Supreme Court collection

Quill Corp. v. North Dakota (91-0194), 504 U.S. 298 (1992).

Other [White]	Concurrence [Scalia]	Syllabus	Opinion [Stevens]
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SUPREME COURT OF THE UNITED STATES

No. 91-194

QUILL CORPORATION, PETITIONER *v.* NORTH DAKOTA by and through its TAX COMMIS SIONER, HEIDI HEITKAMP

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

[May 26, 1992]

Justice Stevens delivered the opinion of the Court.

In this case the Supreme Court of North Dakota declined to follow *Bellas Hess* because "the tremendous social, economic, commercial, and legal innovations" of the past quarter century have rendered its holding "obsole[te]." 470 N. W. 2d 203, 208 (1991). Having granted certiorari, 502 U. S. ___, we must either reverse the State Supreme Court or overrule *Bellas Hess*. While we agree with much of the State Court's reasoning, we take the former course.

Quill is a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. None of its employees work or reside in North Dakota and its ownership of tangible property in that State is either insignificant or nonexistent. [n.1] Quill sells office equipment and supplies; it solicits business through catalogs and flyers, advertisements in national periodicals, and telephone calls. Its annual national sales exceed $200,000,000, of which almost $1,000,000 are made to about 3,000 customers in North Dakota. It is the sixth largest vendor of office supplies in the State. It delivers all of its merchandise to its North Dakota customers by mail or common carrier from out of state locations.

As a corollary to its sales tax, North Dakota imposes a use tax upon property purchased for storage, use or consumption within the State. North Dakota requires every "retailer maintaining a place of business in" the State to collect the tax from the consumer and remit it to the State. N. D. Cent. Code § 57-40.2-07 (Supp. 1991). In 1987 North Dakota amended the statutory definition of the term "retailer" to include "every person who engages in regular or systematic solicitation of a consumer market in th[e] state." § 57-40.2-01(6). State regulations in turn define"regular or systematic solicitation" to mean three or more advertisements within a 12 month period. N. D. Admin. Code § 81-04.1-01-03.1 (1988). Thus, since 1987, mail order companies that engage in such solicitation have been subject to the tax even if they maintain no property or personnel in North Dakota.

Quill has taken the position that North Dakota does not have the power to compel it to collect a use tax from its North Dakota customers. Consequently, the State, through its Tax Commissioner, filed this action to require Quill to pay taxes (as well as interest and penalties) on all such sales made after July 1, 1987. The trial court ruled in Quill's favor, finding the case indistinguishable from *Bellas Hess*; specifically, it found that because the State had not shown that it had spent tax revenues for the benefit of the mail order business, there was no "nexus to allow the state to define retailer in the manner it chose." App. to Pet. for Cert. A41.

The North Dakota Supreme Court reversed, concluding that "wholesale changes" in both the economy and the law made it inappropriate to follow *Bellas Hess* today. 470 N. W. 2d, at 213. The principal economic change noted by the court was the remarkable growth of the mail order business "from a relatively inconsequential market niche" in 1967 to a "goliath" with annual sales that reached "the staggering figure of $183.3 billion in 1989." *Id.*, at 208, 209. Moreover, the court observed, advances in computer technology greatly eased the burden of compliance with a " `welter of complicated obligations' " imposed by state and local taxing authorities. *Id.*, at 215 (quoting *Bellas Hess*, 386 U. S., at 759-760).

Equally important, in the court's view, were the changes in the "legal landscape." With respect to the Commerce Clause, the court emphasized that *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), rejected the line of cases holding that the direct taxation of interstate commerce was impermissible and adopted instead a "consistent andrational method of inquiry [that focused on] the practical effect of [the] challenged tax." *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U.S. 425, 443 (1980). This and subsequent rulings, the court maintained, indicated that the Commerce Clause no longer mandated the sort of physical presence nexus suggested in *Bellas Hess*.

