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Collection of the Use Tax on Out-of-State Mail-Order Sales

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Collection of the Use Tax on Out-of-State Mail-Order Sales

*Paul J. Hartman**

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I. INTRODUCTION

> Every day of the year, every hour of the day, the phones are ringing at L. L. Bean's famous mail-order store in Freeport, Maine.
>
> When customers pay for their duck shoes, camping gear or other items ordered from the company's catalogs, they get a little break. That is because L. L. Bean does not charge state sales taxes on the goods it ships to customers outside of Maine.
>
> Although mail-order customers are supposed to pay sales taxes, states have no effective way of forcing them to do so because of a 1967 Supreme Court decision that said most mail-order firms cannot be required to collect the taxes.[1]

The states' inability to collect taxes on out-of-state mail-order sales constitutes a major fiscal problem. The federal government's Advisory Commission on Intergovernmental Relations estimates that states are losing as much as 1.5 billion dollars each year in unpaid out-of-state mail-order purchase taxes.[2]

II. THE PURPOSES AND INCIDENTS OF THE USE TAX ON OUT-OF-STATE MAIL-ORDER SALES

In addition to raising revenue, the compensating use tax serves two purposes: (1) The use tax helps local sellers to compete with retail dealers in other states who are subject to a lesser tax burden; and (2) the use tax avoids the likelihood of draining the taxing state's revenue by removing buyers' incentive or temptation to go bargain hunting by mail orders or through other means to escape payment of the tax on in-state sales.[3]

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1. 43 Cong. Q. 2571 (Dec. 7, 1985).

2. Preliminary Draft, "State and Local Taxation of Interstate Mail Order Sales," Advisory Commission on Intergovernmental Relations 7, (Aug. 23, 1985) [hereinafter cited as ACIR]. This Advisory Commission is the national, bipartisan commission established by Congress in 1959 to monitor the American federal system and make recommendations for change. Its 26 members include officials from federal, state, and local governments as well as representatives of the general public. *See* News Release of ACIR September 30, 1985, P.R. 85-16 at 3.

3. *See* Minneapolis Star & Tribune Co. v. Commissioner, 460 U.S. 577 (1983). For a discussion by the author of these purposes, see P. HARTMAN, FEDERAL LIMITATIONS ON STATE

The legislatures of states with sales taxes could not plug these economic leaks by extending the reach of the sales tax. One reason was the idea that a state could not, consistently with the due process clause, tax extraterritorial sales.[4] Prior to the Supreme Court's 1940 decision in *McGoldrick v. Berwind-White Coal Mining Co.*,[5] it was assumed that an interstate sale was immune from state or local taxation.[6] Later, *McLeod v. J.E. Dilworth Co.*[7] placed severe constitutional constraints on a destination state's ability to tax a sale consummated in another state. These restrictions on the states' taxing power enabled residents of states with sales taxes to make their purchases either tax free or at a lower tax rate beyond the territorial limits of the taxing jurisdiction. Purchasers either could travel beyond the borders of their state, use the telephone, mail orders, or buy from solicitors.

To protect their revenue bases and local businesses, the states that have sales taxes also have enacted a use tax. Under this tax a person buying something from an out-of-state source is liable for a use tax at a rate identical to the sales tax in the purchaser's home state. Local governments later began imposing use taxes. State and local sales and use taxes are levied on the final purchaser, but are collected generally through the seller. The out-of-state seller has resisted collection of the use tax on both commerce clause and due process clause grounds. The purposes and consequences of the compensating use tax, however, have been frankly recognized by the Supreme Court and do not militate against the tax's constitutionality.[8] In resolving the commerce and due process clause questions, the courts have faced the basic issue of what kinds of contact or activity the out-of-state seller must have with the taxing state so that these constitutional attacks can be resisted successfully.

III. Necessary Nexus for Collecting Use Taxes from Out-of-State Sellers

A. *Seller's Personnel in the Taxing State*

In order to resolve whether a constitutionally adequate basis existed for a state's requiring a seller to collect a use tax, courts

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AND LOCAL TAXATION § 10:6 (1981).

4. *See* Lowndes, *State Taxation of Interstate Sales*, 7 MISS. L.J. 223, 228-29 (1935).

5. 309 U.S. 33 (1940).

6. *See* Sonneborn Bros. v. Cureton, 262 U.S. 506, 514-15 (1923).

7. 322 U.S. 327 (1944).

8. *See* Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 363 (1941); Henneford v. Silas Mason Co., 300 U.S. 577, 586-87 (1937).

have examined various activities and combinations of activities by the out-of-state seller. The seller's chief constitutional objections to use tax collection have been the commerce and due process clauses.[9]

A familiar type of connection between the out-of-state seller and the taxing state has been the out-of-state seller's solicitation of business in the taxing state. This solicitation of business may be by solicitors who work from offices in the taxing state; by out-of-state firms that sell through traveling salesmen or independent contractors in the taxing state, but have no offices in the taxing state; by mail; or by sophisticated technological methods, such as toll-free (800) telephone sales, computer marketing via home computer link-ups, and computer terminal "catalogs" for direct sales that are strategically located in factory cafeterias, supermarkets, and other places.[10]

A state's power to enforce tax collection from an out-of-state firm that had general sales agents operating from offices in the taxing state was sustained at a relatively early date in *Felt & Terrant Manufacturing Co. v. Gallagher*.[11] In *Gallagher* the seller, an out-of-state manufacturer, resisted collecting the use tax for sales of goods made in another state. Because the seller maintained an office in the taxing state from which sales agents solicited orders, the seller's constitutional objections to coerced collection of the tax did not persuade the Court. The out-of-state seller may have no office, branch, warehouse, or general agents in the taxing state; the seller may never have qualified to do business in the taxing state; and its only business may be done through traveling salesmen who solicit the orders that the out-of-state seller accepts and fills. The Supreme Court sustained the out-of-state seller's collection of the use tax in this type of factual situation in *General Trading Co. v. State Tax Commission*.[12]

A comparison of *General Trading* with *McLeod v. J.E. Dilworth Co.*[13] raises the interesting question whether a lesser nexus is required to compel the out-of-state seller to collect a use

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9. For a detailed and perceptive analysis of the cases dealing with the out-of-state seller's collection of the use tax, see Simet, *The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes*, 73 Nw. L. Rev. 112 (1978). For a treatment of this subject by the author, see P. Hartman, *supra* note 3 § 10:8. For a treatment by a leading authority in the field, see J. Hellerstein, 1 State Taxation § 6.7(2) (1983).

10. *See* ACIR *supra* note 2, at 5-6.

11. 306 U.S. 62 (1939).

12. 322 U.S. 335 (1944).

13. 322 U.S. 327 (1944).

tax than is necessary to impose a sales tax. The facts in *General Trading*, a use tax collection case, are similar to the facts in *Dilworth*, a sales tax case. In both cases the only nexus between the seller and the taxing state was the seller's employment of traveling salesmen in the state imposing the tax. In both cases the solicited orders were accepted out-of-state and the seller shipped the goods from an out-of-state source in response to the orders the salesmen solicited. In both cases the out-of-state seller parted with title to the goods in his own state. Yet the Court held that a valid judgment properly could be taken against the out-of-state *General Trading* seller in the *buyer's* state for the amount of the use tax the state imposed on the purchaser. The Court further held that the state could require the out-of-state seller to collect the tax for the state.[14] On the other side of the coin, the Court held it constitutionally impermissible to impose a sales tax in *Dilworth*.[15] It is not clear whether the tax ran afoul of the commerce clause or the due process clause or both.

B. *Solicitation by Independent Contractors*

Apparently in an effort to get around the doctrine of *General Trading*, which upheld collection of the use tax when the out-of-state seller solicited through its own traveling salesmen, out-of-state sellers resorted to solicitation by independent contractors. In *Scripto, Inc. v. Carson*,[16] in which the out-of-state seller solicited orders in the taxing state through independent wholesalers and jobbers, the Court found a sufficient nexus and sustained the state's requirement that the out-of-state seller collect the use tax. Although the jobbers and wholesalers were regarded as "independent contractors," the Court determined that the jobbers and wholesalers had continuously engaged in soliciting orders for the seller in the taxing state. This continuous solicitation was sufficient to satisfy due process requirements; nor did the tax violate the commerce clause. The *Scripto* Court believed that the distinction between independent contractors and employee solicitors found in *General Trading* was "without constitutional significance."[17] Both methods of solicitation should be effective in creating and holding the market for the seller's goods.

