NEXUS AND THE SUPREME COURT

I. Introduction and Contextualization

The Constitution establishes that Congress has the power to "to lay and collect taxes, duties, imposts, and excises [...]."[1] Taxation has been subject to constitutional scrutiny throughout the history of the United States. In the recent landmark decision *Wayfair v. South Dakota* by the United States Supreme Court, the Court overturned their previous holding in both *Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Illinois* establishing that the "physical-presence rule" for taxation is inappropriate.

II. The "Dormant" Commerce Clause Doctrine

The Commerce Clause provides the Congress the responsibility to "regulate commerce [...] among the several states."[2] In the Court's majority opinion in *Gibbons v. Ogden,* Justice Marshall states explicitly that commerce "must be placed in the hands of agents or lie dormant."[3] "Dormant" or "negative" interpretations of the Commerce Clause have been frequent topics of debate among legal scholars, but generally the doctrine is summarized in that the Commerce Clause "[prohibits …] states passing legislation that discriminates against or excessively burdens interstate commerce."[4] This doctrine has had fierce opponents on the bench including Justice Antonin Scalia who believed the "dormant" Commerce Clause to be "judicial fraud" and "utterly illogical."[5] The dormant Commerce Clause is cited and recited across the board in many landmark taxation cases.

III. Nexus and the Court Broadly

Taxation is an extremely complex issue in the eyes of the Court and is controlled majoritively by "nexus". Sales tax nexus describes the relationship between a given jurisdiction and a tax payee.[6] The Court determined in 1872 that the "extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."[7] Further, in New York, L.E. & W.R. Co. v. Pennsylvania, the court solidifies this principle and asserts that "no principle is better settled than the power of a state, even its power of taxation, in respect to property, is limited to such as within its jurisdiction."[8] The court reaffirmed this idea in another landmark tax case, *Miller Brothers Co. v. Maryland*, stating that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[9] The ideas of "definite link" and "minimum connection" permeate significantly through nexus related jurisprudence culminating most recently in the landmark *Wayfair* case in 2018.

The Court also held in *Complete Auto Transit v. Brady*, that taxes are acceptable "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state."[10] The notion of "substantial nexus" is also utilized repeatedly in the court's decision to overturn their precedent set in the most recent *Quill* decision.

---

[1] U.S. CONST. art. I, § 8, cl. 1.
[2] U.S. CONST. art. I, § 8, cl. 3.
[3] Gibbons v. Ogden, 22 U.S. 1, 189 (1824).
[4] *Commerce Clause*, CORNELL LAW SCHOOL. (2021), https://www.law.cornell.edu/wex/commerce_clause
[5] Comptroller of the Treasury of Md. v. Wynne, 575 U.S. ___ (2015).
[6] *What is Nexus?* SALES TAX INSTITUTE. (2021), https://www.salestaxinstitute.com/sales_tax_faqs/what_is_nexus.
[7] Erie R. Co. *v.* Pennsylvania, 82 U.S. 300 (1872).
[8] New York, L.E. & W. R. Co. v. Pennsylvania, 153 U.S. 628, 646 (1894).
[9] Miller Brothers Co. v. Maryland, 347 U.S. 340, 345 (1954).
[10] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

IV. Nexus and the Court Today

In 1967 and the years prior, National Bellas Hess, a mail-order catalogue company, was headquartered in Missouri. Doing business as a mail-order corporation, customers from other states could find products in catalogue and order them for delivery to their home. Prior to a decision by the Supreme Court of Illinois, National Bellas Hess did not have to collect and remit Illinois state sales tax when they sold goods to residents of the state. Upon hearing the case in 1967, the Supreme Court of the United States found that "the Commerce Clause prohibits a State from imposing the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or by mail."[11] This decision remains in line with the courts prior determinations. Notably though, the dissenting opinions in *Bellas Hess* provide interesting insight into the changing attitudes of the Court. Justice Fortas offers the notion that "there should be no doubt that this large-scale, systematic, continuous solicitation of the Illinois consumer market is sufficient "nexus" to require Bellas Hess to collect from Illinois customers and to remit the use tax…"[12] This attitude represents a shift towards a system in which simply conducting business within a state, even without the presence of a physical operation, is enough to establish a nexus, particularly where there are systematic efforts to target the consumers within the state.