Similarly, with respect to the Due Process Clause, the North Dakota court observed that cases following *Bellas Hess* had not construed "minimum contacts" to require physical presence within a State as a prerequisite to the legitimate exercise of state power. The State Court then concluded that "the Due Process requirement of a `minimal connection' to establish nexus is encompassed within the *Complete Auto* test" and that the relevant inquiry under the latter test was whether "the state has provided some protection, opportunities, or benefit for which it can expect a return." 470 N. W. 2d, at 216.

Turning to the case at hand, the State Court emphasized that North Dakota had created "an economic climate that fosters demand for" Quill's products, maintained a legal infrastructure that protected that market, and disposed of 24 tons of catalogs and flyers mailed by Quill into the State every year. *Id.*, at 218-219. Based on these facts, the court concluded that Quill's "economic presence" in North Dakota depended on services and benefits provided by the State and therefore generated "a constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax." *Id.*, at 219. [n.2]

As in a number of other cases involving the application of state taxing statutes to out of state sellers, our holding in *Bellas Hess* relied on both the Due Process Clause and the Commerce Clause. Although the "two claims are closely related," *Bellas Hess*, 386 U. S., at 756, the clauses pose distinct limits on the taxing powers of the States. Accordingly, while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause. See, *e. g.*, *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232 (1987).

The two constitutional requirements differ fundamentally, in several ways. As discussed at greater length below, see *infra*, at Part IV, the Due Process Clause and the Commerce Clause reflect different constitutional concerns. Moreover, while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, see *International Shoe Co.* v. *Washington*, 326 U.S. 310, 315 (1945), it does not similarly have the power to authorize violations of the Due Process Clause.

Thus, although we have not always been precise in distinguishing between the two, the Due Process Clause and the Commerce Clause are analytically distinct.

> " `Due process' and `commerce clause' conceptions are not always sharply separable in dealing with these problems. . . . To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes `undue.' But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of itsburdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are pre-sented, at least tentatively as if they were separate and distinct, not intermingled ones." *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part).

Heeding Justice Rutledge's counsel, we consider each con stitutional limit in turn.

The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344-345 (1954), and that the "income attributed to the State for tax purposes must be rationally related to `values connected with the taxing State.' " *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 273 (1978) (citation omitted). Here, we are concerned primarily with the first of these requirements. Prior to *Bellas Hess*, we had held that that requirement was satisfied in a variety of circumstances involving use taxes. For example, the presence of sales personnel in the State, [n.3] or the maintenance of local retail stores in the State, [n.4] justified the exercise of that power because the seller's local activities were "plainly accorded the protection and services of the taxing State." *Bellas Hess*, 386 U. S., at 757. The furthest extension of that power was recognized in *Scripto, Inc.* v. *Carson*, 362 U.S. 207 (1960), in which the Court upheld a use tax despite the fact that all of the seller's in state solicitation was performed by independent contractors. These cases all involved some sort of physical presencewithin the State, and in *Bellas Hess* the Court suggested that such presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary. We expressly declined to obliterate the "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business." 386 U. S., at 758.

Our due process jurisprudence has evolved substantially in the 25 years since *Bellas Hess*, particularly in the area of judicial jurisdiction. Building on the seminal case of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), we have framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction "such that the maintenance of the suit does not offend `traditional notions of fair play and substantial justice.' " *Id.*, at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). In that spirit, we have abandoned more formalistic tests that focused on a defendant's "presence" within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of government, to require it to defend the suit in that State. In *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977), the Court extended the flexible approach that *International Shoe* had prescribed for purposes of *in personam* jurisdiction to *in rem* jurisdiction, concluding that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."

Applying these principles, we have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State. As we explained in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985):

> "Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence

> frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are `purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.*, at 476 (emphasis in original).

Comparable reasoning justifies the imposition of the collection duty on a mail order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign." *Shaffer* v. *Heitner*, 433 U. S., at 218 (Stevens, J., concurring in judgment). In "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.

In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts are more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State. Wetherefore agree with the North Dakota Supreme Court's conclusion that the Due Process Clause does not bar enforcement of that State's use tax against Quill.

