *See supra* note 161 (outlining cases addressing jurisdiction to tax in context of mail order insurance sales).

163. *See* Holby, *supra* note 119, at 1131 (stating that due process clearly defines more rigid standard for evaluation of tax jurisdiction than for adjudicatory jurisdiction); *see also* Charles Rothfeld, *Mail-Order Sales and State Jurisdiction to Tax*, 91 STATE TAX NOTES 581 (1991) (noting that Supreme Court's approach thus far has been that out-of-state mail order firm may be subjected to tax only if it maintains some physical presence in taxing jurisdiction).

164. *See supra* notes 147-62 and accompanying text (discussing tax jurisdiction test and analysis).

165. *See State Taxation of Mail Order Sales to State Residents by Out-of-State Firms*, 60 U.S.L.W. 3511, 3511-12 (1992) (summarizing oral arguments heard by Supreme Court in *Quill*). Justice Scalia asserted this very point during oral arguments in *Quill* and counsel gave

jurisdiction is an analysis of whether an out-of-state defendant has purposefully availed itself of the protection and benefits of the state.[168] The due process test for tax jurisdiction is an analysis of whether the tax relates to opportunities, benefits and protection provided to the entity by the state.[169] Simply phrased, both analyses look to see whether the state has given anything to the corporation for which the state can ask for something in return. Therefore, although the Supreme Court has looked for more substantial and continuous contacts with a state to support tax jurisdiction than to support adjudicatory jurisdiction, the test applied to both is fundamentally the same. It only makes sense that contacts of a similar nature should satisfy the test.

C. *Interrelation of the Types of Jurisdiction*

While the due process analysis of the various types of jurisdiction looks similar, the analysis still requires different levels of contacts depending upon the type of jurisdiction the state is attempting to assert.[170] Some commentators state that the distinction between tax, regulatory and adjudicatory jurisdiction should be irrelevant under the nexus test.[171] Courts, however, continue to distinguish between the different types of jurisdiction,[172] and these distinctions, rooted in the doing business requirement, are still a potent

---

no reason why benefits could not be provided to a company which was not present within a state but which participated in active solicitation of a state market. *Id.*

166. Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991), *aff'd in part*, 112 S. Ct. 1904, 1910-11 (1992).

167. *See* Travelers Health Ass'n. v. Virginia, 339 U.S. 643, 653 (1950) (Douglas, J., concurring) (stating that activity necessary to sustain tax and maintain suit are not synonymous); Kulick v. Department of Revenue, 624 P.2d 93, 97 (Or. 1981) (stating that nexus required to tax and nexus required for personal jurisdiction are not functionally identical). The Oregon Supreme Court held in *Kulick* that due process concerns in the assertion of adjudicatory jurisdiction focus on the state's putting the nonresident to the inconvenience and possible procedural drawbacks of an inappropriate forum, while the due process concerns with regard to a tax law address a general class of persons on whom the state means to place the substantive obligation to contribute to its revenues. *Id.* at 97. *See also supra* notes 124-30 and accompanying text (outlining distinction between nexus required to sustain adjudicatory and nexus to sustain tax jurisdiction).

168. *See supra* notes 132-46 and accompanying text (describing due process requirements for jurisdiction over person).

169. *See supra* notes 147-66 and accompanying text (describing due process requirements for jurisdiction to tax).

170. *See supra* note 167 and accompanying text (explaining differences between jurisdiction to tax and jurisdiction over the person).

171. *See* McCray, *supra* note 1, at 286 (stating that because doing business is no longer due process test to establish jurisdiction, theory that levels of doing business correspond to levels of due process is no longer valid); *see also* Walter Nagel, *The Emergence of a Single Nexus Standard*, 45 TAX NOTES 327, 335 (1989) (saying that distinctions between requirements for various types of jurisdiction are irrelevant).

172. *See* Kulick v. Oregon, 624 P.2d 93, 97 (Or. 1981) (refusing to equate adjudicatory jurisdiction tests with tax jurisdiction tests); *see also supra* note 167 (discussing cases which distinguish between required levels of activity needed to sustain different types of jurisdiction).

force in due process analysis. Even though the Supreme Court eradicated the physical presence test for jurisdiction to tax in *Quill*, the nexus requirements for all three types of jurisdiction are not necessarily synonymous.[173] Jurisdiction to tax will still require more contacts than regulatory or adjudicatory jurisdiction.[174] Thus, an examination of the relationship between the types of jurisdiction reveals the potential implications of change in the physical presence requirement for jurisdiction to tax.

i. Regulatory Jurisdiction and Tax Jurisdiction

The relationship between regulatory jurisdiction and tax jurisdiction, while not a key issue in *Quill*, is important in analyzing the use tax collection debate because tax jurisdiction requires more substantive contacts with the state than regulatory jurisdiction.[175] Use tax collection statutes usually place

---

173. *See* Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1923 (1992) (Scalia, J., concurring) (stating that application of adjudicatory due process principles to tax jurisdiction does not mean that due process standards for legislative [tax] jurisdiction and adjudicatory jurisdiction are necessarily identical); *see also infra* notes 192-206 and accompanying text (discussing potential change in tax jurisdiction analysis from Supreme Court consideration of *Quill*).

