AMERICAN BUSINESS USA CORP.: THE CLOUDY LINES OF THE DORMANT COMMERCE CLAUSE IN SALES TAXATION

INTRODUCTION

The past twenty years have seen an explosion of interstate and international commerce unrivaled in human history. With the rise of digital commerce, it has become easier than ever for a business to have clients hundreds or thousands of miles away.

This new age has raised an abundance of questions in the financial, corporate, and legal spectrum.

In the world of state taxation, states have begun to push the envelope of their Constitutional taxation powers. With ever increasing state budget deficits, it has become more important than ever for states to pull every cent of tax revenue from corporations doing business in their state.[1] They have done this by challenging the Dormant Commerce Clause, often under the "nexus" requirement of the clause.[2] Because of this, the Dormant Commerce Clause nexus continues to be a contentious issue across every type of state tax.[3]

Specific to state sales tax, digital and cloud transactions have made state taxation powers complicated and murky.[4] This came to national attention in recent years in a debate over the "Amazon Tax," the power for states to levy sales taxes on digital sales from an out of state company.[5] But Amazon and other remote retailers are not the only businesses affected by the current murkiness surrounding the Dormant Commerce Clause. As a small flower shop in Florida found out, the state sales tax can be complicated even for the state where the business is physically located.[6]

What makes this problem even more sticky is that states are forced to rely on decades old Supreme Court precedent to determine the extent of their state taxation powers.[7] Because the Supreme Court continues to deny certiorari on cases dealing with the Dormant Commerce Clause in state taxation, states are left to fend for themselves to try to apply these rules to a modern digital

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[1] Audrey Wall, *Book of the States 2017, Chapter 7: State Finance*, COUNCIL OF STATE GOVERNMENTS (Sept. 12, 2017), http://knowledgecenter.csg.org/kc/content/book-states-2017-chapter-7-state-finance [https://perma.cc/4Z38-8XFQ].

[2] *See* Quill Corp. v. North Dakota, 504 U.S. 298, 309-17 (1992).

[3] *See* KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308 (Iowa 2010) (challenging the nexus requirement as it applies to income tax).

[4] Stephen J. Lusch, *State Taxation of Cloud Computing*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 369, 377-80 (2013).

[5] Sarah Halzack, *The True Cost to Amazon of the 'Amazon Tax'*, WASH. POST (Jan. 13, 2016), https://www.washingtonpost.com/news/business/wp/2016/01/13/the-true-cost-to-amazon-of-the-amazon-tax/ [https://perma.cc/Q2D7-6YDJ].

[6] Florida Dep't of Revenue v. Am. Bus. USA Corp. (*Am. Bus. II*), 191 So. 3d 906, 915-17 (Fla. 2016), *cert. denied*, 137 S. Ct. 1067 (2017).

[7] *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); *Quill Corp.*, 504 U.S. 298.

world.[8] With the looming threat of deficits at their heels, states continue to push the limits of what they can tax under the dated *Quill* and *Complete Auto Transit* tests for state taxation under the Commerce Clause.

This Comment analyzes Florida's taxation powers under the Commerce Clause, whether *Florida Department of Revenue v. American Business USA Corp.* fell within those powers, and proposes a new streamlined approach to the nexus requirement for state sales taxation.

I. *FLORIDA DEPARTMENT OF REVENUE V. AMERICAN BUSINESS USA CORP.*

American Business USA Corp. ("American Business") owned and operated 1Vende.com, an online flower retailer.[9] American Business was incorporated in Florida, had its principal place of business in Florida, and 1Vende.com's office was located in Florida.[10] 1Vende.com, however, sold flowers to customers all over the world, including Latin America, Spain, and throughout the United States.[11]

American Business did not maintain any flowers, gift baskets, or other inventory themselves.[12] Instead it used "local florists to fill the orders it received for flowers, gift baskets and other items of tangible personal property."[13] So when an out of state customer purchased a product on 1Vende.com, the purchase was fulfilled by an out of state florist. Because of this, the only

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[8] *See, e.g.*, DirectTV, Inc. v. Roberts, 477 S.W.3d 293 (Tenn. Ct. App. 2015), *cert. denied*, 136 S. Ct. 401 (2015); KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308 (Iowa 2010), *cert. denied*, 565 U.S. 817 (2011); *Am. Bus. II*, 191 So. 3d 906 (Fla. 2016), *cert. denied*, 137 S. Ct. 1067 (2017).

[9] *Am. Bus. II*, 191 So. 3d at 908. The website also sells prepaid calling arrangements. The Florida District Court of Appeals found that American Business failed to maintain proper records and failed to charge sales tax on the prepaid calling arrangement sales, and therefore owed sales tax on them. But the court distinguished the cards from its holding regarding the flowers because the calling arrangements are sold *and delivered* through the internet, while the flowers are sold but not delivered through the internet. Because of this, the prepaid phone cards are not an issue in the Florida Supreme Court. *See* Am. Bus. USA Corp. v. Florida Dep't of Revenue (*Am Bus. I*), 151 So. 3d 67, 70, 73 (Fla. Dist. Ct. App. 2014).

[10] *Am. Bus. II*, 191 So. 3d at 908.

[11] *Am. Bus. I*, 151 So. 3d at 69.