Later, in 1992, the court again approached this issue. The facts in Quill Corp. v. North Dakota are very similar to those in *Bellas Hess*. Indeed, the mail order company was compelled by the state to collect and remit sales tax. In the North Dakota Supreme Court, the majority rejected the precedent set in *Bellas Hess*, citing "tremendous social, economic, commercial, and legal innovation."[13] Indeed, this innovation was concurrent with the time that had elapsed in the 24 years between *Bellas Hess* and the North Dakota decision in *Quill*.

Empirically, the population of America during that time period grew by more than 50 million, nearly every economic indicator positively increased in a substantial way, and the entire world underwent a period of massive innovation.[14] More subjectively, these changes resulted in a shift in the very cultural fabric of America. The late 1960's and 70's provided a "transformation of values" towards a society that represents "expressive individualism."[15]

In 1992, the Supreme Court overruled the North Dakota decision holding that "the Due Process Clause does not bar enforcement of the State's use tax against Quill" and "the State's enforcement of the use tax against Quill places an unconstitutional burden on interstate commerce."[16] Despite the fact that the Court overrules the initial decision they do acknowledge the reasoning for the prior decision. In the majority opinion, authored by Justice Stevens, the Court "agree[s] with much of the state court's reasoning."[17] This statement is fundamental to inferring that the Majority understands the need for progress in the law as it relates to correlates to changes in society. Despite not overturning *Bellas Hess*, the court does acknowledge in their holding that the "Court's due process jurisprudence has evolved substantially since *Bellas Hess,* abandoning formalistic tests 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 the federal system of Government, to require it to defend the suit in that State."[18] The Court's

---

[11] National Bellas Hess v. Department of Revenue, 386 U.S. 756 (1967).
[12] 386 U.S. at 762.
[13] State ex rel. Heitkamp v. Quill Corp., 470 N.W.2d 203 (1991).
[14] *In a Lifetime,* FORBES MAG. (Oct 1, 2021), https://www.forbes.com/johnhancock/in-a-lifetime-work/#56e8492ae65c.
[15] David Yankelovich, *How American Individualism is Evolving*, THE PUBLIC PERSPECTIVE. Feb.-Mar. 1998 at 1, 5.
[16] Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
[17] *Quill*, 504 U.S. at 302.
[18] *Quill*, 504 U.S. at 298.

subtle movement with the times is obvious in their majority opinion, even though the outcome of this case does not represent a complete shift.

In *Quill*, the Court also establishes a fundamental difference between the due process and Commerce Clause requirements for nexus. While the state court suggested the clauses to be identical, the Supreme Court rejected this proposition offering that "due process centrally concerns the fundamental fairness of governmental activity [, while,] 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."[19] This reading allows the Court a broader understanding and more easily applicable standard than that of the precedent set in *Bellas Hess* and prior cases.

The Court also directly mentions the role of the negative Commerce Clause doctrine in establishing nexus. In the opinion of the Court, Justice Stevens writes that "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. 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 and bars state regulations that unduly burden interstate commerce."[20] The explicit mention of the negative Commerce Clause serves as an important insight and notion in the Court's subsequent decisions regarding nexus and state tax laws. Indeed, the application of the negative commerce doctrine serves as the establishment of this idea as the foundation of subsequent litigation related to nexus on interstate taxation.

