SUPREME COURT OF THE UNITED STATES

No. 91–194

QUILL CORPORATION, PETITIONER *v.* NORTH DAKOTA BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

[May 26, 1992]

JUSTICE WHITE, concurring in part and dissenting in part.

Today the Court repudiates that aspect of our decision in *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), which restricts, under the Due Process Clause of the Fourteenth Amendment, the power of the States to impose use tax collection responsibilities on out-of-state mail order businesses that do not have a ``physical presence'' in the State. The Court stops short, however, of giving *Bellas Hess* the complete burial it justly deserves. In my view, the Court should also overrule that part of *Bellas Hess* which justifies its holding under the Commerce Clause. I, therefore, respectfully dissent from Part IV.

In Part IV of its opinion, the majority goes to some lengths to justify the *Bellas Hess* physical presence requirement under our Commerce Clause jurisprudence. I am unpersuaded by its interpretation of our cases. In *Bellas Hess*, the majority placed great weight on the interstate quality of the mail order sales, stating that ``it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved.'' *Bellas Hess*, *supra*, at 759. As the majority correctly observes, the idea of prohibiting States from taxing ``exclusively interstate'' transactions had been an important part of our

jurisprudence for many decades, ranging intermittently from such cases as *Case of State Freight Tax*, 15 Wall. 232, 279 (1873), through *Freeman* v. *Hewit*, 329 U. S. 249, 256 (1946), and *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951). But though it recognizes that *Bellas Hess* was decided amidst an upheaval in our Commerce Clause jurisprudence, in which we began to hold that ``a State, with proper drafting, may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause,'' *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 285 (1977), the majority draws entirely the wrong conclusion from this period of ferment.

The Court attempts to paint *Bellas Hess* in a different hue from *Freeman* and *Spector* because the former ``did not rely'' on labeling taxes that had ``direct'' and ``indirect'' effects on interstate commerce. See *ante*, at 10–11. Thus, the Court concludes, *Bellas Hess* ``did not automatically fall with *Freeman* and its progeny'' in our decision in *Complete Auto*. See *id.*, at 11. I am unpersuaded by this attempt to distinguish *Bellas Hess* from *Freeman* and *Spector*, both of which were repudiated by this Court. See *Complete Auto*, *supra*, at 288–289, and n.15. What we disavowed in *Complete Auto* was not just the ``formal distinction between `direct' and `indirect' taxes on interstate commerce,'' *ante*, at 10, but also the whole notion underlying the *Bellas Hess* physical presence rule—that ``interstate commerce is immune from state taxation.'' *Complete Auto*, *supra*, at 288.

The Court compounds its misreading by attempting to show that *Bellas Hess* ``is not inconsistent with *Complete Auto* and our recent cases.'' *Ante*, at 11. This will be news to commentators, who have rightly criticized *Bellas Hess*.[1] Indeed, the majority displays no small amount of audacity in claiming that our decision in *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551, 559 (1977), which was rendered several weeks after *Complete Auto*, reaffirmed the continuing vitality of *Bellas Hess*. See

[1]See, *e.g.*, P. Hartman, Federal Limitations on State and Local Taxation §10.8 (1981); Hartman, Collection of Use Tax on Out-of-State Mail-Order Sales, 39 Vand. L. Rev. 993, 1006–1015 (1986); Hellerstein, Significant Sales and Use Tax Developments During the Past Half Century, 39 Vand. L. Rev. 961, 984–985 (1986); McCray, Overturning *Bellas Hess*: Due Process Considerations, 1985 B.Y.U.L. Rev. 265, 288–290; Rothfeld, Mail Order Sales and State Jurisdiction to Tax, 53 Tax Notes 1405, 1414–1418 (1991).

ante, at 11.