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14. *Id.*
15. 322 U.S. at 331. For a criticism of *Dilworth* by the author, see P. HARTMAN, *supra* note 3, at §§ 10:2 and 10:4.
16. 362 U.S. 207 (1960).
17. *Id.* at 211.

C. *Out-of-State Mail-Order Sales When Seller Has a Separate Retail Outlet in the Taxing State*

In a number of instances the Court has grappled with the issue of whether the presence of an out-of-state mail-order seller's local outlet within the taxing state is a sufficient connection to require the seller to collect and remit the use tax, even though the seller's separate out-of-state department handles the mail-order sales to purchasers within the taxing state. The Court first addressed that issue in *Nelson v. Sears, Roebuck & Co.*[18] Sears, a foreign corporation authorized to do business in the taxing State of Iowa, was departmentalized: the mail-order and retail outlet operations were separately administered. Sears conducted business in the taxing state through local retail stores, yet maintained a distinct out-of-state department that handled only mail orders. Sears' out-of-state mail-order operations accepted orders from purchasers in the taxing state. Sears' agents in the taxing state, although not directly involved in the solicitation of the mail-order sales, often helped in processing the mail orders, which Sears filled by direct shipments from an out-of-state branch to the purchasers in the taxing state. As applied, Iowa's use tax statute required Sears to collect use taxes on out-of-state mail orders shipped into Iowa.

Sears resisted the collection of the Iowa use tax on commerce clause and due process clause grounds. The simple issue was whether the existence of the retail stores in the taxing state, although separable from Sears' out-of-state mail-order sales, constituted a sufficient connection to allow the state to require Sears to collect the use tax on the mail-order sales, which Sears accepted and filled out-of-state. The Court had little trouble requiring Sears to collect the use tax on the mail-order sales. The fact that Sears' business operation was departmentalized—the mail-order and retail store operations were separately administered—did not prevent the Court's finding of a nexus sufficient to require Sears' collection of the use tax on its out-of-state mail orders. Irrespective of whether Sears' in-state outlets solicited the direct mail-order sales, the Court was of the opinion that the taxing state was justified in requiring use tax collection because the out-of-state mail orders were related to Sears' overall course of business in the taxing state. Sears' local activities in the taxing state benefited from the protection and services that the state provided. *Nelson v. Montgomery*

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18. 312 U.S. 359 (1941).

Ward & Co.,[19] a companion case to *Sears Roebuck*, involved a similar fact pattern. In *Montgomery Ward*, however, the local retail outlets did engage in some local advertising of the out-of-state mail-order merchandise. The Court held that the state could require Montgomery Ward to collect the use tax.

In a much later case, *National Geographic Society v. California Board of Equalization*,[20] the Court held that neither local retail stores' assistance in processing the mail orders, as in *Sears Roebuck*, nor the local retail store's advertisement of the out-of-state mail-order business, as in *Montgomery Ward*, was crucial to the Court's decision.[21] In *National Geographic* the out-of-state seller was departmentalized: it had both an interstate mail-order business and local offices within the taxing State of California that solicited advertising. The local offices and the mail-order business within the taxing state were separately administered. The National Geographic Society, a nonprofit corporation of the District of Columbia, maintained two offices in California that solicited advertising copy for the Society's monthly magazine. The offices, however, performed no activities related to the Society's interstate mail-order business, located in the District of Columbia, which sold maps, atlases, globes, and books. California purchasers mailed their orders for these items directly to the Society's headquarters in the District of Columbia, and the Society delivered these items to purchasers in California by mail from the Society's District of Columbia headquarters. As applied, California's use tax statute required the Society to collect use taxes on the mail-order sales.

The Society resisted payment of the use tax on two grounds: (1) The Society's contacts with its California customers related solely to its mail-order sales through a common carrier or the mails; and (2) the Society's two California offices played no part in the sales activity. As a consequence, it was argued that the Society's collection of the use tax assessed against the mail-order sales violated both the commerce and the due process clauses. In short, the Society argued that a nexus or relationship must exist not only between the seller and the taxing state, but a transactional nexus also must exist between the seller's mail-order sales and its activity within the taxing state.[22]

If the Court had accepted the Society's position, then the stat-

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19. 312 U.S. 373 (1941).
20. 430 U.S. 551 (1977).
21. *Id.* at 560.
22. *Id.*

utorily imposed duty to collect the use tax would be impermissible under the Court's holding in *National Bellas Hess, Inc. v. Department of Revenue*,[23] which will be examined in detail below. In *Bellas Hess* the Court held that the out-of-state seller's mail-order sales to purchasers in the taxing state were insufficient to require the out-of-state mail-order seller's collection of the use tax.[24] The Court in *National Geographic* did not apply *Bellas Hess*. The *National Geographic* Court upheld the requirement that the Society collect the California use tax on the mail-order sales. The Court reasoned that the

> requisite nexus for requiring an out-of-state seller (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."[25]

National Geographic thus adopts the rule that a transactional nexus between the out-of-state mail-order sales and the taxing state is not essential. The nexus linchpin for use tax collection by the seller is that a connection need not be established for the particular activity. Nexus depends upon the totality of the out-of-state seller's activities within the taxing state. Although the Society's offices for soliciting advertising were departments separate and distinct from the mail-order sales, the Court applied the concept of nexus for due process clause purposes to the Society's activities as a whole, and not to the separate mail-order activity. In this respect the case is similar to *Sears Roebuck* and *Montgomery Ward*, which also involved the departmentalization of the mail-order and retail store operations. The *National Geographic* Court noted that the Society's offices had the "advantage of the same municipal services—fire and police protection, and the like—as they would have had if their activities, as in *Sears* and *Montgomery Ward*, included assistance to the mail-order operations that generated the use taxes."[26]

The Court summarily answered the Society's commerce clause objection to the collection of the use tax. The Court pointed out that the out-of-state seller was exposed to no risk of double taxation because the tax was imposed only on sales to in-state custom-

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23. 386 U.S. 753 (1967).
24. For criticism of *Bellas Hess* by the author, see *infra* notes 43-129 and accompanying text.
25. 430 U.S. at 561 (quoting Miller Bros. v. Maryland, 347 U.S. 340, 344-45 (1954)).
26. 430 U.S. at 561.

ers. The customer's identification as a resident of the taxing state was obvious, and the Society became liable for the tax only by failing or refusing to collect it from the resident customer.[27]

D. *Mail-Order Solicitation of Sales and Media Advertising as a Basis for Requiring Collection of the Use Tax by the Out-of-State Seller*

In all the situations thus far mentioned, where the Court required the out-of-state seller to collect the use tax, the seller engaged in business within the taxing state through independent contractors or employees. In *General Trading* the seller engaged in business within the taxing state through traveling salesmen who did not operate from an office within the state.[28] In *Scripto, Inc.* the seller engaged in business within the taxing state through independent contractors.[29] In *Sears Roebuck, Montgomery Ward,* and *National Geographic*, the sellers operated offices within the taxing state, but these offices were separate from the out-of-state mail-order sales in question.[30] In the following cases, however, when the Court thought the nexus was slimmer, the Court did not find a sufficient nexus between the taxing state and the out-of-state seller to require the seller to collect the use tax.

1. *Miller Brothers Co. v. Maryland*

When the taxing state sought to satisfy the due process nexus requirement for collection of its use tax based on the out-of-state seller's deliveries of goods into the taxing state, as well as radio, newspaper, and circular advertising, the attempt at collection could not pass due process clause scrutiny. In *Miller Brothers Co. v. Maryland*[31] the seller, a Delaware furniture dealer, refused to serve as a use tax collector for Maryland under a statute that required the nonresident seller to collect a use tax from Maryland residents who made retail purchases at the seller's Delaware store. Some of the sales were cash-and-carry; others involved the delivery of goods into Maryland by the seller's private truck or by common carrier.[32] The out-of-state seller neither was qualified to do busi-

27. *Id.* at 558.
28. 322 U.S. at 337.
29. 362 U.S. at 209.
30. *See supra*, notes 18-27 and accompanying text.
31. 347 U.S. 340 (1954).
32. *Id.* at 350-51.

ness in the taxing state; nor did the seller send its salesmen, solicitors, or agents into the state. No orders were taken by mail or telephone. The out-of-state seller, however, advertised in newspapers and on radio stations in Delaware. Although no advertisements were directed specifically to customers of the taxing state, nevertheless the advertisements did reach Maryland customers. Additionally, the seller periodically mailed circulars to all its former customers, including Maryland customers.