174. The use tax collection statutes passed by several states already recognize that jurisdiction to tax will require a substantial and regular solicitation of business within the state. *See, e.g.*, CONN. GEN. STAT. ANN. § 12-407(12)(g) & 15(e) (West Supp. 1991) (requiring regular or systematic solicitation by mail, catalog or media in order to impose use tax collection duty); IOWA CODE ANN. § 422.43(12)(b) (West 1990) (looking for continuous, regular, seasonal or systematic solicitation by mail and benefits from banking, financing and debt collection before state imposes use tax collection duty); MISS. CODE ANN. § 27-67-3(j) (1990) (imposing use tax collection liability on retailers that purposefully or systematically exploit consumer market by direct mail or unsolicited catalog distribution). In contrast, these same states extend adjudicatory jurisdiction over nonresident corporations based upon as few as one contact with the state. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-59B(a)(2) & (3)(B) (West 1991) (imposing personal jurisdiction on nonresident corporation for tortious act in state or tortious act out-of-state if defendant expects act to have in-state consequences and derives revenue from interstate commerce); IOWA CODE ANN. § 617.3 (West Supp. 1991) (extending adjudicatory jurisdiction over nonresident who entered contract or performed tortious act in whole or in part in-state); MISS. CODE ANN. § 13-3-57 (Supp. 1991) (imposing adjudicatory jurisdiction over nonresident defendant that has entered contract or committed tort in whole or in part in-state).

175. Due process jurisprudence places fewer limits on a state's regulatory jurisdiction than on its tax jurisdiction or its adjudicatory jurisdiction. *See* Freeman v. Hewit, 329 U.S. 249, 253 (1946) (stating that taxes that touch upon commerce have always been more carefully scrutinized and more consistently resisted than police power regulations of commerce); Holby, *supra* note 119, at 1117 (noting that due process analysis of regulatory legislation, unlike that of tax legislation, is fairly minimal). The Commerce Clause poses the primary impediment to jurisdiction to regulate. *See* Holby, *supra* note 119, at 1117 (stating that critical issue for regulatory control is Commerce Clause, whereas due process poses threshold issue for tax jurisdiction).

Typically, states have required businesses carrying on a certain level of in-state activity to register with the state and be qualified, as an exercise of regulatory authority. *See* McCray, *supra* note 1, at 270 n.22 (stating that qualification is prerequisite for transacting substantial business in-state). Qualification requirements may include consent to service of process, payment of fees or subjection to certain state regulations. *See* Holby, *supra* note 119, at 1117 n.59 (describing possible requirements that states imposed upon corporations for qualification).

responsibility for the collection and payment of use taxes on the retailer.[176] Even though the state is technically forcing mail order companies into the posture of tax collection, the statutes make the retailer directly liable for payment of the tax regardless of whether the company succeeds in collecting the tax.[177] Therefore, courts often analyze the obligations imposed by use tax collection statutes as if the state were assessing the tax upon the retailer.[178] While some decisions and commentators indicate that the state is exercising regulatory jurisdiction when the state imposes a use tax collection duty,[179] the Supreme Court has most often referred to imposition of this duty as an exercise of tax jurisdiction.[180] Indeed, even the parties

---

Although the level of contacts which constitutes doing business is higher for qualification than for adjudicatory jurisdiction, it is not clear what level is required. *Id.* at 1123.