Our decision in that case did just the opposite. *National Geographic* held that the National Geographic Society was liable for use tax collection responsibilities in California. The Society conducted an out-of-state mail order business similar to the one at issue here and in *Bellas Hess*, and in addition, maintained two small offices in California that solicited advertisements for National Geographic Magazine. The Society argued that its physical presence in California was unrelated to its mail order sales, and thus that the *Bellas Hess* rule compelled us to hold that the tax collection responsibilities could not be imposed. We expressly rejected that view, holding that the ``requisite nexus for requiring an out-of-state seller [the Society] to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate `some definite link, some minimum connection, between (the State and) the *person* . . . it seeks to tax.''' 430 U. S., at 561 (citation omitted).

By decoupling any notion of a *transactional* nexus from the inquiry, the *National Geographic* Court in fact repudiated the free trade rationale of the *Bellas Hess* majority. Instead, the *National Geographic* Court relied on a due process-type minimum contacts analysis that examined whether a link existed between the seller and the State wholly apart from the seller's in-state transaction that was being taxed. Citations to *Bellas Hess* notwithstanding, see 430 U. S., at 559, it is clear that rather than adopting the rationale of *Bellas Hess*, the *National Geographic* Court was instead politely brushing it aside. Even were I to agree that the free trade rationale embodied in *Bellas Hess*' rule against taxes of purely interstate sales was required by our cases prior to 1967, therefore, I see no basis in the majority's opening premise that this substantive underpinning of *Bellas*

Hess has not since been disavowed by our cases.[2]

The Court next launches into an uncharted and treacherous foray into differentiating between the ``nexus'' requirements under the Due Process and Commerce Clauses. As the Court explains, ``[d]espite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are animated by different constitutional concerns and policies.'' *Ante*, at 12. The due process nexus, which the Court properly holds is met in this case, see *ante*, at Part III, ``concerns the fundamental fairness of governmental activity.'' *Ante*, at 12. The Commerce Clause nexus requirement, on the other hand, is

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[2]Similarly, I am unconvinced by the majority's reliance on subsequent decisions that have cited *Bellas Hess*. See *ante*, at 11. In *D.H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 33 (1988), for example, we distinguished *Bellas Hess* on the basis of the company's ``significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business.'' We then went on to note that the situation presented was much more analogous to that in *National Geographic Society* v. *California Bd. of Equalization,* 430 U.S. 551 (1977). See *id.*, at 33–34. In *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 626 (1981), the Court cited *Bellas Hess* not to revalidate the physical presence requirement, but rather to establish that a ``nexus'' must exist to justify imposition of a state tax. And finally, in *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 437 (1980), the Court cited *Bellas Hess* for the due process requirements necessary to sustain a tax. In my view, these citations hardly signal the continuing support of *Bellas Hess* that the majority seems to find persuasive.

``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.'' *Ibid.*

Citing *Complete Auto*, the Court then explains that the Commerce Clause 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.'' *Ante*, at 13. This is very curious, because parts two and three of the *Complete Auto* test, which require fair apportionment and nondiscrimination in order that interstate commerce not be unduly burdened, now appear to become the animating features of the nexus requirement, which is the first prong of the *Complete Auto* inquiry. The Court freely acknowledges that there is no authority for this novel interpretation of our cases and that we have never before found, as we do in this case, sufficient contacts for due process purposes but an insufficient nexus under the Commerce Clause. See *ante*, at 13–14, and n.6.

The majority's attempt to disavow language in our opinions acknowledging the presence of due process requirements in the *Complete Auto* test is also unpersuasive. See *ante*, at 13–14, n. 6 (citing *Trinova Corp.* v. *Michigan Dept. of Treasury*, 498 U. S. ___, ___ (1991) (slip op., at ——)). Instead of explaining the doctrinal origins of the Commerce Clause nexus requirement, the majority breezily announces the rule and moves on to other matters. See *ante*, at 13–14. In my view, before resting on the assertion that the Constitution mandates inquiry into two readily distinct ``nexus'' requirements, it would seem prudent to discern the origins of the ``nexus'' requirement in order better to understand whether the Court's concern traditionally has been with the fairness of a State's tax or some other value.