Article I, § 8, cl. 3 of the Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." It says nothing about the protection of interstate commerce in the absence of any action by Congress. Nevertheless, as Justice Johnson suggested in his concurring opinion in *Gibbons* v. *Ogden*, 9 Wheat. 1, 231-232, 239 (1824), the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. The clause, in Justice Stone's phrasing, "by its own force" prohibits certain state actions that interfere with interstate commerce. *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938).

Our interpretation of the "negative" or "dormant" Commerce Clause has evolved substantially over the years, particularly as that clause concerns limitations on state taxation powers. See generally, P. Hartman, Federal Limitations on State and Local Taxation §§ 2:9-2:17 (1981). Our early cases, beginning with *Brown* v. *Maryland*, 12 Wheat. 419 (1827), swept broadly, and in *Leloup* v. *Port of Mobile*, 127 U.S. 640, 648 (1888), we declared that "no State has the right to lay a tax on interstate commerce in any form." We later narrowed that rule and distinguished between direct burdens on interstate commerce, which were prohibited, and indirect burdens, which generally were not. See, *e. g.*, *Sanford* v. *Poe*, 69 F. 546 (CA6 1895), aff'd *sub nom. Adams Express Co.* v. *Ohio State Auditor*, 165 U.S. 194, 220 (1897). *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 256-258 (1938), and subsequent decisions rejected this formal, categorical analysis and adopted a "multiple taxation doctrine" that focused not on whether a tax was "direct" or "indirect" but rather on whether a tax subjected interstate commerce to a risk of multiple taxation. However, in *Freeman* v. *Hewit*, 329 U.S. 249, 256 (1946), we embraced again the formal distinction between direct and indirect taxation, invalidating Indiana's imposition of a gross receipts tax on a particular transaction because that application would "impos[e] a direct tax on interstate sales." Most recently, in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 285 (1977), we renounced the *Freeman* approach as "attaching constitutional significance to a semantic difference." We expressly overruled one of *Freeman*'s progeny, *Spector Motor Service*, *Inc.* v. *O'Connor*, 340 U.S. 602 (1951), which held that a tax on "the privilege of doing interstate business" was unconstitutional, while recognizing that a differently denominated tax with the same economic effect would not be unconstitutional. *Spector*, as we observed in *Railway Express Agency*, *Inc.* v. *Virginia*, 358 U.S. 434, 441 (1959), created a situation in which "magic words or labels" could "disable an otherwise constitutional levy." *Complete Auto* emphasized the importance of looking past "the formal language of the tax statute [to] its practical effect," *Complete Auto*, 430 U. S., at 279, and set forth a four part test that continues to govern the validity of state taxes under the Commerce Clause. [n.5]

Bellas Hess was decided in 1967, in the middle of this latest rally between formalism and pragmatism. Contrary to the suggestion of the North Dakota Supreme Court, this timing does not mean that *Complete Auto* rendered *Bellas Hess* "obsolete." *Complete Auto* rejected *Freeman* and *Spector*'s formal distinction between "direct" and "indirect"taxes on interstate commerce because that formalism allowed the validity of statutes to hinge on "legal terminol ogy," "draftsmanship and phraseology." 430 U. S., at 281. *Bellas Hess* did not rely on any such labeling of taxes and therefore did not automatically fall with *Freeman* and its progeny.

While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases. Under *Complete Auto*'s four part test, we will sustain a tax against a Commerce Clause challenge so long as 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." 430 U. S., at 279. *Bellas Hess* concerns the first of these tests and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause.

Thus, three weeks after *Complete Auto* was handed down, we cited *Bellas Hess* for this proposition and discussed the case at some length. In *National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551, 559 (1977), we affirmed the continuing vitality of *Bellas Hess*' "sharp distinction . . . between mail order sellers with [a physical presence in the taxing] State and those . . . who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." We have continued to cite *Bellas Hess* with approval ever since. For example, in *Goldberg* v. *Sweet*, 488 U.S. 252, 263 (1989), we expressed "doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call. See *National Bellas Hess* . . . (receipt of mail provides insufficient nexus)." See also *D. H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 33 (1988); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S., at 437; *National Geographic Society*, 430 U. S., at 559. For these reasons, we disagree with the State Supreme Court's conclusion that our decision in *Complete Auto* undercut the *Bellas Hess* rule.