Regulatory jurisdiction also encompasses the reach of a state's police power or control over the activities of out-of-state actors. *Id.* at 1123. The activities that constitute doing business for purposes of the exercise of police power are often considerably less than those required for qualification. *Id.* It is difficult to ascertain what level of contacts is necessary to sustain jurisdiction to regulate. *See, e.g.*, Aldens, Inc. v. LaFollette, 552 F.2d 745, 750-51 (7th Cir.) (observing that exercise of regulatory power requires less nexus than taxing power but more than adjudicatory power), *cert. denied*, 434 U.S. 880 (1977); Aldens, Inc. v. Packel, 524 F.2d 38, 42-43 (3d Cir. 1975) (applying adjudicatory jurisdiction nexus standard to mail order retailer's objection to state regulation), *cert. denied*, 425 U.S. 943 (1976); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (1950) (applying minimum contacts standard from *International Shoe* when state's regulatory authority over out-of-state mail order insurance corporation was in question). Where a strong state interest in regulating an industry is involved, such as in the insurance industry, the threshold level of required contacts is lowered. *See* Leonard E. Kust & Graham Sale, Jr., *State Taxation of Interstate Sales*, 46 VA. L. REV. 1290, 1305 (1960) (noting that where strong public policy intervenes, lower nexus threshold may be required for jurisdiction to regulate). Thus, jurisdiction to regulate undergoes less scrutiny than jurisdiction to tax. When a strong state interest is involved, the level of contacts required is similar to the level required for adjudicatory jurisdiction. *See id.* Otherwise, jurisdiction to regulate demands a mid-level of contacts—somewhere between jurisdiction to tax and adjudicatory jurisdiction. *See Alden's Inc.*, 552 F.2d at 750-51 (postulating that regulatory jurisdiction requires mid-level of contacts between adjudicatory and tax jurisdiction).

176. *See supra* note 7 (listing various state statutes which require out-of-state retailers to collect use taxes on in-state sales and hold retailer liable for amount of tax due for remittance); *see also infra* note 174 (describing judicial interpretation of use tax statutes as exercise of states' jurisdiction to tax).

177. *See supra* note 7 (listing use tax collection statutes); *infra* note 171 (describing judicial construction of use tax collection statutes which make mail order vendor liable for payment of use tax).

178. *See* National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 757 n.9 (1967) (stating that while retailer was not person or entity being taxed directly, statute made retailer directly liable for payment of tax whether or not retailer collected tax); Scripto v. Carson, 362 U.S. 207, 210 (1960) (observing that in event dealer fails to collect tax, dealer is liable for tax payment); Miller Bros. Co. v. Maryland, 347 U.S. 340, 344 (1954) (noting that practical and legal effect of Maryland use tax collection statute was akin to making vendor pay sales tax); *see also* Kust & Sale, *supra* note 175, at 1303-08 (describing cases concerning problem of use tax collection as cases involving jurisdiction to tax).

179. *See* National Geographic Soc'y v. Bd. of Equalization, 430 U.S. 551, 558 (1977) (stating sole burden borne by out-of-state seller under use tax collection statutes is administrative duty of collecting tax); Gillis, *supra* note 1, at 543-44 (opining that state is exercising regulatory authority and not taxing authority when state requires out-of-state vendors to collect use taxes).

180. *See supra* note 178 (discussing cases which regarded use tax collection as exercise of

involved in *Quill* treated the use tax collection duty as a tax issue.[181]

ii. Jurisdiction to Adjudicate and Jurisdiction to Tax

The differences between jurisdiction to adjudicate tax and jurisdiction to tax are also critical to the due process analysis of the use tax collection issue. The obligations imposed by adjudicatory jurisdiction and tax collection are significantly different. Under specific adjudicatory jurisdiction, the state requires the defendant to submit to the jurisdiction of a state's courts only for controversies arising from the defendant's contacts with the state.[182] It is often a one-time obligation.[183] Under a tax collection statute, a state forces the company to undertake burdensome and costly tax collection procedures for every sale it makes in the state. This tax collection burden, although arising from a series of individual transactions, is comparable to the burden imposed by general adjudicatory jurisdiction and requires a greater level of commitment and effort than does a single court appearance.[184] Under general jurisdiction, the state requires a defendant to submit to adjudicatory jurisdiction in a state for any suit, regardless of whether the transaction giving rise to the suit took place in the state.[185] The obligation is continuing and burdensome.

Moreover, the factors supporting tax jurisdiction in *National Geographic*, which dispensed with the requirement that activities giving rise to

jurisdiction to tax). Justice Scalia noted in his concurring opinion in *Quill* that it is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax. Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1923 (1992) (Scalia, J., concurring).

181. *See* Brief for Respondent, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (arguing that changes in adjudicatory jurisdiction control tax jurisdiction analysis and problem in *Quill* is one of jurisdiction to tax), *aff'd in part*, 112 S. Ct. 1904 (1992); Brief for Petitioner, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (approaching problem as one of jurisdiction to tax, which unlike adjudicatory jurisdiction, should retain physical presence requirement), *aff'd in part*, 112 S. Ct. 1904 (1992).