The cases from which the *Complete Auto* Court derived the nexus requirement in its four-part test

convince me that the issue of ``nexus'' is really a due process fairness inquiry. In explaining the sources of the four-part inquiry in *Complete Auto*, the Court relied heavily on Justice Rutledge's separate concurring opinion in *Freeman* v. *Hewit*, 329 U. S. 249 (1946), the case whose majority opinion the *Complete Auto* Court was in the process of comprehensively disavowing. Instead of the formalistic inquiry into whether the State was taxing interstate commerce, the *Complete Auto* Court adopted the more functionalist approach of Justice Rutledge in *Freeman*. See *Complete Auto*, 430 U. S., at 280–281. In conducting his inquiry, Justice Rutledge used language that by now should be familiar, arguing that a tax was unconstitutional if the activity lacked a sufficient connection to the State to give ``jurisdiction to tax,'' *Freeman*, *supra*, at 271; or if the tax discriminated against interstate commerce; or if the activity was subjected to multiple tax burdens. 329 U.S., at 276–277. Justice Rutledge later refined these principles in *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80 (1948), in which he described the principles that the *Complete Auto* Court would later substantially adopt: ``[I]t is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or `jurisdiction to tax' in that sense is concerned; it is nondiscriminatory . . . ; [it] is duly apportioned . . .; and cannot be repeated by any other state.'' 335 U.S., at 96–97 (concurring opinion) (footnotes omitted).

By the time the Court decided *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959), Justice Rutledge was no longer on the Court, but his view of the nexus requirement as grounded in the Due Process Clause was decisively adopted. In rejecting challenges to a state tax based on the Due Process and Commerce Clauses, the Court stated that ``[t]he taxes imposed are levied only on that portion

of the taxpayer's net income which arises from its activities within the taxing State. These activities form a sufficient `nexus between such a tax and transactions within a state for which the tax is an exaction.''' *Id.*, at 464 (citation omitted). The Court went on to observe that ``[i]t strains reality to say, in terms of our decisions, that each of the corporations here was not sufficiently involved in local events to forge `some definite link, some minimum connection' sufficient to satisfy due process requirements.'' *Id.*, at 464–465 (quoting *Miller Bros.* v. *Maryland*, 347 U. S. 340, 344–345 (1954)). When the Court announced its four-part synthesis in *Complete Auto*, the nexus requirement was definitely traceable to concerns grounded in the Due Process Clause, and not the Commerce Clause, as the Court's discussion of the doctrinal antecedents for its rule made clear. See *Complete Auto*, *supra*, at 281–282, 285. For the Court now to assert that our Commerce Clause jurisprudence supports a separate notion of nexus is without precedent or explanation.

Even were there to be such an independent requirement under the Commerce Clause, there is no relationship between the physical presence/nexus rule the Court retains and Commerce Clause considerations that allegedly justify it. Perhaps long ago a seller's ``physical presence'' was a sufficient part of a trade to condition imposition of a tax on such presence. But in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax. Wire transfers of money involving billions of dollars occur every day; purchasers place orders with sellers by fax, phone, and computer linkup; sellers ship goods by air, road, and sea through sundry delivery services without leaving their place of business. It is certainly true that the days of the door-to-door salesperson are not gone. Nevertheless, an out-of-state direct marketer derives numerous commercial benefits from the State

in which it does business. These advantages include laws establishing sound local banking institutions to support credit transactions; courts to insure collection of the purchase price from the seller's customers; means of waste disposal from garbage generated by mail order solicitations; and creation and enforcement of consumer protection laws, which protect buyers and sellers alike, the former by ensuring that they will have a ready means of protecting against fraud, and the latter by creating a climate of consumer confidence that inures to the benefit of reputable dealers in mail order transactions. To create, for the first time, a nexus requirement under the Commerce Clause independent of that established for due process purposes is one thing; to attempt to justify an anachronistic notion of physical presence in economic terms is quite another.