By a five to four vote, *Miller Brothers* torpedoed Maryland's use tax collection statute as applied to this extra-state seller on the ground that there was not a sufficient connection between the taxing state and the seller to satisfy due process clause requirements. Although there was a commerce clause objection to the tax, the Court did not reach that issue. The taxing state justified the imposition of the collection requirement primarily on the grounds that the seller's newspaper and radio ads were known to reach the residents of the taxing state, and that the seller's trucks delivered purchases within the taxing state for local use. The *Miller Brothers* majority declared that there was a "wide gulf" between this activity and the aggressive and regular solicitation by traveling salesmen within a taxing state found in *General Trading*.[33] Nor did the delivery of goods by the *Miller Brothers* seller to customers within the taxing state satisfy due process clause requirements. The *Miller Brothers* seller was said to have participated in "no invasion or exploitation of the consumer market in Maryland."[34] It is not easy to understand how *General Trading* solicitation, done exclusively by the out-of-state seller's traveling salesmen, is constitutionally different, for the purposes of the due process clause, from the seller's deliveries and advertisement in *Miller Brothers*. All of the activities in both cases were designed exclusively to create and hold a market for the out-of-state seller's goods in the taxing state. That is the stuff which the Court has declared satisfies due process requirements.[35]

In *Miller Brothers* the majority expressed concern that the out-of-state seller could not know whether or not the goods it sold over-the-counter would ultimately be used in the taxing state and thus be taxed. The majority, however, failed to address the question of whether the seller easily could have obtained knowledge

33. *Id.* at 347.
34. *Id.*
35. *See* General Motors Corp. v. Washington, 377 U.S. 436, 448 (1964).

about the destination of the goods. This concern of the *Miller Brothers* majority is not persuasive with respect to the goods seller delivered to customers in the taxing state. The seller's records surely showed where it delivered goods. In fact, the tax collection suit against Miller Brothers was started by the seizing of one of the seller's trucks, which was making deliveries of the seller's goods in the taxing state.

There was a strong dissent in *Miller Brothers*. The dissenters voted to sustain the Maryland use tax collecting device as applied to this out-of-state seller, because the seller engaged in a course of conduct that regularly injected its advertising into media reaching local customers in the taxing state. Moreover, this out-of-state seller regularly made local household deliveries of goods to customers within the taxing state by its own vehicles and by common carriers. The *Miller Brothers* dissent also notes that the seller would be paid for the trouble of serving as tax collector.

In *Miller Brothers* the taxing state provided a viable market for the out-of-state seller's goods; it conferred benefits on the seller's trucks, which used the state's highways to deliver merchandise to customers in the state. Further, the *Miller Brothers* decision places the local merchant in the taxing state at a competitive disadvantage, because the local merchant must shoulder the tax to pay for the benefits the state confers on the out-of-state seller.

Also, states have tried mail-order solicitation of sales through advertisement by catalogs and "flyers" as a basis for requiring the out-of-state seller to collect the use tax, even when the seller has no other connections with the taxing state. Estimates of total mail-order sales for 1985 range between fifty billion and one hundred and fifty billion dollars.[36] Mail-order solicitation of sales, however, has not been a fruitful basis for requiring use tax collection by out-of-state firms that solicit business in the taxing state by mailing catalogs and other advertising items to in-state customers.

2. *Bellas Hess*

These attempts by states to require an out-of-state mail-order seller to collect the use tax bring up the *National Bellas Hess* situation, or "can of worms."[37] This case brought to a halt the extension of use tax collection from out-of-state mail-order sellers. It is a bone of contention in harvesting revenue today. The *Bellas Hess*

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36. 43 Cong. Q. *supra* note 1, at 2572.
37. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967).

decision is the principal cause of the estimated annual loss of as much as 1.5 billion dollars in use taxes each year.[38] In *Bellas Hess* the Court held that the State of Illinois could not require an out-of-state mail-order company to collect use taxes when the mail-order firm's only activity in the taxing state was the mailing of catalogs and advertising flyers, and the delivery of the ordered goods was by mail or common carrier. In *Bellas Hess* the Court, in a six to three decision, struck down the attempt to collect the use tax on both commerce and due process clause grounds.

The *Bellas Hess* decision is based upon a composite of violations of both the commerce clause and due process clause, although the Court relied chiefly on the commerce clause as the constitutional impediment to the collection requirement. In its opinion the *Bellas Hess* Court stressed a sharp distinction that it claimed had been drawn in earlier cases regarding a state's power to impose use tax collection liability on an out-of-state mail-order seller. In *Bellas Hess* the Court took the unalterable position that prior cases demonstrated that a state could coerce use tax collection only when the mail-order seller had *retail outlets* or *solicitors* in the taxing state. The Court, however, insisted that prior cases made it clear that a state lacked the power to collect the use tax from the out-of-state seller when the seller did "no more than communicate with customers in the State *by mail* or *common carrier* as part of a general interstate business."[39] The *Bellas Hess* majority thought this distinction was valid and refused to obliterate it. This distinction is unrealistic and outmoded.

In his *Bellas Hess* opinion, Justice Potter Stewart made out the Court's best case for refusing, on commerce clause grounds, to require the out-of-state mail-order seller to collect the use tax. The opinion explains:

> And if the power of Illinois (the taxing State) to impose use tax burdens upon National (Bellas Hess, the out-of-state seller) were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose a "fair share of the cost of the local government." The very purpose of the Commerce Clause was to

38. *See supra* note 2.
39. 386 U.S. at 758 (emphasis added).

ensure a national economy free from such unjustifiable local entanglements.[40]

3. The *Bellas Hess* Dissent

The three *Bellas Hess* dissenting Justices[41] capsulized many of the basic reasons that can be lodged against the *Bellas Hess* holding. Although *Bellas Hess* was decided before *Complete Auto Transit, Inc. v. Brady*,[42] perhaps the four-pronged *Complete Auto Transit* test for valid taxation involving interstate operations should be kept in mind in analyzing the *Bellas Hess* dissent. Under *Complete Auto Transit*, a tax on interstate commerce is valid if it satisfies a four-pronged test: (1) the tax must be applied to an activity with a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the taxing state.[43] The first prong is pertinent here, but the fourth prong of *Complete Auto Transit* appears to have the most relevancy to the collection of the use tax; the tax must be fairly related to the services provided by the taxing state. With that observation in mind, one may analyze properly the *Bellas Hess* dissent. The dissenters believed that the out-of-state seller in *Bellas Hess* derived benefits through large-scale, systematic, continuous solicitation and exploitation of the taxing state's consumer markets.[44] In the view of the *Bellas Hess* dissent that activity constituted a sufficient connection between Bellas Hess and the taxing state to require Bellas Hess to collect the tax from the customers in the taxing state. Bellas Hess' use of the taxing state's residents' credit resources, which are dependent upon the taxing state's banking and credit institutions, further strengthened the out-of-state seller's connection with the taxing state.[45] According to the *Bellas Hess* dissent, that out-of-state seller could not carry on its business in the taxing state, and particularly its substantial credit business, without utilizing the taxing state's banking and credit facilities.[46] Moreover, the dissent thought it reasonable to assume that Bellas Hess would take mea-

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40. *Id.* at 759-60.
41. Justice Fortas wrote the dissent; and Justices Black and Douglas concurred in the dissent.
42. 430 U.S. 274 (1977).
43. *Id.* at 279.
44. 386 U.S. at 759-60.
45. *Id.* at 761-62.
46. *Id.* at 762.

sures to collect its delinquent accounts in the taxing state by using the state's facilities, perhaps including the courts.[47]

Nor were the *Bellas Hess* dissenters impressed by the *Bellas Hess* majority's claim that administrative and record-keeping requirements would entangle the seller's interstate business in a welter of complicated and expensive obligations. To that majority fear, the dissent replied that the majority "vastly underestimate[d] the skill of contemporary man and his machines."[48] A little later, this Article will explore further what "contemporary man and his machines" can do in the present-day context of technology and interstate use tax collections.