182. *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.8 (1984) (defining specific jurisdiction to be jurisdiction over suits arising out of or relating to contacts within state).

183. *See supra* note 182 (defining specific jurisdiction).

184. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 448 (1952) (finding general jurisdiction over Philippine company which had moved its headquarters temporarily to United States during war). *But see Helicopteros*, 466 U.S. at 418 (holding series of sales contracts with in-state companies and use of in-state banks did not meet requirements of general jurisdiction); Charles Rothfeld, *Mail-Order Sales and State Jurisdiction to Tax*, 91 STATE TAX NOTES 581, 585 (1991) (noting that subjecting out-of-state defendant to court appearance and forum's laws is form of regulation and that use of injunctive or preventative relief is potent method of controlling conduct). Incorporation in a state subjects a corporation to both general adjudicatory and tax jurisdiction. *See supra* notes 121-22 (describing how incorporation in state satisfies physical presence which gives state jurisdiction over corporation).

185. *See Helicopteros*, 466 U.S. at 414 n.9 (defining general jurisdiction as state exercise of personal jurisdiction over defendant in suit not arising out of or related to defendant's contacts with forum). *See generally* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988) (describing development of specific and general jurisdiction).

tax jurisdiction must relate to the activity that the state is taxing, are similar to the requirements of general jurisdiction.[186] In *National Geographic*, the Court justified imposition of the use tax collection burden by pointing to National Geographic's substantial presence in the state and the location of an office there.[187] A corporation's activities within the state have only satisfied the test for general adjudicatory jurisdiction over a nonresident corporation when the activities were substantial and continuous, and the corporation was physically present within the state.[188] Thus, the level of contacts necessary to support jurisdiction to tax is far more akin to the level supporting general rather than specific adjudicatory jurisdiction. Even though the Supreme Court applied the due process nexus test for adjudicatory jurisdiction to tax jurisdiction in *Quill*, tax nexus requirements should continue to reflect the high level of contacts required to subject a corporation to general jurisdiction. States already recognize the higher level of contact needed to support jurisdiction to tax in their statutory schemes.[189] The quantitative differences between adjudicatory jurisdiction analysis and tax jurisdiction analysis do have constitutional significance, as recognized early on by the doing business standards and by courts.[190] The Court has not erased the distinctions between the level of contacts required for each type of jurisdiction by applying adjudicatory due process standards to tax due process nexus analysis.[191]

IV. Modern Tax Due Process Analysis

As discussed, historical analysis of the application of the Due Process Clause to state jurisdictional power reveals that courts have traditionally not treated adjudicatory jurisdiction and tax jurisdiction equally. Just as the Court took these distinctions into account, the Court considered the changes that have taken place in tax analysis since the Court decided *Bellas Hess*. The Supreme Court has effected significant changes in the framework for tax jurisdictional analysis since it decided *Bellas Hess*. Modern tax analysis of a state's power to tax out-of-state entities has involved a Commerce Clause analysis, set out in *Complete Auto Transit, Inc. v. Brady*.[192] In *Complete Auto*, the Supreme Court articulated a four-pronged

---

186. *See supra* notes 42-55 and accompanying text (describing holding and rationale of *National Geographic*).

187. *Id.*

188. *See supra* note 184 (giving examples of general jurisdiction cases).

189. *See supra* note 174 (describing various state statutes imposing jurisdiction to tax and jurisdiction over person).

190. *See supra* notes 119-28 and accompanying text (describing doing business standards); *supra* note 167 (describing how courts differentiate between various jurisdictional requirements).

191. *See* Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1923 (1992) (Scalia, J., concurring) (noting that repudiation of physical presence test for purpose of due process does not mean due process standards for adjudicative jurisdiction and legislative jurisdiction are necessarily identical).

192. 430 U.S. 274, 279 (1977). The issue in *Complete Auto* was whether sales taxes

test for analyzing taxes on interstate business under the Commerce Clause.[193] Yet, even though the *Complete Auto* test seemed to encompass due process requirements for tax jurisdiction such that satisfaction of the *Complete Auto* test indicated that due process requirements had been met,[194] the Court has continued to treat due process requirements as a distinct issue. For instance, in *Commonwealth Edison Co. v. Montana*,[195] the Supreme Court held, while applying the *Complete Auto* test, that a due process analysis does not require that the amount of taxes a state collects from a company