The illogic of retaining the physical presence requirement in these circumstances is palpable. Under the majority's analysis, and our decision in *National Geographic*, an out-of-state seller with one salesperson in a State would be subject to use tax collection burdens on its entire mail order sales even if those sales were unrelated to the salesperson's solicitation efforts. By contrast, an out-of-state seller in a neighboring State could be the dominant business in the putative taxing State, creating the greatest infrastructure burdens and undercutting the State's home companies by its comparative price advantage in selling products free of use taxes, and yet not have to collect such taxes if it lacks a physical presence in the taxing State. The majority clings to the physical presence rule not because of any logical relation to fairness or any economic rationale related to principles underlying the Commerce Clause, but simply out of the supposed convenience of having a bright-line rule. I am less impressed by the

convenience of such adherence than the unfairness it produces. Here, convenience should give way. Cf. *Complete Auto, supra,* at 289, n.15 (``We believe, however, that administrative convenience . . . is insufficient justification for abandoning the principle that `interstate commerce may be made to pay its way''').

Also very questionable is the rationality of perpetuating a rule that creates an interstate tax shelter for one form of business—mail order sellers—but no countervailing advantage for its competitors. If the Commerce Clause was intended to put businesses on an even playing field, the majority's rule is hardly a way to achieve that goal. Indeed, arguably even under the majority's explanation for its ``Commerce Clause nexus'' requirement, the unfairness of its rule on retailers other than direct marketers should be taken into account. See *ante*, at 12 (stating that the Commerce Clause nexus requirement addresses the ``structural concerns about the effects of state regulation on the national economy''). I would think that protectionist rules favoring a $180 billion-a-year industry might come within the scope of such ``structural concerns.'' See Brief for State of New Jersey as *Amicus Curiae* 4.

The Court attempts to justify what it rightly acknowledges is an ``artificial'' rule in several ways. See *ante*, at 15. First, it asserts that the *Bellas Hess* principle ``firmly establishes the boundaries of legitimate state taxing authority and reduces litigation concerning state taxation.'' *Ibid.* It is very doubtful, however, that the Court's opinion can achieve its aims. Certainly our cases now demonstrate two ``bright-line'' rules for mail order sellers to follow: under the physical presence requirement reaffirmed here they will not be subjected to use tax collection if they have no

physical presence in the taxing State; under the *National Geographic* rule, mail order sellers will be subject to use tax collection if they have some presence in the taxing State even if that activity has no relation to the transaction being taxed. See *National Geographic*, 430 U. S., at 560–562. Between these narrow lines lies the issue of what constitutes the requisite ``physical presence'' to justify imposition of use tax collection responsibilities.

Instead of confronting this question head-on, the majority offers only a cursory analysis of whether Quill's physical presence in North Dakota was sufficient to justify its use tax collection burdens, despite briefing on this point by the State.[3] See Brief for Respondent 45–47. North Dakota contends that even should the Court reaffirm the *Bellas Hess* rule, Quill's physical presence in North Dakota was sufficient to justify application of its use tax collection law. Quill concedes it owns software sent to its North Dakota customers, but suggests that such property is insufficient to justify a finding of nexus. In my view, the question of Quill's actual physical presence is sufficiently close to cast doubt on the majority's confidence that it is propounding a truly ``bright-line'' rule. Reasonable minds surely can, and will, differ over what showing is required to make out a

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[3]Instead of remanding for consideration of whether Quill's ownership of software constitutes sufficient physical presence under its new Commerce Clause nexus requirement, the majority concludes as a matter of law that it does not. See *ante*, n. 8. In so doing, the majority rebuffs North Dakota's challenge without setting out any clear standard for what meets the Commerce Clause physical presence nexus standard and without affording the State an opportunity on remand to attempt to develop facts or otherwise to argue that Quill's presence is constitutionally sufficient.