26 years following *Quill* and 51 years after *Bellas Hess*, the court approached this issue again. The significant and fundamental changes between 1992 and 2018 were equally significant to those between the decisions in *Bellas Hess* and *Quill*. As the rise of e-commerce captured much of the American market, many of these e-commerce giants were not collecting taxes in states where they conducted business. In South Dakota alone, the Court "estimates revenue loss at $48 to $58 million annually,"[21] as a result of the decisions in *Quill* and *Bellas Hess*. Considering these facts, the South Dakota legislature imposed an Act that requires out-of-state sellers under certain parameters to collect and remit state sales tax.[22] Wayfair Inc., an e-commerce corporation with no physical real-property presence in South Dakota, falls into the group outlined within the statute.

After hearing oral arguments in *Wayfair*, the Supreme Court held that "Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause."[23] The Court clearly identifies that the need for physical presence simply is not cohesive with the economic realities of the 21st century. The Court further determines that "*Quill* is flawed on its own terms [... and] creates rather than resolves market distortions."[24] Both components of this statement represent a fundamental change in understanding between the decisions in *Quill* and *Wayfair*. Because the *Quill* decision meant that corporations with no physical presence in the state did not have to collect sales tax, it actually benefited consumers to shop with these types of businesses. The Court goes on to explain that "modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. In a footnote, *Quill* rejected the argument that 'title to 'a few floppy diskettes' present in a State' was sufficient to constitute a

---

[19] *Quill*, 504 U.S. at 312.
[20] *Quill*, 504 U.S. at 312.
[21] South Dakota v. Wayfair, Inc., 585 U.S. ___ (2018).
[22] S. D. Codified Laws §§10–45–2, 10–45–4 (2010 and Supp. 2017).
[23] *Wayfair*, 585 U.S. at ___.
[24] *Wayfair*, 585 U.S. at ___.

'substantial nexus.' But it is not clear why a single employee or a single warehouse should create a substantial nexus while 'physical' aspects of pervasive modern technology should not."[25] Clearly here, the Court acknowledges nexus through internet presence.

In concurrence, Justice Thomas commented that "a quarter century of experience has convinced me that *Bellas Hess* and *Quill* 'can no longer be rationally justified.' The same is true for this Court's entire negative Commerce Clause jurisprudence."[26] It is interesting to note Justice Thomas's rejection of the precedent and of the negative Commerce Clause. Further, Justice Gorsuch comments that "for years [the courts] have enforced a judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals."[27] This importantly identifies the flaws in the *Quill* decision that establish a *de facto* tax break and advantage for e-commerce corporations.

Dissenting, Justices Roberts, Kagan, and Sotomayor make several interesting notes about their reasoning for not overturning the decision in *Quill*. Justice Roberts comments that "the Court breezily disregards the costs that its decision will impose on retailers. Correctly calculating and remitting sales taxes on all e-commerce sales will likely prove baffling for many retailers."[28] Justice Roberts goes on to mention how the burden of the Court's decision will fall disproportionately on small businesses. It is interesting to see such a perspective from the bench that indicates a protectionist stance on small businesses and retailers in America.

V. Jurisprudence for a Changing America

In a 1789 letter to James Madison, Thomas Jefferson writes that "no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation."[29] Jefferson acknowledges that there is a significant need for the law to modernize in tandem with the deep and fundamental changes in cultural principles as a result of innovation. The Court, in the *Wayfair* decision, explicitly cites the need for the law to adapt to the changing realities of the Internet and e-commerce in our society. Citing Justice Jackson from a 1950 decision, Justice Thomas states in his *Wayfair* concurring opinion that "it is never too late to "surrende[r] former views to a better considered position."[30] Indeed, the Court must continually be willing, as they were in *Wayfair,* to consider alternative views that more appropriately mesh with the realities of the present day.

---

[25] *Wayfair*, 585 U.S. at ___.
[26] *Wayfair*, 585 U.S. at ___.
[27] *Wayfair*, 585 U.S. at ___.
[28] *Wayfair*, 585 U.S. at ___.
[29] Letter from Thomas Jefferson to James Madison (Sept. 7, 1789) (on file with the Princeton University Press).
[30] *Wayfair*, 585 U.S. at ___.