The State of North Dakota relies less on *Complete Auto* and more on the evolution of our due process jurisprudence. The State contends that the nexus requirements imposed by the Due Process and Commerce Clauses are equivalent and that if, as we concluded above, a mail order house that lacks a physical presence in the taxing State nonetheless satisfies the due process "minimum contacts" test, then that corporation also meets the Commerce Clause "substantial nexus" test. We disagree. Despite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are animated by different constitutional concerns and policies.

Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis. In contrast, the Commerce Clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. Under the Articles of Confederation, State taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. See generally The Federalist Nos. 7, 11 (A. Hamilton). It is in this light that we have interpreted the negative implication of the Commerce Clause. Accordingly, we have ruled that that Clause prohibits discrimination against interstate commerce, see,*e. g.*, *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), and bars state regulations that unduly burden interstate commerce, see, *e. g.*, *Kassel* v. *Consolidated Freightways Corp. of Del.*, 450 U.S. 662 (1981).

The *Complete Auto* analysis reflects these concerns about the national economy. The second and third parts of that analysis, which require fair apportionment and non discrimination, prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. The first and fourth prongs, which require a substantial nexus and a relationship between the tax and State provided services, limit the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce. [n.6] Thus, the "substantial nexus" requirement is not, like due process' "minimum contacts" requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. Accordingly, contrary to the

State's suggestion, a corporation may have the "minimum contacts" with a taxing State as required by the Due Process Clause, and yet lack the "substantial nexus" with that State as required by the Commerce Clause. [n.7]

The State Supreme Court reviewed our recent Commerce Clause decisions and concluded that those rulings signalled a "retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach" and thus supported its decision not to apply *Bellas Hess*. 470 N. W. 2d, at 214 (citing *Standard Pressed Steel Co.* v. *Department of Revenue of Wash.*, 419 U.S. 560 (1975), and *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232 (1987)). Although we agree with the State Court's assessment of the evolution of our cases, we do not share its conclusion that this evolution indicates that the Commerce Clause ruling of *Bellas Hess* is no longer good law.

First, as the State Court itself noted, 470 N. W. 2d, at 214, all of these cases involved taxpayers who had a physical presence in the taxing State and therefore do not directly conflict with the rule of *Bellas Hess* or compel that it be overruled. Second, and more importantly, although our Commerce Clause jurisprudence now favors more flexible balancing analyses, we have never intimated a desire to reject all established "bright line" tests. Although we have not, in our review of other types of taxes, articulated the same physical presence requirement that *Bellas Hess* established for sales and use taxes, that silence does not imply repudiation of the *Bellas Hess* rule.

Complete Auto, it is true, renounced *Freeman* and its progeny as "formalistic." But not all formalism is alike. *Spector*'s formal distinction between taxes on the "privilegeof doing business" and all other taxes served no purpose within our Commerce Clause jurisprudence, but stood "only as a trap for the unwary draftsman." *Complete Auto*, 430 U. S., at 279. In contrast, the bright line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause. Undue burdens on interstate commerce may be avoided not only by a case by case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach and created a safe harbor for vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." Under *Bellas Hess*, such vendors are free from state imposed duties to collect sales and use taxes. [n.8]

Like other bright line tests, the *Bellas Hess* rule appears artificial at its edges: whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office. Cf. *National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551 (1977); *Scripto, Inc.* v. *Carson*, 362 U.S. 207 (1960). This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefitis important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457-458 (1959).

Moreover, a bright line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. [n.9] Indeed, it is not unlikely that the mail order industry's dramatic growth over the last quarter century is due in part to the bright line exemption from state taxation created in *Bellas Hess*.