``physical presence'' adequate to justify imposing responsibilities for use tax collection. And given the estimated loss in revenue to States of more than $3.2 billion this year alone, see Brief for Respondent 9, it is a sure bet that the vagaries of ``physical presence'' will be tested to their fullest in our courts.

The majority next explains that its ``bright-line'' rule encourages ``settled expectations'' and business investment. *Ante*, at 15–16. Though legal certainty promotes business confidence, the mail order business has grown exponentially despite the long line of our post–*Bellas Hess* precedents that signalled the demise of the physical presence requirement. Moreover, the Court's seeming but inadequate justification of encouraging settled expectations in fact connotes a substantive economic decision to favor out-of-state direct marketers to the detriment of other retailers. By justifying the *Bellas Hess* rule in terms of ``the mail order industry's dramatic growth over the last quarter-century,'' *ante*, at 16, the Court is effectively imposing its own economic preferences in deciding this case. The Court's invitation to Congress to legislate in this area signals that its preferences are not immutable, but its approach is different from past instances in which we have deferred to state legislatures when they enacted tax obligations on the State's share of interstate commerce. See, *e.g.*, *Goldberg* v. *Sweet*, 488 U. S. 252 (1989); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981).

Finally, the Court accords far greater weight to *stare decisis* than was given to that principle in *Complete Auto* itself. As that case demonstrates, we have not been averse to overruling our precedents under the Commerce Clause when they have become anachronistic in light of later decisions. See *Complete Auto*, 430 U.S., at 288–289. One typically invoked rationale for *stare decisis*—an unwillingness to upset settled expectations—is particularly weak in

this case. It is unreasonable for companies such as Quill to invoke a ``settled expectation'' in conducting affairs without being taxed. Neither Quill nor any of its *amici* point to any investment decisions or reliance interests that suggest any unfairness in overturning *Bellas Hess*. And the costs of compliance with the rule, in light of today's modern computer and software technology, appear to be nominal. See Brief for Respondents 40; Brief for State of New Jersey as *Amicus Curiae* 18. To the extent Quill developed any reliance on the old rule, I would submit that its reliance was unreasonable because of its failure to comply with the law as enacted by the North Dakota state legislature. Instead of rewarding companies for ignoring the studied judgments of duly-elected officials, we should insist that the appropriate way to challenge a tax as unconstitutional is to pay it (or in this case collect it and remit it or place it in escrow) and then sue for declaratory judgment and refund.[4] Quill's refusal to comply with a state tax statute prior to its being held unconstitutional hardly merits a determination that its reliance interests were reasonable.

The Court hints, but does not state directly, that a basis for its invocation of *stare decisis* is a fear that overturning *Bellas Hess* will lead to the imposition of retroactive liability. *Ante*, at 18, and n.10. See *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. —— (1991). As I thought in that case, such fears are groundless because no one can ``sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system.'' *Id.*, at —— (WHITE,

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[4]For the federal rule, see *Flora* v. *United States*, 357 U. S. 63 (1958); see generally J. Mertens, Law of Federal Income Taxation §58A.05 (1992). North Dakota appears to follow the same principle. See *First Bank of Buffalo* v. *Conrad*, 350 N. W. 2d 580, 586 (N.D. 1984) (citing 72 Am. Jur. 2d §1087).

J., concurring in judgment). Since we specifically limited the question on which certiorari was granted in order *not* to consider the potential retroactive effects of overruling *Bellas Hess*, I believe we should leave that issue for another day. If indeed fears about retroactivity are driving the Court's decision in this case, we would be better served, in my view, to address those concerns directly rather than permit them to infect our formulation of the applicable substantive rule.

Although Congress can and should address itself to this area of law, we should not adhere to a decision, however right it was at the time, that by reason of later cases and economic reality can no longer be rationally justified. The Commerce Clause aspect of *Bellas Hess*, along with its due process holding, should be overruled.