Furthermore, the *Bellas Hess* dissenters pointed out that the compliance burden on the out-of-state seller was no greater than the burden on mail-order firms located in the taxing state, which must collect sales and use taxes. In the dissent's view, Bellas Hess, the out-of-state seller, was exploiting the taxing state's consumer market by soliciting the state's residents who, absent the solicitation, might buy in-state sellers' goods and pay the sales tax to support their own state government.[49] Moreover, as the *Bellas Hess* dissent saw it, to excuse Bellas Hess from its obligation to collect the use tax would penalize retailers located in the taxing state, who must collect a sales tax equal to the *Bellas Hess* use tax from their customers. Thus, the local merchant who sold at retail was placed at a competitive disadvantage with the out-of-state sellers who escaped the use tax.[50]

IV. The Need for Review of *Bellas Hess:* Its Reasons are Outmoded

When the Supreme Court decided *Bellas Hess* in 1967, mail-order sales were relatively small—about thirteen billion dollars annually. This activity has grown vastly in recent years. For 1985 it has been estimated that mail-order sales ranged between fifty billion and one hundred and fifty billion dollars.[51] It has also been estimated that as much as forty-five billion dollars worth of these purchases were not taxed.[52] Further, it has been estimated, as

47. *Id.*
48. *Id.* at 766.
49. *Id.* at 762.
50. For further treatment of *Bellas Hess* by the author, see P. Hartman, *supra* note 3, at 626-631.
51. 43 Cong. Q., *supra* note 1, at 2571-72.
52. *Id.* at 2572.

noted earlier, that annual total sales and use tax revenue losses are in excess of one billion dollars.[53]

Because the Court decided *Bellas Hess* almost twenty years ago in an era of more traditional sales methods, and because today's increased use of more sophisticated communication methods requires no physical presence, review and reversal of that decision seem proper. Some of the recent technological changes in communications that make the *Bellas Hess* reasoning outmoded include the growing use of toll-free (800) sales through newspapers, magazine, and television ads; computer marketing via home computer linkups; and new developments such as computer terminal "catalogs" for direct sales.[54] One writer has described the concept of an economic nexus in the realities of modern commercial operations in this language:

> The old "doing business" test based solely on physical presence was valid when interstate business was conducted primarily face-to-face by traveling salesmen. Today, in contrast, interstate business is regularly conducted electronically and by mail. Interstate consumer sales occur through computer terminals located in homes and at retail outlets; consumer banking services are available at detached electronic units; credit cards are issued by mail across state lines and used for interstate retail transactions; and advertising by television and by mail is commonplace.[55]

Catalog selling, the issue in *Bellas Hess*, is now only one of a number of sales methods that do not require physical presence or direct face-to-face contact by the buyer. The entire pursuit of business takes on an entirely new meaning from that which existed in 1967 when *Bellas Hess* was decided.

Forty-five states and the District of Columbia impose sales and use taxes. In addition, somewhere between 6,400 and 7,000 local governments charge sales taxes, which account for nearly one-third of all state revenues.[56] Furthermore, states increasingly have been depending on the sales tax.[57] The tremendous increase in interstate sellers' use of sophisticated technological advances making their products increasingly available to wide audiences will cause mail-order sales to increase even more dramatically. According to

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53. ACIR, *supra* note 2, at 7.

54. *See supra* text accompanying note 10.

55. *See* McCray, *Overturning* Bellas Hess: *Due Process Considerations*, 1985 B.Y.U. L. Rev. 265, at 286.

56. There is some discrepancy in the number of local taxing jursidictions. *See* 43 Cong. Q. *supra* note 1, at 2573 (estimates 6,400); ACIR *supra* note 2, at 8 (estimates 7,000).

57. Between 1973 and 1983, the median state sales tax rose from 3.8 percent to 4.4 percent. During that period only New Mexico lowered its sales tax rate, and 29 States raised their sales taxes. *See* 43 Cong. Q. *supra* note 1, at 2573.

mail-order industry predictions, mail-order sales now represent approximately fifteen percent of all retail sales and could comprise twenty percent of the total retail sales by 1990.[58] By permitting taxpayers who utilize the rapidly increasing mail-order sales industry to avoid use tax payment only weakens the sales tax base, with resulting state revenue losses.

On the other hand, the use of sophisticated technological advances in interstate sales operations should greatly reduce those compliance burdens that the *Bellas Hess* Court feared would inextricably entangle interstate business in a "virtual welter of complicated obligations to State and local governmental jurisdictions,"[59] which spelled the doom for use tax collection on commerce clause grounds. Some of these technological aids to taxpayers will be explored further.

There are two ways to remove the *Bellas Hess* roadblock to use tax collections. First, the Supreme Court could—and should—relegate the *Bellas Hess* decision to the dustbin of unconstitutional oblivion. Second, Congress likely has the power to negate that case. Bills are now pending before both houses of Congress to overthrow *Bellas Hess*. Senate Bill 1510, designed to accomplish that goal, is pending before the Senate Finance Committee, and hearings have been held on that bill. House Bill 3549 is before the House Judiciary Committee.

To alleviate compliance burdens in collecting use taxes, the bills before the Congress do not propose to force every small business to master perhaps as many as 7,000 state and local tax structures. The bills would require collection only by large businesses. This arrangement would spare small firms the financial and administrative burdens of collecting the taxes and paying them to the states. To reduce these compliance burdens on small businesses, the proposed legislation would exempt sellers with sales below a specified threshold dollar amount. Recommended exemptions vary from 5 million dollars to 12.5 million dollars in annual gross sales. Moreover, proposed statutes would require a single tax rate for each state and its local governments that tax out-of-state companies. Each state would decide its own uniform rate. Even without the aid of Congress, modern technological advances have greatly eased accounting headaches and other compliance costs in keeping track of the many different use tax rates.

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58. 43 Cong. Q. *supra* note 1, at 2572.
59. 386 U.S. at 760.

V. Prospects of a Judicial Rejection of *Bellas Hess*

A. *The Due Process Clause*

Although the commerce clause appears to be the principal reason for unhorsing the out-of-state seller's obligation to collect the use tax in *Bellas Hess*, the Court indicated both due process and commerce clause infirmities in the taxing state's collection system as applied to the out-of-state mail-order seller. With reference to the mix of commerce and due process clause impediments to the collection of the tax, the *Bellas Hess* Court noted:

> The test whether a particular State exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirement of due process in this area are similar . . . . And in determining whether a State tax falls within the confines of the Due Process Clause, the Court has said that the "single but controlling question is whether the State has given anything for which it can ask return." . . . The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires "some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax . . . ."[60]

The *Bellas Hess* dissent made it clear that the taxing state did give something "for which it can ask return." Moreover, between the taxing state and the out-of-state mail-order seller there was "some definite link, some minimum connection." What the *Bellas Hess* dissenters had to say in 1967 is more compelling today. The dissenters believed that the out-of-state seller derived benefits through large-scale, systematic, continuous solicitation and exploitation of the taxing state's consumer market. The seller's use of the taxing state's residents' credit resources, the taxing state's banking and credit institutions, and the possible use of the taxing state's courts to collect delinquent accounts further reinforce this definite link and show that the state does give something "for which it can ask return." The government of the taxing state conferred benefits and gave support, protection, and opportunities in the development of the consumer market. In addition to the observations of the *Bellas Hess* dissenters, the present-day out-of-state mail-order seller, through sophisticated technological advances, has further invaded the taxing state.[61] Credit cards also are issued by mail across state lines and used for interstate retail sales. Advertising by glorified, fancy, color catalogs and fiyers has become com-

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60. 386 U.S. at 756.

61. *See supra* text accompanying note 10.

monplace. The out-of-state seller may be the recipient of proceeds collected by the taxing state's credit facilities, including the courts.

Many of these advances in interstate mail-order selling were foreign to the Court when it decided *Bellas Hess* in 1967. It seems time for the Court to rethink its due process clause doctrines. Rationally, today's Supreme Court could find that the due process clause is satisfied when a state collects a use tax from an out-of-state mail-order seller in a *Bellas Hess* situation.

In the *Bellas Hess* opinion, the Court, perhaps significantly, declared that "under the Constitution this is a domain where Congress alone has power of regulation and control."[62] This observation may imply that congressionally defined standards for mail-order use tax collection cases would satisfy both the due process and commerce clause requirements. A recent Supreme Court decision also gives some hope that the Court may now be using a more flexible and realistic due process clause concept than it envisaged in *Bellas Hess.*

In *Burger King v. Rudzewicz,*[63] decided in 1985, the Court was faced with whether a sufficient nexus existed to give a state jurisdiction over an individual in an *in personam* law suit for breach of contract. In *Burger King* the Court held that Florida's long-arm statute, which extends jurisdiction over a nonresident who breaches a contract in the state, could withstand due process clause scrutiny when the defendant was a nonresident. In *Burger King* the Court made a number of pertinent and realistic statements:

> Moreover, where individuals "purposefully derive benefit" from their interstate activities, . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because "*modern transportation and communications have made it less burdensome* for a party sued to defend himself *in a State where he engages in economic activity,*" it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.[64]

Then the *Burger King* Court mowed a verbal swath that seems to afford a reasonable basis for scuttling *Bellas Hess* on the due process clause question:

> Jurisdiction in these circumstances may not be avoided merely because

62. 386 U.S. at 760.