[12] *Id.*

[13] *Id.*

connection to the state of Florida when an out of state customer bought from 1Vende.com was that the website and office of the website were physically in Florida.[14] The entire process of making the flower arrangements and delivering them to the customer was done entirely outside of Florida.

American Business charged the Florida sales tax to customers within the state of Florida, but did not charge the Florida sales tax to customers outside of the state.[15] The Florida Department of Revenue ("The Department") assessed American Business for taxes and interest on the out of state transactions within the United States between April 1, 2008, and March 31, 2011, pursuant to Florida Statutes section 212.05(1)(*l*) and Florida Administrative Code Rule 12A–1.047(2)(b).[16] Specifically, that rule states:

> In cases where a Florida florist receives an order pursuant to which he gives telegraphic instructions to a second florist located outside Florida for delivery of flowers to a point outside Florida, tax will likewise be owing with respect to the total receipts of the sending florist from the customer who places the order.[17]

The legal battle following that assessment revolved around whether this rule is constitutional under the Due Process and Dormant Commerce Clauses.[18] The Florida District Court of Appeals found that the tax was unconstitutional under the Dormant Commerce Clause,[19] but this ruling was reversed by the Florida Supreme Court in 2016.[20] When American Business appealed to the Supreme Court of the United States, like so many tax Commerce Clause cases before it, certiorari was denied.[21]

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[14] *Id.* at 72-73.

[15] *Id.* at 69.

[16] *Id.*; *see also* FLA. STAT. ANN. § 212.05(1)(*l*) (West 2012); FLA. ADMIN. CODE ANN. r. 12A-1.047(2)(b) (1972).

[17] FLA. ADMIN. CODE ANN. r. 12A-1.047(2)(b).

[18] *Am. Bus. I*, 151 So. 3d at 70.

[19] *Id.*

[20] *See generally* Florida Dep't of Revenue v. Am. Bus. USA Corp. (*Am. Bus. II*), 191 So. 3d 906, 917 (Fla. 2016), *cert. denied*, 137 S. Ct. 1067 (2017).

[21] Florida Dep't of Revenue v. Am. Bus. USA Corp., 137 S. Ct. 1067 (2017) (denying certiorari).

II. CONSTITUTIONALITY OF A STATE SALES TAX

For a state tax to be constitutional, it must fall within the Due Process Clause and the Commerce Clause.[22] There is overlap between the two clauses, but "[t]he Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities."[23]

A. Due Process

The modern interpretation of the Due Process Clause stems from the landmark *International Shoe Co. v. Washington* decision, which said that a state needs "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[24] In regard to tax, this has been interpreted as a state needing "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax[.]"[25] *Quill Corp.* found that minimum contacts under due process exists if the business is "engaged in continuous and widespread solicitation of business within a State."[26]

A broader way of thinking about the Due Process Clause in state taxation is that an entity can only be taxed if it is benefiting from the entity taxing it.[27] A state can only tax if "the taxing power exerted . . . bears fiscal relation to protection, opportunities and benefits given by the state."[28]

B. History of the Dormant Commerce Clause

The Constitution explicitly gives Congress the power to "[r]egulate Commerce . . . among the several States."[29] In two

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[22] Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992).

[23] MeadWestvaco Corp. *ex rel.* Mead Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24 (2008).

[24] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see also Quill Corp.*, 504 U.S. at 307.

[25] *Quill Corp.*, 504 U.S. at 306 (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954)).

[26] *Id.* at 308.

[27] Hayes R. Holderness, *Taking Tax Due Process Seriously: The Give and Take of State Taxation*, 20 FLA. TAX REV. 371, 383-87 (2017).

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

[29] U.S. CONST. art. I, § 8, cl. 3.

opinions by Chief Justice Marshall in the 1820s, the Supreme Court first discussed whether that clause means that Congress has the *exclusive* power to regulate interstate commerce or whether it is a power shared by the states.[30]

In *Gibbons v. Ogden*, New York gave Ogden exclusive rights "to use *steam navigation* on all the waters of New-York, for thirty years from 1808."[31] Gibbons was navigating waters that formed the border between New York and New Jersey, and Ogden claimed he had the exclusive right to steam navigation on that waterway.[32] There is no doubt that the Commerce Clause gives Congress the power to regulate interstate commerce, but this case asked, "[C]an a State interfere with this regulation?"[33]

Chief Justice Marshall noted that the New York law "interfere[s] with the power given to Congress, to regulate commerce with foreign nations and among the several States . . . upon the ground of the power being exclusive in Congress[.]"[34] This is one of the first signifiers that the Commerce Clause, to some extent, precludes the powers of the states in dealing with interstate commerce.[35]

Five years later, Chief Justice Marshall was more direct in recognizing a restriction on states derived from the Commerce Clause.[36] In *Wilson v. Black-Bird Creek Marsh Co.*, the Delaware legislature approved of the construction of a dam on a creek within the state.[37] Defendants crashed their ship into the dam and were ordered by the Delaware courts to pay damages.[38] The defendants contended that the creek was "a public and common navigable creek . . . for all the citizens of the state of Delaware and of the United States, with sloops or other vessels to navigate[.]"[39]

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[30] Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 575 (1987).

[31] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 7 (1824).

[32] *Id.*

[33] *Id.* at 175.

[34] *Id.* at 177.

[35] Redish & Nugent, *supra* note 30, at 575.