---

assessed against an interstate corporation were constitutional because the statute assessed taxes on interstate transactions. *Id.* at 277. The plaintiff, Complete Auto Transit, was engaged in the business of transporting motor vehicles for General Motors to dealers in various states. *Id.* Mississippi assessed sales taxes on Complete Auto Transit for the sale of transportation services within the state, and Complete Auto Transit paid the taxes under protest. *Id.* at 276-77. Rejecting prior cases which held that states could not apply sales taxes to activities which were part of interstate commerce, the Supreme Court adopted a new test for evaluating taxes on interstate business. *Id.* at 288-89. The Court reasoned that the privilege of doing interstate business was not immune from state taxation and that a per se prohibition against taxing activity which was part of interstate commerce was unreasonable. *Id.* at 286-89. Under the new test for jurisdiction to tax, premised on Commerce Clause considerations, a tax is to be sustained if the tax: (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce and (4) is fairly related to the services provided by the state. *Id.* at 279. The Supreme Court upheld the Mississippi sales tax because it met the requirements set out by the new test. *Id.* at 289.

193. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1976). *See supra* note 192 (describing *Complete Auto* and giving language of four part test). The Supreme Court's adoption of the *Complete Auto* test was significant. The Court had espoused the prevailing doctrine prior to this decision in *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602 (1951), *overruled by* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1976). The *Spector* doctrine, also formulated in response to a tax on interstate transportation, forbade the imposition of taxes on purely interstate transactions. 340 U.S. at 609. The Court had considered state taxes on business that was exclusively interstate in character to be an undue infringement on the taxing power of the federal government, and these taxes were strictly forbidden, no matter how fairly the tax was apportioned to reflect business within the state. *Id.*

194. *See* Amerada Hess Corp. v. New Jersey, 490 U.S. 66, 79-80 (1989) (stating that *Complete Auto* test encompasses due process standards and holding that if tax satisfies all four prongs of *Complete Auto* test, tax does not violate due process).

195. 453 U.S. 609 (1981). In *Commonwealth Edison*, Montana coal producers and their out-of-state utility customers brought a Commerce Clause challenge to a Montana statute that imposed a severance tax on each ton of coal mined in the state. 453 U.S. at 613. The coal producers and customers did not dispute that the first requirement of the *Complete Auto* test—that the taxed activity have a substantial nexus with the state—was satisfied because the coal subjected to the severance tax was located within Montana. *Id.* at 617. However, Commonwealth Edison did dispute the contention that the tax was fairly related to the services Commonwealth Edison received from the state, the fourth requirement of the *Complete Auto* test. *Id.* at 620. Commonwealth Edison argued that the amount of money the state received in taxes from coal corporations far exceeded the value of the government services provided to the coal mining industry. *Id.* The Supreme Court held that the Due Process Clause does not require the amount of general revenue taxes collected from a particular activity to be reasonably related to the value of the state government services provided to the activity. *Id.* at 622. The tax burden merely has to be reasonably related to the extent of the taxpayer's contact with the state—in other words, to the taxpayer's earnings that the state has made possible by providing a civilized society. *Id.* at 625-26.

for a particular activity correspond to the value of the state government services provided to the activity.[196] In *D.H. Holmes Co. v. McNamara*,[197] the Court referred to a retailer's economic presence in the state in evaluating a nexus under the *Complete Auto* test, but ultimately relied on the retailer's actual physical presence in the state and *Bellas Hess* due process principles to uphold jurisdiction to tax.[198] The Court relied upon the *Bellas Hess* emphasis on physical presence when evaluating due process nexus concerns in *Goldberg v. Sweet*,[199] and stated that receipt of interstate transmissions was not sufficient to uphold jurisdiction to tax.[200] The Supreme Court mentioned that *Commonwealth Edison*, *D.H. Holmes*, and *Goldberg* represented the continuing vitality of the *Bellas Hess* due process test.[201] The fact that the *Bellas Hess* physical presence test survived *Complete Auto* analysis further underscores the importance of the shift in due process analysis demonstrated in *Quill*.

---

196. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981).