63. 105 S. Ct. 2174 (1985).

64. *Id.* at 2183 (emphasis added) (citing McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957)).

> 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.[65]

Surely, an out-of-state mail-order seller's "commercial efforts are 'purposefully directed' toward the residents of another state."[66]

B. *The Commerce Clause*

In derailing the collection of the use tax on out-of-state mail-order sales, *Bellas Hess* places most of its emphasis on a fatal commerce clause flaw in the statute as it was applied there. The Court insisted that to allow the taxing state to collect the use tax would subject interstate commerce to a "welter of complicated obligations to local jurisdictions."[67] "The very purpose of the Commerce Clause," said the *Bellas Hess* Court, "was to ensure a national economy free from such unjustifiable local entanglements."[68] As suggested earlier, however, recent sophisticated technological advances in communications should sap much of the vitality of the *Bellas Hess* commerce clause reasoning.

One modern advancement that should greatly alter the commerce clause reasoning is the increased use of computer software in connection with automated accounting systems.[69]

> The advent of automated accounting systems, so prevalent in most businesses in America today makes it possible for a nationally organized sales concern to automatically bill and remit for the appropriate local tax in

65. 105 S. Ct. at 2184 (emphasis changed).

66. For a recent discussion of the due process clause aspects of *Bellas Hess*, see McCray, *supra* note 54. Ms. McCray believes that judicial precedent warrants overturning *Bellas Hess*. Hers is an incisive, ambitious piece of legal writing that exhaustively treats the various territorial aspects of the due process clause as it applies to different types of state action.

67. 386 U.S. at 759-60.

68. *Id.* at 760.

69. The following information on the automated accounting system was furnished by letter dated January 13, 1986 by an able, experienced attorney who has served in a high position in the Sales and Use Tax Division of a state, and who is now representing many state and local taxpayers. Thus, he has traveled both sides of the street. That attorney is John R. Gregory, formerly the head of the Tennessee Sales and Use Tax Division; and presently a member of the law firm of Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, in Memphis, Tennessee.

thousands of jurisdictions. The software program which would be used for billing and tax purposes would identify taxpayers of a given political subdivision by their zip codes. The same operation which would generate shipping and billing invoices would also accrue the appropriate state or local tax for the zip code of destination for the shipment. The same programming would also accumulate data for preparation of a Sales Tax Return for each applicable jurisdiction. Additionally, the program could also accumulate total sales for a given time period so that the mail-order house would have timely information if they passed a sales threshold for reporting to a given state.

The difficulty in any programming of this nature is the constant updates and modifications which would be required whenever a local taxing jurisdiction changed its rates. The cost to a mail-order house of setting up a software program of this type and the constant review and revision which would be required to maintain its currency in a number of jurisdictions would be prohibitive for many of the smaller wholesale houses. These vendors do not, to our experience, have sufficient in-house programming personnel and data processing capabilities to keep their State Sales Tax programs current.

Fortunately, the market has stepped in to fill this technological niche. State Tax software programs are currently available in the market-place at a cost which would not be prohibitive to the medium or large mail-order vendor. Updates of this program are supplied by the fabricators of the software for a nominal monthly or yearly maintenance fee. At $5,000 per software package and a monthly maintenance agreement, which would cost a minimum of several hundred dollars a year, programs in this price range would be prohibitive, I believe, for a vendor whose annual gross sales were less than $500,000 a year.[70]

VI. Summary Comment on Judicial Overturning of *Bellas Hess*

Bellas Hess is the judicial barricade to the collection of the use taxes when the out-of-state seller has *no physical presence* in the taxing state. In *Bellas Hess* the Court permitted an out-of-state mail-order seller with no physical presence in the taxing state to invade and exploit the consumer market with impunity. Bellas Hess and other mail-order sellers with thick catalogs and fancy flyers operate what virtually amounts to nationwide department stores. At the time of *Bellas Hess*, the mail-order industry was ringing up only about thirteen billion dollars in annual sales. Since that time, consumers have gone on a mail-order shopping binge, buying everything from expensive home computers and telephone equipment to a vast array of clothing, household furnishings, and other items sold by companies like American Express, Sharper Image, Brookstone, and Lillian Vernon.[71] No doubt this mail-order

70. To reduce the expense, Mr. Gregory thinks Congress should enact legislation allowing out-of-state vendor's compensation for the overhead costs associated with collection but should be phased out or sharply curtailed after gross sales reach a certain level in order to avoid overcompensating a vendor for his collection duties.

71. *See* 43 Cong. Q., *supra* note 1, at 2571.

buying binge from out-of-state sellers has been triggered, in part, by the tax immunity afforded by *Bellas Hess.*

Marketing techniques have dramatically changed since *Bellas Hess* was decided in 1967. Out-of-state mail-order sellers have used sophisticated technological advances, such as toll-free (800) telephone numbers and an array of computer hookups that facilitate mail-order sellers in the invasion of the taxing states' consumer markets for the capture of profits. The entire pursuit of business has taken on an entirely new meaning.

To the extent that *Bellas Hess* insulates such out-of-state sellers from collecting a use tax, the market states not only are deprived of an estimated 1.5 billion dollars in revenue annually, but the failure to collect subverts the most effective available method for bringing about equality of taxation between residents who buy locally and those who buy from tax-exempt foreign mail-order sellers. Maybe 1.5 billion dollars annually does not constitute a huge revenue loss. But now that federal aid to states is being slashed, every billion counts, especially when states are hard pressed to pay for programs suddenly dropped in their laps by the federal government. As the late United States Senator Everett M. Dirksen purportedly proclaimed: "A billion here and a billion there, and pretty soon you are getting into real money."

The absence of an enforceable use tax in this mail-order area fosters an estimated forty-five billion dollars annually of vagabond commerce. Foreign sellers enjoy the benefits of state and local governments and the markets those governments afford, but do not make any contribution whatsoever to support the governments. Thus, these out-of-state sellers leave the tax burden to be shouldered entirely by the local competition, which cannot escape the responsibility to collect and remit the state sales tax. As the *New York Times* put it: "The mail invasions are plainly unfair—to store customers who pay the levies and to local businesses that must compete with mail orders."[72]

Of course, the in-state purchaser is still liable for the use tax on retail goods he purchases from the foreign mail-order seller. It is, however, virtually impossible for the states to identify these purchasers. Even if the states could identify the purchasers, the cost of collecting the use tax from the nonreporting purchaser would be prohibitive.

An unrealistic facet of the *Bellas Hess* doctrine is that the

72. N.Y. Times, Dec. 3, 1985, § 1, at 1, col. 3.

Court presumably thought that a few "warm bodies" in the taxing state—either operating from an office, or traipsing around hawking their wares without any in-state office—constitute a more satisfactory nexus with a state, for constitutional purposes, than other more substantial and meaningful connections. Benefits from the taxing state that are unrelated to physical contact with the state may be of vastly greater significance than those derived from the presence of a whole swarm of the out-of-state seller's agents soliciting business. Practically speaking, some form of physical presence within the state in furtherance of a business purpose is not essential to the existence of a meaningful nexus with the state. As noted earlier, in *Burger King* the Supreme Court recognized the realities of the situation.[73] The Court there declared that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which the business is conducted."[74] An article in *Forbes* relates a pertinent illustration of the Court's point as applied to use taxes on out-of-state mail-order sales. *Forbes* observed that in 1983 American Express sold 2,500 plush fur coats, which cost 1,000 dollars *each, through the mails.* IBM reportedly sold twenty percent of its typewriter production *without salesmen or stores.*[75]

For use tax collection purposes, the connection or nexus between the taxing state and out-of-state mail-order sellers should be an economic, rather than physical, relationship. When an out-of-state mail-order seller, for the purpose of realizing a profit, takes advantage of the taxing state's economic climate and milieu through systematic, continuous, and large-scale solicitation of that state's consumer market, that activity should constitute a connection or nexus sufficient to require the out-of-state seller to collect the use tax. When the state provides a substantial economic benefit to the production of income for the out-of-state seller, the taxing state should be able to demand a tithe from the seller.