[36] *Id.* at 576-77.

[37] Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 245-46 (1829).

[38] *Id.* at 246-47.

[39] *Id.* at 246.

Therefore, the "dam . . . had been wrongfully erected[.]"[40] To that end, the court says:

> We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.[41]

Although the Court ruled against the defendants,[42] this is the first case to firmly recognize the existence of the "dormant" Commerce Clause.[43] But like *Gibbons*, this case also did not give substance to the clause.[44] That happens for the first time in *Cooley v. Board of Wardens*.[45] Justice Curtis found that there are implicit limitations on states because of the Commerce Clause.[46] The Court found that a power is exclusively Congressional on subjects that are "in their nature national, or admit only of one uniform system, or plan of regulation[.]"[47]

C. The Modern Dormant Commerce Clause on State Sales Tax

Modern interpretations of the Dormant Commerce Clause come to a similar conclusion as Justice Curtis: that the clause puts some implicit limitation on the power of states to regulate commerce.[48] As applied to the Commerce Clause's limitations on a state's ability to collect a state sales tax, there are three primary cases: *Complete Auto Transit*, *Quill Corp.*, and *Jefferson Lines*.

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[40] *Id.*

[41] *Id.* at 252.

[42] *Id.*

[43] Redish & Nugent, *supra* note 30, at 577.

[44] *Id.* at 577-79.

[45] Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851), *abrogated by* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

[46] *Id.* at 315-321.

[47] *Id.* at 319.

[48] Quill Corp. v. North Dakota, 504 U.S. 298, 313 (1992). In addition, there are also limitations on Congressional power to regulate interstate commerce. Under *United States v. Lopez*, Congress can regulate "channels of interstate commerce," "instrumentalities of interstate commerce," and "activities having a substantial relation to interstate commerce." 514 U.S. 549, 558-59 (1995).

1. *Complete Auto Transit, Inc. v. Brady*

The basis of the modern Dormant Commerce Clause tax tests comes from *Complete Auto*.[49] Complete Auto was a Michigan based corporation that transported vehicles made outside of Mississippi into the state for distribution at General Motors dealerships.[50] Mississippi had a statute that placed a state income tax "[u]pon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this State[.]"[51] Complete Auto claimed that the transportation of the vehicles was only "part of an interstate movement," therefore "the taxes assessed and paid were unconstitutional."[52]

The *Complete Auto* Court analyzes three principles in creating its test. First, the court breaks down the opinions of *Freeman v. Hewit* at length,[53] emphasizing the majority rule which created "a blanket prohibition against any state taxation imposed directly on an interstate transaction."[54] The Court used this opinion, not for its actual prohibition, but for its legal reasoning for creating that prohibition.[55] The Court noted that the case "moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology."[56]

Then, the court used the holding of *Memphis Gas Co. v. Stone* as the substantial basis for its Commerce Clause test.[57] In his opinion in *Memphis Gas Co.*, Justice Reed noted that the tax in question was constitutional because "the tax was not discriminatory, that there was no possibility of multiple taxation,

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[49] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[50] *Id.* at 276.

[51] *Id.* at 275 (quoting MISS. CODE ANN. § 27-65-19(2) (1972)).

[52] *Id.* at 277.

[53] *Id.* at 279-81; *see also* Freeman v. Hewit, 329 U.S. 249 (1946), *overruled by* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

[54] *Complete Auto Transit, Inc.*, 430 U.S. at 280; *see also Freeman*, 329 U.S. at 261 ("Stripped of any discriminatory element and of any actual or probable tendency to block or impede the commerce in fact, this 'direct incidence' is itself enough without more to invalidate the tax.").

[55] *Complete Auto Transit, Inc.*, 430 U.S. at 281.

[56] *Id.*

[57] *Id.* at 281-84 (citing Memphis Gas Co. v. Stone, 335 U.S. 80 (1948)).

that the amount of the tax was reasonable, and that the tax was properly apportioned to the investment in Mississippi."[58]

Finally, the court emphasized and discussed Justice Reed's distinction between a tax on "the privilege of doing interstate business," which the Court held is unconstitutional, and a tax on "the privilege of exercising corporate functions within the State," which the Court held is constitutional.[59] This distinction was upheld in *Spector Motor Service v. O'Connor*, and became known as the *Spector* rule.[60] However, the *Complete Auto* Court found the rule inapplicable to the Commerce Clause, stating, "Accordingly, we now reject the rule . . . that a state tax on the 'privilege of doing business' is *per se* unconstitutional when it is applied to interstate commerce," thus overruling *Spector*.[61]

The synthesis of these three ideas created a landmark four-part test to determine whether a state tax is constitutional.[62] The tax must (1) be "applied to an activity with a substantial nexus with the taxing State," (2) be "fairly apportioned," (3) "not discriminate against interstate commerce," and (4) be "fairly related to the services provided by the State."[63]

2. *Quill Corp. v. North Dakota*

The second of the three major cases is *Quill Corp. v. North Dakota*, a case that dives into the substantial nexus prong of the *Complete Auto* test.[64] Quill Corp. was a mail order catalogue company that did not have any offices, outlets, or sales representatives from the state of North Dakota.[65] Their only connection with North Dakota was the customers who bought products though their catalogue, but North Dakota still charged them sales tax.[66]

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[58] *Id.* at 282 (citing *Memphis Gas Co.*, 335 U.S. at 87-88).