Notwithstanding the benefits of bright line tests, we have, in some situations, decided to replace such tests with more contextual balancing inquiries. For example, in *Arkansas Electric Cooperative Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983), we reconsidered a bright line test set forth in *Public Utilities Comm'n of R. I.* v. *AttleboroSteam & Electric Co.*, 273 U.S. 83 (1927). *Attleboro* distinguished between state regulation of *wholesale* salesof electricity, which was constitutional as an "indirect" regulation of interstate commerce, and state regulation of *retail* sales of electricity, which was unconstitutional as a "direct regulation" of commerce. In *Arkansas Electric*, we considered whether to "follow the mechanical test set out in *Attleboro*, or the balance of interests test applied in our Commerce Clause cases." *Arkansas Electric Cooperative Corp.*, 461 U. S., at 390-391. We first observed that "the principle of *stare decisis* counsels us, here as elsewhere, not lightly to set aside specific guidance of the sort we find in *Attleboro*." *Id.*, at 391. In deciding to reject the *Attleboro* analysis, we were influenced by the fact that the "mechanical test" was "anachronistic," that the Court had rarely relied on the test, and that we could "see no strong reliance interests" that would be upset by the rejection of that test. *Id.*, at 391-392. None of those factors obtains in this case. First, the *Attleboro* rule was "anachronistic" because it relied on formal distinctions between "direct" and "indirect" regulation (and on the regulatory counterparts of our *Freeman* line of cases); as discussed above, *Bellas Hess* turned on a different logic and thus remained sound after the Court repudiated an analogous distinction in *Complete Auto*. Second, unlike the *Attleboro* rule, we have, in our decisions, frequently relied on the *Bellas Hess* rule in the last 25 years, see *supra*, at 11, and we have never intimated in our review of sales or use taxes that *Bellas Hess* was unsound. Finally, again unlike the *Attleboro* rule, the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizeable industry. The "interest in stability and orderly development of the law" that undergirds the doctrine of *stare decisis*, see *Runyon* v. *McCrary*, 427 U.S. 160, 190-191 (1976) (Stevens, J., concurring), therefore counsels adherence to settled precedent.

In sum, although in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright line, physical presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes. To the contrary, the continuing value of a bright line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law. For these reasons, we disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright line test of *Bellas Hess*.

This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, [n.10] but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. See *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946). Indeed, in recent years Congress has considered legislation that would "overrule" the *Bellas Hess* rule. [n.11] Its decision not to take action in this direction may, of course, have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits States from imposing such taxes, but today we have put that problem to rest. Accordingly, Congress is now free to decide whether, when, and to what extent the States mayburden interstate mail order concerns with a duty to collect use taxes.

Indeed, even if we were convinced that *Bellas Hess* was inconsistent with our Commerce Clause jurisprudence, "this very fact [might] giv[e us] pause and counse[l] withholding our hand, at least for now. Congress has the power to protect interstate commerce from intolerable or even undesirable burdens." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 637 (1981) (White, J., concurring). In this situation, it may be that "the better part of both wisdom and valor is to respect the judgment of the other branches of the Government." *Id.*, at 638.

The judgment of the Supreme Court of North Dakota is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Notes

[1] In the trial court, the State argued that because Quill gave its customers an unconditional 90 day guarantee, it retained title to the merchandise during the 90 day period after delivery. The trial court held, however, that title passed to the purchaser when the merchandise was received. See App. to Pet. for Cert. A40 A41. The State Supreme Court assumed for the purposes of its decision that that ruling was correct. 470 N. W. 2d 203, 217, n. 13. The State Supreme Court also noted that Quill licensed a computer software program to some of its North Dakota customers that enabled them to check Quill's current inventories and prices and to place orders directly. *Id.*, at 216-217. As we shall explain, Quill's interests in the licensed software does not affect our analysis of the due process issue and does not comprise the "substantial

nexus" required by the Commerce Clause. See *infra* n. 8.