The *Bellas Hess* Court seems to think an out-of-state seller's "warm bodies" in a taxing state are essential for a constitutional nexus that requires the seller to collect a use tax. Businesses, however, prefer "cold computers" to "warm bodies" for transacting the

73. 105 S. Ct. at 2184.

74. *Id.*

75. Greene, *A Boutique In Your Living Room*, FORBES, May 7, 1984 at 86.

business that produces the dollars and cents.

VII. NEGATING *Bellas Hess* BY CONGRESSIONAL ACTION

A. *Congressional Approaches to the Problem*

As noted earlier, one method of requiring mail order houses to collect use taxes on out-of-state sales is for Congress to negate *Bellas Hess*. As mentioned earlier, two bills have been introduced into Congress for that purpose. In the Senate, Senate Bill 1510 has been introduced; and in the House of Representatives, similar legislation, House Bill 3549, has been introduced. Later, I will make some additional comments about the content of these two bills.

There are two main approaches that Congress could take to achieve the goal of legalizing use tax collection on out-of-state mail-order sales. First, Congress could enact legislation that would repudiate the *Bellas Hess* decision by requiring out-of-state mail-order sellers to collect a state's use tax on interstate sales delivered into the taxing state. Alternatively, Congress could impose a direct federal tax on interstate mail-order sales at a uniform rate, and the revenues could be distributed among the states.

If Congress takes no action in connection with the requirement that the seller collect the use tax, compliance cost burdens associated with collecting and remitting the use tax in multiple jurisdictions would remain a serious problem, especially for the smaller out-of-state sellers, even if the Court overrules *Bellas Hess*. One advantage of congressional action that requires use tax collection on out-of-state sales is that it could reduce compliance cost burdens, which constitute a very real problem. Forty-five states and the District of Columbia impose sales and use taxes. In addition, between 6,400 and 7,000 local governments charge similar taxes.[76]

In the absence of congressional action, compliance cost burdens associated with sales tax collections in multiple jurisdictions would be particularly burdensome for the smaller out-of-state seller, which presumably would find it necessary to be familiar with the tax laws in all the state and local taxing jurisdictions where it makes sales. In view of the multiplicity of use tax rules in different state and local governments, the mail-order seller would be saddled with high compliance cost burdens if it is required to comply with the differing tax code provisions for forty-five states,

76. 43 Cong. Q., *supra* note 1, at 2572.

the District of Columbia, and between 6,400 and 7,000 local governments that now impose such taxes. In addition to rate differentials, exempt items and taxed buyers vary a great deal from state to state.[77] This administrative burden could conceivably stifle some interstate sales.

There are a number of possible approaches that Congress could use to reduce compliance costs: (1) a de minimis rule (exempt firms with sales below a certain threshold dollar amount); (2) a uniform combined state and local tax rate for each state; (3) allow collection of state use taxes only (no use taxes by local governments); and (4) wider state use of percentage allowances to cover collection costs.[78]

To ameliorate compliance cost burdens, the Advisory Commission on Intergovernmental Relations (ACIR) has recommended two features. ACIR has proposed congressional legislation that would contain a de minimis rule exempting sales below a threshold dollar amount. Additionally, the ACIR has recommended that states in which there also are local use taxes could determine a nondiscriminatory single rate for mail-order sales, consisting either of (a) a state rate only, or (b) a combined state and local rate that would apply at the option of the seller in lieu of the combined state and local rates for all destination jurisdictions.[79] There seems to be broad-based support for the proposition that small firms should be protected from high compliance costs.[80]

Compliance costs, however, may not be as unmanageable as they might first appear. The out-of-state mail-order industry is dominated in *numbers* by small firms, but in *sales* by a *few large firms*. Applying a de minimis rule, the ACIR notes that a threshold amount of five million dollars annually in gross sales would have exempted ninety-six percent of the sellers in 1982 whose primary classification was as mail-order firms, but would have covered seventy-six percent of the sales in the same year; a similar sized distribution appears to hold for firms that use mail-order sales as a secondary industry.[81] Thus, using this de minimis rule, use tax revenue could be collected on a large proportion of mail-order sales, while tax collectors would only have to deal with a relatively small number of out-of-state mail-order sellers. Congress would, of

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77. ACIR, *supra* note 2, at 8.
78. *Id.* at 16.
79. *Id.* at 25.
80. *Id.* at 28.
81. *Id.* at 17.

course, determine the de minimis amount, but five million dollars annually in gross sales has been suggested as an appropriate threshold sum.[82]

Empirical studies of compliance costs show that they are highest for smaller firms.[83] Thus, even from the revenue collection standpoint, it would be cost effective to exempt small firms and thereby reduce the state's high collection costs in collecting relatively small amounts of revenue through a number of small sellers.

As noted earlier, one method for reaching use taxes on interstate sales is the enactment of a direct federal sales tax on interstate mail-order sales. Congress would set the tax rate and would distribute the collected revenue among the states according to some proxy for mail-order purchases, such as population, personal income, or state retail sales.[84] One attractive feature of this method of taxing interstate sales lies in its relative simplicity. Congressional action to overturn *Bellas Hess* would not be required, and this approach would minimize compliance costs for firms by providing a single rate for all out-of-state mail-order sales.[85] Thus, compliance costs should be no different from costs for an in-state firm. This approach should have fewer constitutional problems than a congressional statute requiring out-of-state mail-order sellers to collect state use taxes on interstate sales.

On the other hand, a national tax on interstate mail-order sales would represent the greatest degree of federal intrusion into state and local affairs. Thus, corrective congressional legislation requiring out-of-state mail-order sellers to collect state use taxes on interstate sales delivered into the state that imposes the use tax on the purchaser is the more likely approach.

B. *The Constitutional Power of Congress To Overturn* Bellas Hess

If Congress passes corrective federal legislation that enables states to enforce use tax collection from out-of-state sellers, threshold constitutional questions must be faced. Congressional action would be met with commerce clause and due process clause obstructions. While *Bellas Hess* seems primarily a commerce clause

82. *Id.* at 25; 43 Cong. Q., *supra* note 1, at 2573. H.R. 3549, now before the House of Representatives, would apply only to mail-order firms with sales exceeding five million dollars.

83. ACIR, *supra* note 2, at 28.

84. *Id.* at 31.

85. *Id.* at 28.

decision,[86] the due process clause also was involved. The Court did indicate that the nature of the limitation imposed by the two clauses is closely related in use tax collections.[87] In referring to the commerce clause and the due process clause objections to the *Bellas Hess* tax, the Court noted: "These two claims are closely related."[88] Further, the Court noted that the tests of whether a particular state's action "violates the Commerce Clause and Due Process Clause 'requirements' . . . in this area are similar."[89]

In *Bellas Hess* the Court virtually invited Congress, under its interstate commerce responsibilities, to act in the area of use tax collection on out-of-state mail-order sellers. While striking down the *Bellas Hess* tax, the Court referred to the purpose of the commerce clause and declared that "under the Constitution, this is a domain where Congress has the power of regulation and control."[90] That remark may be a judicial suggestion that Congress possesses power to control both commerce clause and due process limitations on state taxation of interstate commerce.

1. The Power of Congress to Remove the Commerce Clause Barrier to Negating *Bellas Hess*

There would seem to be little, if any, doubt that Congress does possess power to remove the *Bellas Hess* commerce clause curb on the states' power to collect use taxes on out-of-state mail-order sales. As late as 1984, the Court made a significant supportive statement to this effect. In *South-Central Timber Development, Inc. v. Wunnicke*[91] the Court noted: "It is equally clear that Congress may redefine the distribution of power over interstate commerce by permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible."[92] *Wunnicke* cites several supporting cases, including the landmark case of *Pru-*

86. For a discussion by the author of the relationship between the commerce clause and the due process clause, including the overlapping of the two, see P. HARTMAN, *supra* note 3, §§ 2:1, 2:3.

87. 386 U.S. at 756.

88. *Id.*

89. *Id.* at 759-60.

90. Professor Jerome R. Hellerstein, a leading authority in the field of state taxation, thinks *National Bellas Hess* is only a commerce clause decision. *See* "ACIR Considers Legislative Repeal of *National Bellas Hess* Case Restrictions on State Use Taxes," Tax Notes, March 18, 1985, 1073.

91. 467 U.S. 82 (1984).

92. *Id.* at 87 (quoting Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945)).

dential Insurance Co. v. Benjamin,[93] which will be discussed later.