[59] *Id.* (citing *Memphis Gas Co.*, 335 U.S. at 88-93).

[60] Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 607-10 (1951), *overruled by Complete Auto Transit, Inc.*, 430 U.S. 274.

[61] *Complete Auto Transit, Inc.*, 430 U.S. at 288-89.

[62] *Id.* at 279.

[63] *Id.*

[64] Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

[65] *Id.* at 302.

[66] *Id.*

Quill Corp.'s claim was not a fringe case or outlier; it has almost identical facts as *National Bellas Hess*, a case before the Supreme Court twenty-five years earlier on the same issue.[67] *Quill* was an attempt to overturn *National Bellas Hess* for being outdated precedent.[68] Like Quill, National Bellas Hess was a mail order catalogue company.[69] The company was based in Missouri and incorporated in Delaware and did not have outlets or sales representatives in Illinois.[70] However, it was charged sales tax by Illinois.[71]

The *National Bellas Hess* Court looked at the furthest extent it had ever pushed the "connection" requirement (eventually becoming the substantial nexus prong of *Complete Auto* a decade later).[72] That limit was found in *Scripto, Inc. v. Carson* where a Georgia company had only ten employees in Florida, but the Supreme Court found a sufficient nexus to exist for Florida to levy a tax.[73]

But ten employees in *Scripto* had a physical presence in the taxing state, while National Bellas Hess had no employees in the taxing state and, therefore, no such physical presence.[74] The Court in *National Bellas Hess* held that a state cannot collect a tax "upon a seller whose only connection with customers in the State is by common carrier or the United States mail," thus creating the physical presence requirement.[75]

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[67] Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967).

[68] North Dakota *ex rel* Heitkamp v. Quill Corp., 470 N.W.2d 203, 207-08 (N.D. 1991) ("Quill in effect asks us to accept the notion that the United States Supreme Court will abandon its common sense and experience at the courthouse door and ignore the tremendous social, economic, commercial, and legal innovations since 1967, and blindly apply an obsolescent precedent.").

[69] *Nat'l Bellas Hess*, 386 U.S. at 753-54.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 757-58.

[73] *Id.* at 757 (citing Scripto, Inc. v. Carson, 362 U.S. 207, 211 (1960)).

[74] *Id.* at 754.

[75] *Id.* at 758. This holding required physical presence to meet both the due process requirement and the Dormant Commerce Clause requirement for state taxation. While the *National Bellas Hess* court never explicitly states that the holding applies to both clauses, Justice Scalia's concurrence in *Quill* clarifies that it did. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 319 (1992) (Scalia, J., concurring in part).

Similarly, *Quill Corp.* had no physical presence in North Dakota.[76] The Court in *Quill Corp.* reexamined the same issue—whether a physical presence is necessary to create a "substantial nexus."[77] The Court primarily discussed the interaction between *National Bellas Hess* and *Complete Auto*. Instead of finding that the latter overruled the former, it found that *National Bellas Hess*'s holding fit neatly within *Complete Auto*, noting "*Bellas Hess* concerns the first of [the *Complete Auto*] 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."[78]

Because *National Bellas Hess* was not overturned, the question then became whether the physical presence requirement should be overturned. On grounds of stare decisis,[79] the court declined to overturn the physical presence requirement, stating:

> We expressly decline[] 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."[80]

A second important, but often overlooked, part of *Quill*'s holding regarding the Dormant Commerce Clause is the court's distaste for its own holding.[81] Due to the murky and implicit nature of the Dormant Commerce Clause, and because the Commerce Clause by nature deals with Congressional powers, the court outright states that Congress is probably better off fixing this issue:

> [T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the

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[76] *Quill Corp.*, 504 U.S. at 301-02.

[77] *Id.* at 311.

[78] *Id.*

[79] *Id.* at 306-07. ("These cases all involved some sort of physical presence within 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.").

[80] *Id.* at 307 (quoting *Nat'l Bellas Hess*, 386 U.S. at 758).

[81] *Id.* at 318.

> burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.[82]

3. *Oklahoma Tax Commission v. Jefferson Lines, Inc.*

The third primary Supreme Court case that deals with the Dormant Commerce Clause is *Jefferson Lines*, which analyzed the *Complete Auto* prongs in the scope of sales tax.[83] Jefferson Lines was a Minnesota-based common carrier who bussed customers throughout the United States.[84] It collected Oklahoma sales tax on intrastate bus trips, but did not collect any sales tax on interstate trips that originated in Oklahoma.[85]

The court found that, without question, a physical nexus existed because "Oklahoma is where the ticket is purchased, and the service originates there."[86] This developed what is now known as the "transactional nexus," where a nexus in a sales tax exists in the location where the transaction physically takes place.[87]

However, the primary focus of the case is on the second *Complete Auto* prong, whether Oklahoma had the right to apportion 100% of the cost of the ticket in sales tax even when the majority of the trip occurred outside of Oklahoma.[88] The purpose of the apportionment prong is "to ensure that each State taxes only its fair share of an interstate transaction."[89] *Jefferson Lines* reaffirms a two-part test for apportionment, internal and external consistency of the tax.[90]

Internal Consistency is a simple test: if the tax at issue was duplicated identically in all fifty states, it must not create an extra burden on interstate commerce.[91] In essence, a tax fails the test if

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[82] *Id.*

[83] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

[84] *Id.* at 178.