197. 486 U.S. 24 (1988). In *D.H. Holmes*, the Supreme Court upheld a use tax levied on the purchase of catalogs by a Louisiana corporation from an out-of-state vendor. 486 U.S. at 24. The corporation, D.H. Holmes, owned and operated thirteen deparment stores employing 5,000 workers throughout Louisiana. *Id.* at 26. Because the challenge to the use tax came under the commerce Clause, the Cort applied the *Complete Auto* test. *Id.* at 30. In applying the *Complete Auto* test, the Court rejected D.H. Holmes' contention that because the company sent the catalogs in the mail, they were part of the stream of commerce and not subject to taxation. *Id.* at 31. The Court held that the facts of the case met all four prongs of the *Complete Auto* test. *Id.* at 32. The Court found that the use tax was fairly related to the benefits provided by the state—the fourth prong of the *Complete Auto* test—because Louisiana provided a number of services facilitating D.H. Holmes' sale of merchandise within the state, including fire and police protection for the stores and public roads for customers. *Id.*

D.H. Holmes claimed that its distribution of catalogs in Louisiana was analogous to the mail order vendor's activities in *Bellas Hess. Id.* at 33. Looking to *Bellas Hess*, the Supreme court state that the mail order shipments in the two cases were not similar. *Id.* The Court then stated that the claimed analogy ignored the vendor's significant economic presence in Louisiana, with $100 million per year in sales, the retailers' physical presence manifested by several stores, D.H. Holmes's connections with the state, and the direct benefits it received from Louisiana in conducting its business. *Id.* at 32. The Court held that D.H. Holmes had nexus aplenty with Louisiana and that imposition of the use tax did not violate the Commerce Clause. *Id.* at 33-34.

198. D.H. Holmes Co. v. McNamara, 486 U.S. 24, 32-33 (1988).

199. 488 U.S. 252 (1989). In *Goldberg v. Sweet*, taxpayers brought suit protesting a five percent tax on interstate telephone calls. 488 U.S. at 257. Telecommunications retailers joined in the suit because the state required them to collect and remit the tax on calls which originated or terminated in Illinois and which were charged to an Illinois address for payment. *Id.* at 255-57. The Due Process Clause posed no problem for the tax collection aspect of the *Goldberg* statute because the telecommunications retailer had a significant physical presence in Illinois. *Id.* at 258 n.9. Rather, the dispute focused on whether Illinois had a sufficient nexus with the taxable activity—the telephone calls—to satisfy the Commerce Clause. *Id.* at 256-57.

While the Court decided that telephone calls did have sufficient nexus with Illinois to justify jurisdiction to tax, the Court noted that without the company's physical presence in the state, the nexus would not be sufficient to satisfy due process concerns. *Id.* at 263.

200. Goldberg v. Sweet, 488 U.S. 252, 263 (1989).

201. Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1912 (1992).

Lower courts and commentators alike have asserted that modern tax analysis renders both the Commerce Clause and the Due Process Clause reasoning in *Bellas Hess* obsolete.[202] Yet, the Supreme Court made a special point in *Quill* to distinguish Commerce Clause analysis for tax jurisdiction from Due Process Clause analysis.[203] Although satisfaction of the nexus requirements set out by the Commerce Clause might indicate ipso facto that the due process nexus requirements are satisfied, satisfaction of the nexus requirements under the Due Process Clause does not mean ipso facto that Commerce Clause nexus requirements are met.[204] With this shift in tax analysis and the acceptance of economic contacts for due process analysis, Commerce Clause nexus requirements could become more stringent than Due Process Clause requirements.[205] Indeed, the physical presence requirement is still potent under Commerce Clause requirements for jurisdiction to require mail order retailers to collect state sales taxes.[206]

VII. The Future of Due Process Analysis of Jurisdiction to Tax

Several developments justify the shift in due process analysis reflected in *Quill*. First, the nature of the telecommunications industry has undergone radical changes since 1967, and the retail market has become increasingly interstate.[207] Retailers simply have no need to establish a physical presence in a state in order to make millions of dollars worth of sales. Second, the increased market share of mail order retailers[208] reflects the increasingly

---

202. *See* Quill Corp. v. North Dakota, 470 N.W.2d 203, 209-10 (N.D. 1991) (applying *Complete Auto* test to mail order use tax collection problem to conclude that foundational basis of *Bellas Hess* was eroded), *aff'd in part*, 112 S. Ct. 1904 (1992); McCray, *supra* note 1, at 288-90 (arguing that *Complete Auto* test alters Commerce Clause and Due Process Clause analysis for jurisdiction to tax).

203. *See* Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1909 (1992) (stating that nexus requirements of Due Process and Commerce Clauses are not identical because they are animated by different constitutional concerns and policies).

204. *Quill*, 112 S. Ct. at 1909.

205. *Id.* The Court notes that the touchstone of due process nexus analysis is notice or fair warning. *Id.* The fundamental concern for Commerce Clause analysis is a structural concern about the effects of state regulation on the national economy. *Id.*

206. *Id.* at 1916.