Congressional permission for states to regulate and tax interstate commerce in a manner that would otherwise not be permissible runs through the whole fabric of constitutional doctrine. It has numerous legislative illustrations, and it has received unbroken judicial approval. As early in our constitutional history as 1789, Congress passed a statute that placed pilots for interstate commerce under state law. This pilotage law was upheld in the historic case of *Cooley v. Board of Wardens*.[94] A number of earlier, well-known illustrations of congressional consent to state action have been in connection with states' efforts to control interstate traffic in intoxicating liquors. When Congress consented to state action that otherwise would not have been valid because of the commerce clause, the Court sustained the congressional consent.[95] Congressional action also cleared the way for state action dealing with interstate shipment of convict-made goods. Congress consented to state action that prohibited the sale of convict-made goods, and the state law was sustained.[96] Likewise, Congress consented to the construction of a bridge across a navigable river after the Court had invalidated state legislation authorizing such construction before the congressional consent was given. The Court validated the congressional action.[97]

The "undoubted power" of Congress to "redefine the distribution of power over interstate commerce"[98] is found in state taxation, as well as regulatory matters. It has been well recognized that the plenary power of Congress over interstate commerce extends to consent to state taxes affecting such commerce. Both before and after the validity of congressional consent to state taxation squarely was called into question, the Court has indicated in various opinions that Congress could clear away the commerce clause

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93. 328 U.S. 408 (1946).

94. 53 U.S. 299 (1852).

95. Clark Distilling Co. v. Western M.E. Co., 242 U.S. 311 (1917); *In re* Rahrer, 140 U.S. 545 (1891).

96. Kentucky Whip & Collar Co. v. Illinois C.R., 299 U.S. 334 (1937); Whitfield v. Ohio, 297 U.S. 431 (1936).

97. After the Court upset state legislation authorizing a bridge across the Ohio River in Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518 (1952), the Court had no difficulty in reversing its position after Congress had given permission by statute to the presence of the bridge. In Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1856) the Court sustained the state act authorizing the bridge after Congress, in exercising its power over interstate commerce, consented to the state's action.

98. Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945).

hurdle to state taxes.[99]

International Shoe Co. v. Washington,[100] apparently for the first time, called for a square holding on the validity of congressional consent to state taxation of interstate commerce. This litigation involved a state unemployment tax, and Congress had provided that the employer should not be "relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce."[101] In sustaining the tax, the Court disposed of the argument against the power of Congress to consent to the tax in one all-embracing sentence. Declared Chief Justice Stone: "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it."[102]

One of the most conspicuous examples of judicial acceptance of congressional consent to an otherwise invalid state tax on interstate commerce is *Prudential Insurance Co. v. Benjamin*.[103] That case called into question the validity of a South Carolina statute that imposed a tax on the premiums of insurance policies written by foreign insurance companies. No similar tax was imposed on South Carolina corporations. The tax was supported by an act of Congress consenting to taxation. The 1945 congressional enactment, known as the McCarran-Ferguson Act, provided in part: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."[104] The Act had been passed to remove doubts about the continued operation of state laws after the Supreme Court had decided in 1944 that the business of insurance was interstate commerce, and thus subject to antitrust regulation.[105] Prudential maintained that the South Carolina tax was an invalid discrimination against interstate commerce and that the McCarran-Ferguson Act was invalid because it exceeded Congress' commerce clause power. The Act was held valid,

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99. *E.g.*, State Board of Ins. v. Todd Shipyards Corp., 370 U.S. 451, 456 n.4 (1962); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457-58 (1949); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 441 (1939). For a discussion by the author of Congress' power to sweep away the commerce clause restraint on state taxation of interstate commerce, see P. HARTMAN, *supra* note 3, § 13:5.

100. 326 U.S. 310 (1945).

101. *Id.* at 315.

102. *Id.*

103. 328 U.S. 408 (1946).

104. 15 U.S.C. § 1012 (a) (1982).

105. United States v. South-Eastern Underwriters Assoc., 322 U.S. 533 (1944).

and although the South Carolina tax statute discriminated against interstate commerce since it taxed only foreign insurance companies, it was sustained because Congress had consented.

In its rationale the *Prudential* Court stressed that the commerce clause is a grant of power to Congress and not a limitation on that power. Further, the Court noted that the broad congressional purpose was to support the existing and future state systems for regulating and taxing the insurance business.[106] By releasing state powers held in restraint by Congress' "exclusive" power of regulation of interstate commerce, Congress had permitted the States to legislate in a manner previously forbidden them.[107] The *Prudential* Court declared that the plenary power of Congress over interstate commerce "enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons."[108] In *Prudential* Congress had removed the commerce clause barrier to the state tax. The Court sustained the congressional action.

In *Prudential* the Court also noted significantly that it has repeatedly accepted congressional judgment that redefined the scope of proper state activity in interstate commerce, even when that judgment had the effect of overturning prior Court decisions.[109] *Prudential* expressly notes that "in each instance [the Court] has given effect to the congressional judgment contradicting [the Court's] own previous one."[110] That view should be applicable to a congressional enactment negating the Court's decision in *Bellas Hess*. Recently, in *White v. Massachusetts*,[111] the Court declared that when "state or local action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce."[112]

To be sure, none of the cases mentioned in which the Court upheld congressional consent to otherwise invalid state action has involved the collection of a state use tax. The rationale of the cases, however—especially those regarding congressional consent

106. 328 U.S. at 429.

107. *Id.* at 429-30.

108. *Id.* at 434.

109. *Id.* at 423-24.

110. *Id.* at 424. More recently the Court has sustained the power of Congress, under the McCarran Act, to consent to state taxation of interstate insurance, even though the tax may be discriminatory. Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648 (1981).

111. 460 U.S. 204 (1983).

112. *Id.* at 213.

to otherwise invalid state taxes—should support congressional consent to the collection of a use tax from an out-of-state mail-order seller.

2. The Due Process Clause Barrier

Bellas Hess may be primarily a commerce clause case, but a due process clause question also is involved in collection of the use tax from out-of-state sellers. Both the commerce clause and due process clause hurdles would have to be crossed for legislation to be valid. In *Bellas Hess* the validity of the use tax collection from the out-of-state mail-order seller was challenged on both due process clause and commerce clause grounds. Moreover, the Court pointed out that the principles for determining a state's power to impose the burdens of collecting use taxes upon interstate sales may be the same as the test for determining whether a state's imposition of a tax falls within the confines of the due process clause.[113] The *Bellas Hess* opinion also used language from a due process clause use tax collection case, when the Court stated that the "Constitution requires 'some definite link, some minimum connection,' between the state and the person, property or transaction it seeks to tax."[114] Further, the *Bellas Hess* Court observed: "And in determining whether a State tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the State has given anything for which it can ask return.' "[115]

In *Miller Brothers* the Court struck down, *solely* on territorial due process clause grounds, the collection of a use tax from an out-of-state seller who both delivered goods and advertised by newspapers and radio in the taxing state.[116]

It hardly would be safe to assume that a full-blown due process clause attack would not be launched against any corrective legislation Congress might enact to enable states to enforce use tax collection from out-of-state sellers.

There are some random Supreme Court statements, by way of dicta, that cast some doubt on Congress' ability to remove the due process clause barrier when states try to collect use taxes from out-of-state mail-order sellers. In *Mississippi University for Women v.*

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113. 386 U.S. at 756.
114. *Id.* (quoting Miller Bros. Co. v. Maryland, 347 U.S. 343, 344-45 (1954)).
115. 386 U.S. at 756.
116. See notes 31 through 36 and accompanying text for a discussion of *Miller Brothers*.

Hogan[117] Justice O'Connor, speaking for the Court, stated that Congress has no more power than does a state legislature to "violate a law that denies the rights guaranteed by the Fourteenth Amendment."[118] That case held that it was a violation of the equal protection clause for a state university to limit enrollment in its nursing school to women. Then, by way of dicta, the Court stated that an attempt by Congress to exempt the university from the requirements of the fourteenth amendment would be unconstitutional. Civil rights, of course, were involved in *Hogan.* Congress' power to restrict due process in civil rights matters likely would be more closely scrutinized than a congressional enactment in the federalism context of state taxation.