[85] *Id.*

[86] *Id.* at 184.

[87] Matthew Boch & Lauren Ferrante, American Business USA *and the Difficulty of Transactional Nexus Arguments*, 26 J. MULTISTATE TAX'N & INCENTIVES 39, 39 (2016).

[88] *Jefferson Lines, Inc.*, 514 U.S. at 184-96.

[89] *Id.* at 184 (quoting Goldberg v. Sweet, 488 U.S. 252, 260-61 (1989), *abrogated by* Comptroller of the Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015)).

[90] *Id.* at 185 (affirming *Goldberg*, 488 U.S. 252).

[91] *Id.*

the identical application would put "interstate commerce at a disadvantage as compared with commerce intrastate."[92]

External Consistency, on the other hand, looks at the economic justification for the tax.[93] It considers whether the apportioned value is "fairly attributable to economic activity within the taxing State."[94] Instead of making up an imaginary situation, it looks at the "threat of real multiple taxation."[95]

When applying those tests to its own facts, the *Jefferson Lines* Court concluded that Oklahoma had the right to apportion 100% of the tax.[96] The Court primarily focused on external consistency, finding that there is no risk of getting taxed multiple times because "[t]he taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination."[97]

III. *AMERICAN BUSINESS USA* DORMANT COMMERCE CLAUSE ANALYSIS

The strange nature of the *American Business USA* facts created a tricky Commerce Clause analysis under these three cases, and the Florida Supreme Court missed the mark on many of its arguments. The case exemplifies the difficulties in applying Dormant Commerce Clause cases written before the internet era to a modern world.

A. Substantial Nexus

Physical sales done at a physical retail location make the "physical presence" requirement for a transaction fit neatly under *Quill*.[98] However, digital sales like the ones in *American Business USA* have no actual physical location, so they tend to follow the transactional nexus presented in *Jefferson Lines*.[99]

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92 *Id.*
93 *Id.*
94 *Jefferson Lines, Inc.*, 514 U.S. at 185.
95 *Id.*
96 *Id.* at 190-91.
97 *Id.* at 190.
98 *See generally* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
99 Boch & Ferrante, *supra* note 87, at 39.

Although the Florida Supreme Court spent a lot of time distinguishing this case from *Bellas Hess* and *National Geographic*, these cases are never really at issue. While those cases deal with out-of-state companies having mere mail catalogues as their presence in a state, there was no question that American Business is physically located within the state of Florida.[100] Therefore, a large chunk of the court's analysis on this issue is irrelevant. The court even emphasized this itself, writing:

> American Business had more than a slight presence in Florida. Its economic activities and transactions transpired from its principal place of business in Florida, in taking internet orders for flowers, gift baskets, and other tangible personal property and arranging for those items to be located and delivered out of state.[101]

But the problem with the Court's argument is twofold. First, the argument they are making is fundamentally a due process argument. They emphasize that American Business is located in Florida and does a large chunk of their business in Florida.[102] But that is information relevant to whether there are "minimum contacts" and whether taxing American Business is fair, not whether its tax violates the Dormant Commerce Clause.

Second, it ignores the transactional nexus principle created by *Jefferson Lines* which gives nexus to the state where the transaction itself takes place.[103] Ironically, the transactional nexus argument that the court misses is a much stronger argument than the location of the American Business offices argument that the court presents.

The Court in *Jefferson Lines* found the bus ticket sales to unquestionably have nexus because "Oklahoma is where the ticket is purchased, and the service originates there."[104] Similarly, the out-of-state customers purchase their flowers from a Florida-based shop when they use 1Vende.com.[105] Then, the chain of services

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[100] Florida Dep't of Revenue v. Am. Bus. USA Corp. (*Am. Bus. II*), 191 So. 3d 906, 908, 909 n.1, 914 (Fla. 2016).

[101] *Id.* at 913.

[102] *Id.*

[103] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184 (1995).

[104] *Id.* at 184.

[105] *Am. Bus. II*, 191 So. 3d at 908.

that ends in the delivery of flowers starts with 1Vende.com. Once a person buys flowers on the website, the company must then relay that order to the local flower shop which then creates the arrangement and ships it to the customer.[106]

Therefore, it is easy to analogize the facts in *Jefferson Lines* and *American Business USA*. Although the bus rides had a large out-of-state component in *Jefferson Lines*, the actual transaction happened in Oklahoma, thus subjecting it to Oklahoma tax.[107] Likewise, although a large portion of the flower transaction will happen in the customer's home state, the actual transaction happens digitally through a Florida business.[108] And the first action that results in the delivery of flowers to the customer starts with American Business USA, a Florida business.[109]

But there is still a crucial hang-up with this neater nexus argument: arguably the service does not originate with 1Vende.com, it originates from the florist. Although 1Vende.com takes in the order and moves the order to the florist, 1Vende.com plays no part in creating the flower arrangement or delivery.[110] This is important because when a customer goes on 1Vende.com, they purchase with the intent of buying a flower arrangement, and the actual process of arranging and delivering the flowers does not happen in Florida, but happens solely at the florist's location.