207. *See* Brief for Respondent, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (describing evolution of technology available to mail order companies), *aff'd in part*, 112 S. Ct. 1904 (1992). Advances in computer software programming, database management, fax machines and telephones have made it much easier for marketers to communicate with the customer. It is possible that interactive voice response technology, which allows a customer to place an order by just pressing a few buttons on a touch-tone phone, will be available soon. *Id.* In fact, Quill already makes a computer software program available to its customers which allows direct communication between Quill and the customer *via* computer modem. *Id.*

208. *See* McCray, *supra* note 1, at 266 (stating that in 1984, mail order retail sales accounted for fourteen percent of all retail transactions and are growing faster than in-state purchases); Geoffrey A. Campbell, *High Court to Study Scope of State Taxes In Disputes Valued at $3 Billion a Year*, The Bond Buyer, Dec. 31, 1991, at 2 (citing that mail order sales have steadily mounted since mid-1960's, growing 18.9 percent between 1988 and 1990, to $57.75 billion from $48.3 billion); Jeanne Dugan Cooper, *States Taxed by Catalog Issue*, Newsday, June 18, 1991, at 31 (stating number of people shopping at home through mail-order has increased 72 percent 1983 to 98.6 million people).

interstate nature of our economy. In addition, advanced technology makes it less complicated for mail-order companies to calculate and collect the use tax, reducing the collection burden.[209] A corporation's physical presence in the state no longer correlates to the amount of benefits it might receive from the corporation. For instance, the presence of two independent contractors soliciting orders within a state does not confer more benefits on a corporation than access to millions of customers through phone lines and the United States Mail.[210]

In *Quill*, the Court has indicated its willingness to adapt to a changing economy. However, the Court did uphold *Bellas Hess* on Commerce Clause grounds while clarifying that the Due Process Clause poses no barrier to congressional action addressing the use tax collection issue.[211] By upholding *Bellas Hess* on Commerce Clause grounds, the Court has handed Congress the responsibility for determining the constitutionality of use tax collection statutes and for addressing the thorny problem of retroactive tax liability.[212]

---

209. *See* Respondents' Brief, *Quill* (No. 91-194) (describing software technology available to calculate tax on each transaction and integrate tax rate information directly into direct marketers' own computerized billing system); *see generally* Ray Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 VAND. L. REV. 1097 (1986) (discussing computer technology that is designed to assist in tax calculation).

210. Justice Scalia, during oral arguments, asked counsel for Quill why a company with a couple of independent contractors acting as sales agents in a state derived more benefits from the state than a mail order retailer which sends catalogs into a state, deriving millions of dollars of revenue and using state financial institutions to complete the sales. Counsel for Quill replied that *Bellas Hess* had been well-reasoned, but did not explain why the benefits derived from the in-state agents were greater than those derived from mail-order access to state customers. Justice Scalia noted skepticism regarding separate tax treatment for the two scenarios and remarked that the Court had overturned precedent in the past when the precedent was based upon faulty reasoning. *See State Taxation of Mail-Order Sales*, *supra* note 165, at 3511-12 (noting Justice Scalia's skepticism regarding *Bellas Hess*'s treatment of mail order companies differently than small businesses which are forced to send sales representatives into state to obtain business for purposes of use tax collection); Geoffrey A. Campbell, *States' Treasuries Could See Revenue Boosts if Supreme Court Overturns Two Tax Cases*, THE BOND BUYER, Jan. 23, 1992, at 6 (describing oral argument exchange regarding distinction between collecting tax on sales of items sold by field representatives and items sold over phone). The Supreme Court's opinion in *Quill* recognized that the physical presence distinction was artificial and led to irrational results. *Quill*, 112 S. Ct. at 1910-11.

211. Justice O'Connor noted that the use tax issue might be better suited for Congress because Congress could address the retroactivity issue. *See infra* note 212 (describing retroactivity problem in overturn of *Bellas Hess*). Chief Justice Rehnquist asked counsel for the State of North Dakota if it would help Congress address the use tax issue if the Court ruled that *Bellas Hess* was a Commerce Clause case. *See State Taxation of Mail-Order Sales*, *supra* note 165, at 3512.