[2] The court also suggested that, in view of the fact that the "touchstone of Due Process is fundamental fairness" and that the "very object" of the Commerce Clause is protection of interstate business against discriminatory local practices, it would be ironic to exempt Quill from this burden and thereby allow it to enjoy a significant competitive advantage over local retailers. 470 N. W. 2d, at 214-215.

[3] *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62 (1939).

[4] *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941).

[5] Under our current Commerce Clause jurisprudence, "with certain restrictions, interstate commerce may be required to pay its fair share of state taxes." *D. H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 31 (1988); see also *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 623-624 (1981) ("[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business") (internal quotation and citation omitted).

[6] North Dakota's use tax illustrates well how a state tax might unduly burden interstate commerce. On its face, North Dakota law imposes a collection duty on every vendor who advertises in the State three times in a single year. Thus, absent the *Bellas Hess* rule, a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection duty. What is more significant, similar obligations might be imposed by the Nation's 6,000 plus taxing jurisdictions. See *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U.S. 753, 759-760 (1967) (noting that the "many variations in rates of tax, in allowable exemptions, and in administrative and record keeping requirements could entangle [a mail order house] in a virtual welter of complicated obligations") (footnotes omitted); see also Shaviro, An Economic and Political Look at Federalism in Taxation, 90 Mich. L. Rev. 895, 925-926 (1992).

[7] We have sometimes stated that the "*Complete Auto* test, whileresponsive to Commerce Clause dictates, encompasses as well . . . Due Process requirement[s]." *Trinova Corp* v. *Michigan Dept. of Treasury*, 498 U. S. ___, ___ (1991) (slip op. 12). Although such comments might suggest that every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well true: a tax may be consistent with Due Process and yet unduly burden interstate commerce. See, *e. g.*, *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232 (1987).

[8] In addition to its common carrier contacts with the State, Quill also licensed software to some of its North Dakota clients. See *supra* n. 1. The State "concedes that the existence in North Dakota of a few floppy diskettes to which Quill holds title seems a slender thread upon which to base nexus." Brief for Respondent 46. We agree. Although title to "a few floppy diskettes" present in a State might constitute some minimal nexus, in *National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551, 556 (1977), we expressly rejected a " `slightest presence' standard of constitutional nexus." We therefore conclude that Quill's licensing of software in this case does not meet the "substantial nexus" requirement of the Commerce Clause.

[9] It is worth noting that Congress has, at least on one occasion, followed a similar approach in its regulation of state taxation. In response to this Court's indication in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 452 (1959), that, so long as the taxpayer has an adequate nexus with the taxing State, "net income from the interstate operations of a foreign corporation may be subjected to state taxation," Congress enacted Pub. L. 86-272, codified at 15 U.S.C. § 381. That statute provides that a State may not impose a net income tax on any person if that person's "only business activities within such State [involve] the solicitation of orders [approved] outside the State [and] filled . . . outside the State." 15 U.S.C. § 381. As we noted in *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 280 (1972), in enacting § 381, "Congress attempted to allay the apprehension of businessmen that `mere solicitation' would subject them to state taxation. . . . Section 381 was designed to define clearly a lower

limit for the exercise of [the State's power to tax]. *Clarity that would remove uncertainty was Congress' primary goal*." (Emphasis supplied.)

[10] Many States have enacted use taxes. See App. 3 to Brief for Direct Marketing Association as *Amicus Curiae*. An overruling of *Bellas Hess* might raise thorny questions concerning the retroactive application of those taxes and might trigger substantial unanticipated liability for mail order houses. The precise allocation of such burdens is better resolved by Congress rather than this Court.

[11] See, *e. g.*, H. R. 2230, 101st Cong., 1st Sess. (1989); S. 480, 101st Cong., 1st Sess. (1989); S. 2368, 100th Cong., 2d Sess. (1988); H. R. 3521, 100th Cong., 1st Sess. (1987); S. 1099, 100th Cong., 1st Sess. (1987); H. R. 3549, 99th Cong., 1st Sess. (1985); S. 983, 96th Cong., 1st Sess. (1979); S. 282, 93d Cong., 1st Sess. (1973).