This would better analogize with *Jefferson Lines* if, for instance, the ticket was purchased in Kansas then the bus trip begins in Oklahoma. However, because they are two distinct fact patterns, *American Business* distinguishes itself from *Jefferson Lines* when examining where the service originates.

The complicated nature of the Dormant Commerce Clause jurisprudence lead to a confusing Florida Supreme Court analysis on the nexus of purchases from 1Vende.com. But this is not the fault of the Florida Supreme Court. The old nexus cases are hard to apply to a modern context, as they all focus on physical

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106 *Id.*

107 *Jefferson Lines, Inc.*, 514 U.S. at 184.

108 *Am. Bus. II*, 191 So. 3d at 908.

109 *Id.*

110 Am. Bus. USA Corp. v. Florida Dep't of Revenue (*Am. Bus. I*), 151 So. 3d 67, 69 (Fla. Dist. Ct. App. 2014).

transactions and presence, while our world is shaped around digital transactions.

B. Apportionment

In order for a tax to be properly apportioned, it must pass the internal and external consistency tests set out by *Jefferson Lines*.[111] Internal consistency creates an imaginary scenario where all fifty states adopt the same tax law as the state in question, if the taxpayer would be taxed multiple times under this scenario, it fails the test.[112] The Florida Supreme Court found that the Florida Sales Tax passes this test because "if all states taxed only the entity initially receiving the order for flowers, and not the florist to whom the flower order and delivery is referred, then no florist would be taxed twice."[113]

The second test, external consistency, looks "'to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State.'"[114]

The Florida Supreme Court agreed with the Department of Revenue's analysis, finding that "the transaction occurs in Florida where the business facilitated every stage of the transaction from advertising for customers, accepting their orders, receiving payment, and locating and transmitting the orders to third-party florists."[115]

However, the court's analysis overlooked the test that *Jefferson Lines* created. The *Jefferson Lines* test asks the court to answer whether there "is there a possibility of successive taxation so closely related to the transaction as to indicate potential unfairness of [a state's] tax on the full amount of sale?"[116]

In this case, arguably there was. Even if the Department could successfully argue that the transaction takes place in Florida, the entire delivery process of the purchase happens in the

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[111] *See supra* notes 92-97 and accompanying text.

[112] *See supra* notes 93-94 and accompanying text.

[113] Florida Dep't of Revenue v. Am. Bus. USA Corp. (*Am. Bus. II*), 191 So. 3d 906, 915 (Fla. 2016).

[114] *Id.* at 912 (quoting Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995)).

[115] *Id.* at 915.

[116] *Jefferson Lines, Inc.*, 514 U.S. at 191.

customer's home state and not in Florida. Because American Business goes through flower shops local to the customer, it acts as a middleman, rather than a substantial actor in carrying out the transaction. Therefore, unlike in *Jefferson Lines* where the customer starts their journey by getting on a bus within Oklahoma, the only part of the American Business transaction that happens in the forum state is the payment and transfer of that payment information to a flower shop.[117] The actual action required to fulfil the transaction (like the bus ride in *Jefferson Lines*) happens exclusively outside of the forum state, therefore distinguishing the facts in *American Business USA* from *Jefferson Lines*.[118]

Turning to the *Jefferson Lines* rule, is there a chance of successive taxation so related to the transaction that it is unfair?[119] Because the overwhelming majority of the transaction happens outside of the taxing state, there is a realistic chance of another state taxing the transaction. And the non-forum state's claim that they can tax the transaction is almost equally as strong as Florida's claim.

Let's briefly assume that there is a Georgia-based customer buying from 1Vende.com and do a Dormant Commerce Clause analysis as if Georgia is levying a state sales tax. Let us further assume the flower shop has a physical presence in Georgia, and the transaction arguably begins in Georgia since 1Vende.com is simply a middleman. Internal consistency exists because if all fifty states tax a flower shop within their own state for making a flower arrangement and delivering it to a customer, it will not be double taxed. Georgia then faces the same issue of external consistency as Florida does: there is a realistic chance of another state (Florida, in this case) taxing the same transaction. Georgia's claim to tax the transaction under the Dormant Commerce Clause is almost the exact same analysis that Florida has to levy a sales tax. There is a realistic possibility that another state tries to levy a sales tax on American Business, which means there is a chance of successive taxation and, therefore, there are external consistency issues.

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[117] *See supra* notes 12-16, 104-06 and accompanying text.

[118] *See id.*

[119] *Jefferson Lines, Inc.*, 514 U.S. at 191.

This example simply highlights the issue with the current apportionment test. If Florida has a realistic chance of being double taxed, then it cannot apportion the tax, and if Georgia has a realistic chance of being double taxed, then it also cannot apportion the tax. In a scenario where two states have realistic claim over a tax, the consistency tests eliminate the ability for either state to claim the tax.

IV. PROBLEMS WITH CURRENT COMMERCE CLAUSE JURISPRUDENCE

Every retail business must understand the Dormant Commerce Clause framework and the small technicalities that may go with it if they wish to participate in interstate commerce. Is that reasonable to ask of every retail business in the United States? *American Business USA* reveals the immense issues with outdated precedent, bloated Dormant Commerce Clause jurisprudence, and shows why the death of *Quill Corp.* should occur through statute rather than by just ignoring precedent.