212. Because some states passed statutes that require use tax collection by out-of-state retailers several years ago, the Court's overturn of *Bellas Hess* could have imposed retroactive tax liability on retailers who had refused to comply by asserting the protection of *Bellas Hess*. *See e.g.*, ALA. CODE § 40-23-68(b)(5) (Supp. 1991) (becoming effective 4-30-86); IOWA CODE ANN. § 422.43(12) (West 1990) (becoming effective 7-01-88); NEB. REV. STATE. § 77-2702(21) (1990) (becoming effective 10-01-87) ; OHIO REV. CODE ANN. § 5741.01(H) (Anderson Supp. 1990) (becoming effective 10-05-87). The Supreme Court recently has addressed the retroactivity

The onus is now on Congress to take action to bring use tax collection requirements in line with twentieth century reality.[213]

The most important task for Congress is the preservation of the traditionally higher standard required for jurisdiction to tax. While it is logical to permit economic or technological contacts, such as telephone, mail order or computer solicitation, to factor into the analysis of jurisdiction to tax, the Due Process Clause still requires more contacts with a state to give rise to tax jurisdiction than to give rise to adjudicatory jurisdiction. As historical

---

of the invalidation of tax schemes and has found that once a tax is invalidated, retroactive relief must be granted to the taxpayer. *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) (holding that state could not apply invalidation of discriminatory state liquor tax statute prospectively to deny taxpayer claims for refund and that state must provide retroactive refunds to taxpayers); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39 (1990) (finding that Due Process Clause requires state to provide meaningful backward-looking relief to taxpayers once court has declared tax to be unconstitutional).

Quill presented a different problem: whether tax collectors could be held retroactively liable for taxes which were unconstitutional when assessed, but judged to be constitutional at a later point in time. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), established a three factor test to determine when prospective, rather than retroactive, application of a change in the law was appropriate. The factors for consideration are: (1) whether the decision establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression; (2) whether the purpose of the new rule is furthered by retroactive application; and (3) whether inequitable results would result from retroactive application. *Chevron*, 404 U.S. at 106-07. Given the treatment of *Chevron* in recent decisions and the disparity of views of Supreme Court justices on the issue of retroactivity, it is not at all clear whether the *Chevron* prospectivity test would have applied had the Court overturned *Bellas Hess* in *Quill*. *See generally* Albin C. Koch, *Beam Resolves Taxpayer Claims under Davis but Quill Raises New Prospectivity Issue*, 43 TAX EXECUTIVE 321 (1991) (discussing recent decisions addressing retroactivity, views of various justices on issue of retroactivity and potential outcome of *Quill*).

The overturn of *Bellas Hess* and consequent potential retroactive tax liability could have brought great hardship to retailers who, relying on *Bellas Hess*, had failed to collect taxes. Because collecting sales taxes due on purchases dating back several years from customers would be virtually impossible, the mail-order firms would inevitably have had to bear the tax burden themselves. *See* Brief for Petitioner, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (stating that potential back-tax liability which would accrue from overturn of *Bellas Hess* would wipe out many businesses), *aff'd in part*, 60 U.S.L.W. 4423 (U.S. May 26, 1992); *Amicus Curiae* Brief by Tax Executives Institute in Support of Petitioner, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (describing how retroactive application of any decision curtailing protection afforded by *Bellas Hess* would inflict major hardship on interstate commerce and unjustly reward states for passing statutes in defiance of Court's holdings); *see also Amicus Curiae* Brief by Arizona Mail Order Company in Support of Petitioner, at Appendix E, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (estimating potential retroactive liability by state that would result from overruling of *Bellas Hess*), *aff'd in part*, 60 U.S.L.W. 4423 (U.S. May 26, 1992).

213. *See* Gillis, *supra* note 1, at 556-65 (discussing potential federal legislation to provide for use tax collection and remove Commerce Clause obstacle). Quill urged the Court to leave any changes in tax jurisdiction to Congress, a body with more flexibility to fashion solutions for the use tax problem. *See* Brief for Respondent, Quill Corp. v. North Dakota, 470 N.W.2d 203 (N.D. 1991) (arguing that Congress is appropriate body to regulate and control commerce because congressional consideration would provide adequate basis for creation of integrated national rules), *aff'd in part*, 60 U.S.L.W. 4423 (U.S. May 26, 1992).

analysis of tax and adjudicatory jurisdiction indicates, the distinction between the two types of jurisdiction recognizes the more substantial burdens imposed by tax liability and prevents states from overstepping the bounds of their authority. The higher level of nexus required for taxation is well-founded in due process jurisprudence and should be reflected in whatever action Congress takes and in future application of *Quill*. However, the different levels of contacts may be maintained while eradicating the arbitrary physical presence test.

It is fitting that the Court has left the details of use tax collection requirements to Congress to decide. Congress can address the retroactivity problem and any special burdens that might be placed on small mail order retailers.[214] A joint effort from the Supreme Court and from Congress can put the outdated physical test to rest and create a level playing field for all retailers.

Catherine V. Lane

214. *See* Gillis, *supra* note 1, at 561-62 (discussing special burdens posed to small mail order retailers).