A. The Precedent Is Outdated

In 1977, twenty-four years after *Bellas Hess*, the Supreme Court of North Dakota tried to overturn it, finding:

> While in 1967 it may have generally been necessary to rely upon in-state sales personnel and inventory to successfully market a product, technology has changed the rules of the game. Today a direct marketer can communicate with his customers across the country through toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication just as effectively, and more efficiently, than if he were calling personally on each customer. Clearly the direct marketing of the 1990's bears little resemblance to the mail order of the 1960's.[120]

It has now been over fifty years since *Bellas Hess*, and like what North Dakota thought in 1991, it has becoming increasingly

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[120] North Dakota *ex rel* Heitkamp v. Quill Corp., 470 N.W.2d 203, 209 (N.D. 1991), *rev'd* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

apparent that rules on interstate commerce created in 1977 are hard to apply to digital and cloud transactions, and create awkward results.

The outdated precedent creates a multitude of unintuitive legal issues which every business in the U.S. must decipher: Where does a transaction actually take place? Is a computer server sending a few packets of information over the internet to a flower shop the beginning of delivering a purchase, or are the actions of the flower shop the actual first step? What happens when two states have near identical claims of taxation powers? All of these questions are, at best, unclear under the Dormant Commerce Clause framework presented by *Complete Auto, Quill Corp.*, and *Jefferson Lines.*

B. The Bloated Commerce Clause

A huge reason why it is so difficult to apply Dormant Commerce Clause jurisprudence is that it has become incredibly bloated. The Supreme Court, in its hesitation on ruling too much on an enumerated Congressional power, has created a winding maze of rules that must be understood to apply a simple sales tax.

Somehow, a clause giving Congress the power to "regulate commerce . . . among the several states" has turned into a four-prong test under *Complete Auto*,[121] with the two-prong apportionment test from *Jefferson Lines* on top of that,[122] and a maze of nexus rulings.[123] And this is just sales tax. Every business must also navigate these rulings as they apply to use and income taxes. However, this complex framework is not necessary, and it can be cut down considerably.

First, the external consistency is the only consistency test that is necessary. It is not necessary to create an imaginary scenario where every state has the same tax, when the external consistency test already covers that scenario by looking at the "threat of real multiple taxation."[124] If it is realistic that other states could adopt a similar tax as the one in question, then there is an actual threat of multiple taxation.

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[121] *See supra* notes 62-63 and accompanying text.

[122] *See supra* notes 90-97 and accompanying text.

[123] *See generally supra* Part II(C).

[124] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995).

Second, the final prong of *Complete Auto* requires the tax to be "fairly related to the services provided by the [s]tate," but this does not relate to the Dormant Commerce Clause.[125] The Dormant Commerce Clause is primarily concerned with the limitation on the states' authority to regulate commerce.[126] Instead, this prong deals with the nature of the tax itself. If a state has sufficient nexus, does not discriminate against interstate commerce, and fairly apportions their tax, the decision on how their tax works then falls into the state's jurisdiction as long as it also falls under the limitations set by the Due Process Clause.

Finally, much of the Dormant Commerce Clause framework is not applicable to sales tax because it is not a tax levied for the use of state resources like income and use tax are. It is simply a source of income for states. Sales tax, in its current iteration, is winner take all since only one state is given authority to levy sales tax on any given transaction. Therefore, apportionment would not be an issue if the nexus, the single state with taxing authority, was clearer.

It would be much easier for businesses, consumers, and courts if this overly complicated framework was collapsed down to simpler rules.

C. Ignoring Quill Corp.

What makes the previous issues worse is the gradual disuse of *Quill Corp.* Just one year after *Quill Corp.*, the incredibly influential *Geoffrey, Inc. v. South Carolina* case came down, in which Geoffrey, Inc. argued that *Quill Corp.*'s physical presence requirement on the Commerce Clause applied only to sales and use tax.[127] *Quill Corp.* hints at this several times throughout its holding, but it is explicit when it states that "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."[128]

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[125] *Complete Auto Transit, Inc.*, 430 U.S. at 279.

[126] *See supra* Part II.

[127] Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13, 16 (S.C. 1993).

[128] Quill Corp. v. North Dakota, 504 U.S. 298, 314 (1992).

Then, states started to find ways around *Quill Corp.* by using alternative tax mechanisms such as the "Drop Shipment Rule."[129] These laws are designed so that if an entity such as Amazon is outside of their physical taxation nexus, they instead tax the shipping company who brings the product into the state.[130] This means that even in the case that a business understands the *Quill Corp.* framework, the business, or a subsidiary thereof, might still be liable for state sales tax.

In addition, it has become hard to navigate the state sales tax waters because of *Quill Corp.*'s disuse.[131] Currently, there are thirteen states either ignoring *Quill Corp.* or have bills in the 2017 legislative session to ignore it.[132] So, even if a company understands the Dormant Commerce Clause framework, the laws that ignore it can get the company into trouble.

V. THE BUYER NEXUS: A NEXUS FOR THE MODERN AGE

The Buyer Nexus is a simplified Dormant Commerce Clause test, and it provides a new perspective on how to handle the nexus requirement. This change is better handled in Congress rather than the courts, as the Commerce Clause is, by nature, a Congressional power.[133] This solution works specifically for sales tax, as each type of tax has its own set of challenges and issues.[134]

The statutory language for levying a state sales tax should be modeled as follows:

> For each transaction, the state must meet the following requirements to levy a sales tax on a transaction.

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[129] *See, e.g.*, D & H Distrib. Co. v. Comm'r, 79 N.E.3d 409, 412 (Mass. 2017) ("The rule applies to a sales transaction such as the hypothetical online baseball glove purchase. When the wholesale supplier is engaged in business in the Commonwealth but the retailer is not, the drop shipment rule requires the Massachusetts wholesale supplier to collect and remit the sales tax due on the ultimate retail sale to the consumer.").

[130] *Id.*

[131] Shirley Sicilian, *The Collateral Constitutional Damage of Killing Quill*, 27 J. MULTISTATE TAX'N & INCENTIVES 36, 36 (2017).

[132] *Id.*

[133] *See Quill Corp.*, 504 U.S. at 318.

[134] Other types of tax, such as income and use tax, nexus are equally as, if not more, problematic than the sales tax nexus, but are outside the scope of this Comment.

> The state must have nexus over the sale.
>
> The nexus is determined by the location of the buyer in the transaction.
>
> When the sale is physical or done digitally on the seller's premises, the buyer's location is the physical location of the buyer.
>
> When the sale is a remote digital sale, the buyer's location is the billing address of the buyer.
>
> If a buyer's location is indeterminable because of the nature of the transaction, the seller's principal place of business has nexus for 100% of the sale price of a transaction.
>
> The tax may not discriminate against interstate commerce.

The first point of discussion on this rule is the usage of the word "remote" when discussing the digital sale. Without it, there is a fuzzy line on digital sales in a physical retail location. If a store has a kiosk within its store to buy things, is that a digital sale where the credit card billing address is applied, or is it a physical sale where the local tax is applied? The use of "remote" eliminates this problem. Because that sale is not remote, as it is still on the physical premises of the business itself, it, therefore, falls under the first part of the proposed nexus test.

The second point of discussion is the indeterminable location of the buyer. This is important considering the rise of cryptocurrency-based transactions where the buyer's location is not always obvious.[135] This technology should not become a tax haven, and any law regulating commercial and business transactions should consider how these technologies interact with the law. Without the usage of "by the nature of the transaction," even if there is a good faith clause included, it allows businesses to establish their principal place of business in a tax haven and find ways to become willfully ignorant of the customer's location.

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[135] Lorena Yashira Gely-Rojas, *Cryptocurrencies and the Uniform Commercial Code: The Curious Case of Bitcoin*, 8 U. P.R. BUS. L.J. 129, 130 (2017) ("[M]ost cryptocurrencies are pseudo-anonymous because users are solely known by addresses that cannot be easily traced back to their real-world identity.").

Third, is the usage of "principal place of business." There is certainly an argument for using a different measure of the seller's location, but determination of principal place of business is already well established in precedent, and most companies, no matter the size, are well aware of where that location is.

Finally, there is no need to include any reference to any other *Complete Auto* prongs. This rule directly gives a state a nexus, and gives them authority to tax 100% of the sale price so there is no issue of apportionment. The nature of the Dormant Commerce Clause implies the third prong, that a state cannot directly tax an interstate transaction. And the final prong which requires a tax to be "fairly related to the services provided by the State," does not apply to sales tax because a sales tax is not, by nature, relating to services provided by the state.[136]

A. The Buyer Nexus is a More Practical Nexus

As stated earlier, the current "physical presence" nexus requirement is completely inapplicable to a modern setting.[137] It is difficult to apply to online transactions, and does not make sense considering our current usage of e-commerce. The Buyer Nexus solves each of these issues. The nexus is extremely straightforward to figure out. The overwhelming majority of transactions just use the customer's location and it is obvious to a business when the customer's location is indeterminable.

Using the Buyers Nexus, transactions in a physical location are without issue, and digital transactions would not be much, if any, extra burden on retailers. At first glance, it seems scary that every online business would need to keep up with all 50 state sales tax rates constantly, but this is not nearly as bad as it sounds. Digital sales are already typically done through software that handles this issue, and this change would only further push usage of the software.

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[136] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[137] *See supra* Part II.

CONCLUSION

Florida Department of Revenue v. American Business USA Corp. exemplifies the problems that arise with applying the Dormant Commerce Clause jurisprudence to modern cases. It is confusing, outdated, hard to apply, and leads to weird and arbitrary results. The Dormant Commerce Clause as applied to tax needs a drastic overhaul and simplification, as state sales taxes are quickly becoming "shark infested waters" as states continue to diverge from *Quill Corp.*[138]

The proposed Buyer Nexus solves these problems and creates a straight-forward legal standard that is easier to apply and considers modern technological advancements.

*Tyler Alcorn**

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[138] James Sutton, *FL Taxation of Florists Case Denied Cert by US Sp Ct*, LAW OFFICES OF MOFFA, SUTTON, & DONNINI, P.A.: FL TAX BLOG (Feb. 21, 2017), http://www.floridasalestax.com/Florida-Tax-Law-Blog/2017/February/FL-Taxation-of-Florists-Case-Denied-Cert-by-US-S.aspx [https://perma.cc/E3VQ-V43C].

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Mississippi Law Journal

Published by Students at the
University of Mississippi School of Law

VOLUME 87 **2018** **NUMBER 5**

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