Justice O'Connor had made essentially the same point in a different context in her dissent in *ASARCO, Inc. v. Idaho State Tax Commission.*[119] In *ASARCO* the Court invalidated, on territorial due process clause grounds, a state income tax law applied to a multistate operation. In her dissent Justice O'Connor noted that the due process barrier to state taxation "may be beyond Congress's power to correct."[120] Justice Powell, who spoke for the *ASARCO* Court, addressed Justice O'Connor's concerns by noting that the issue was not before the Court, because no relevant federal legislation had undertaken to remove the due process clause obstacle.[121] Justice Powell did observe that the limitations on state taxing power do not apply to the federal government, but he refused to express an opinion on the scope of federal authority to legislate in this area.[122] In dictum the Court also has noted in another connection that "Congress does not have final say as to what constitutes due process under the Fourteenth Amendment."[123] That statement does not mean, however, that the Court might not accept Congress' judgment as to what constitutes due process.

The Court might well find due process clause protection has more elasticity in the context of fiscal matters in federalism than the clause does in a civil rights context. Thus, the Court might well accept congressional judgment in defining the scope of due process, even though that judgment effectively negates the Court's decision

117. 458 U.S. 718 (1982).
118. *Id.* at 732.
119. 458 U.S. 307 (1982).
120. *Id.* at 350.
121. *Id.* at 327 n.23.
122. *Id.*
123. State Board of Insurance v. Todd, 370 U.S. 451, 457 (1962).

in *Bellas Hess*.[124] This action could be effected more readily because Congress would not be restricting due process in the context of fundamental constitutional rights or suspect classifications. When legislation, rather than dealing with economic or resource allocation—including state taxation—creates classifications that affect the rights of the individual, the equal protection clause imposes a much stricter curb on state action.[125] The due process clause, however, should not impose such strict constraints on the collection of the use tax from out-of-state mail-order sellers. Since congressional action requiring the out-of-state mail-order seller to collect use taxes would involve regulating economic matters in the federal system, the Court, one hopes, would find sufficient flexibility in the due process clause to uphold action taken by Congress if it should make the watershed decision of defining due process for use tax collection purposes. After all, the out-of-state mail-order seller is not the party taxed; it is only required *to collect* the tax, and has no liability if the tax is collected from the purchaser, who is the taxpayer. Such coerced *collection* by the out-of-state mail-order seller would not hobble or impede the workings of our federal system. Nor should such collection unconstitutionally impinge upon the out-of-state mail-order sellers' activity of skimming the cream off the consumer market.

There are precedents for congressional assistance to the states in resolving interstate problems that exceed the power of the states when acting alone. In a number of those instances, the precedent was established over both commerce clause and due process clause attacks. A congressional enactment that would enable states to enforce use tax collection from out-of-state mail-order sellers should not have a fatal due process clause flaw.

As noted earlier, in *Kentucky Whip & Collar Co. v. Illinois Central Railroad*[126] the Court sustained the constitutionality of a congressional enactment prohibiting the interstate transportation of articles made by convict labor into states that had prohibited the sale of such goods. The Court upheld this congressional legislation as a valid exercise of Congress' plenary power over interstate commerce. The Court rejected the argument that because the law aided state policy it was arbitrary or capricious and a violation of due process. Said the Court: "In the congressional action there is

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124. *Prudential*, 328 U.S. at 424.
125. J. HELLERSTEIN, *supra* note 9, at § 3.2; P. HARTMAN, *supra* note 3, at ¶ 3:10.
126. 299 U.S. 334 (1937).

nothing arbitrary or capricious bringing the statute into collision with the requirements of due process of law . . . . The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection."[127]

Other illustrations show Congress' power to aid state policy when acting under its commerce clause power. Moreover, there was no due process clause roadblock to the congressional legislation. As noted above, in *Clark Distilling Co. v. Western Maryland Railroad Co.*[128] the Court upheld the power of Congress in the Webb-Kenyon Act to prevent interstate transportation of liquor to states where receipt and possession of liquor were prohibited by state law. The statute weathered both a commerce clause and a due process clause attack. After finding that the commerce clause power enabled Congress to pass this statute, the Court then addressed the due process clause question. The *Clark* Court considered the due process clause of both the fifth and fourteenth amendments. The Court said:

> It is only necessary to point out that the considerations which we have stated dispose of all contentions that the Webb-Kenyon Act is repugnant to the due process clause of the Fifth Amendment, since what we have said concerning that clause in the Fourteenth Amendment as applied to state power is decisive.[129]

Holding that the states had power to enact the prohibition law consistent with the due process clause of the fourteenth amendment, the *Clark* Court stated:

> That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open. . . . This being true, there can be no doubt that the West Virginia prohibition law did not offend against the due process clause of the Fourteenth Amendment.[130]

Also, Congress has assisted the states by passing legislation to curb cigarette tax evasion by interstate mail order,[131] as well as by transportation across state lines.[132]

In the above instances Congress recognized that the state borders and limited state jurisdiction create insuperable state problems that can be resolved only by congressional action. The

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127. *Id.* at 352.
128. 242 U.S. 311 (1917).
129. *Id.* at 332.
130. *Id.* at 320.
131. 15 U.S.C. §§ 375-78 (1982).
132. 18 U.S.C. §§ 2341-44 (1982).

pressing need to curb use tax collection evasion by out-of-state mail-order sales in order to protect state revenues and to eliminate any competitive disadvantage to local merchants, who are required to collect the sales tax, should fall within this category of congressional assistance to the states in furtherance of state policies to collect use taxes on out-of-state mail-order sales.

The due process clause of the fifth amendment should not limit the exercise of congressional power to negate *Bellas Hess.* Unlike the due process clause of the fourteenth amendment, the fifth amendment due process clause has no territorial limits within the United States. Seemingly, a rational basis for such an economic regulation could be found in use tax collection from out-of-state mail-order sellers. Because Congress is not bound by the territorial limits of the individual states, Congress should have the power to consent to state laws that permit the collection of a use tax imposed upon a mail-order sale made beyond the borders of each state.

One authority in this area of the law, Professor William Cohen of Stanford Law School, suggests that Congress should be able to consent to the state tax invalidated in *ASARCO, Inc. v. Idaho Tax Commission,*[133] even though the Court unhinged the tax on fourteenth amendment due process clause grounds because the state taxed transactions beyond its borders.[134] As Cohen explains,

> My thesis, however, is that Congress should be able to remove constitutional limits on State power if those limits stem solely from division of power within the federal system. In other words, Congress should be able to approve unconstitutional policy choices in state law when Congress is not constitutionally prohibited from directly adopting the same policy itself. In appropriate circumstances, Congress should be able to authorize the states to enact legislation that, in the absence of congressional consent, would run afoul of due process or equal protection clauses of the fourteenth amendment . . . .[135]

Professor Cohen, however, does place limits on the extent to which Congress could validate unconstitutional state action: "Moreover, my thesis would *not* permit Congress to ignore constitutional limits on its *own* power. Thus, ordinary federal legislation cannot eliminate constitutional gnarantees of individual liberty that are applicable to the states and Congress alike."[136] Professor Cohen recognizes that the answer to whether Congress has power to enact

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133. 458 U.S. 307 (1983).

134. *See* Cohen, *Congressional Power To Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma,* 35 STAN. L. REV. 387, 412-13 (1983).

135. *Id.* at 388.

136. *Id.*

the constitutional legislation itself often will be unsettled and controversial.[137]

In suggesting that Congress could remove the due process clause limitations of the fourteenth amendment, which were fatal to the state tax in *ASARCO*, Professor Cohen points out that those limitations applied in *ASARCO* were the states' power to tax transactions beyond their borders. Those limitations are not applicable to federal regulation; hence Congress should be able to remove them.

Applying these principles to *Bellas Hess*, even if the collection of the tax met its Waterloo under fourteenth amendment due process limitations, Congress should be able to remove those limitations, because the fourteenth amendment due process clause does not apply to the federal government. The same reasoning, of course, would permit Congress to remove the Court's *Bellas Hess* commerce clause obstruction, because the commerce clause is a *grant of power* to Congress—not a limitation on congressional power.[138]

Because the only due process constraint on congressional action is the fifth amendment, what substantive due process standards apply to congressional economic legislation? Congress would face this situation should it undertake to negate *Bellas Hess*.

If the due process standards in *United States v. Carolene Products Co.*[139] are applied, perhaps a congressional statute requiring collection of the use tax by an out-of-state mail-order seller could weather a fifth amendment due process clause storm. In *Carolene Products* the Court considered the validity of a fifth amendment due process assault on a congressional statute that prohibited the interstate shipment of "filled" milk. In turning back the attack, the Court responded through Justice Stone, who said that "where the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed, affords support for [the legislation]."[140] Although the Court found sufficient facts in *Carolene Products* to support the finding of a rational basis for the statute, nevertheless Justice Stone emphasized that, even absent these legislative findings, the Court would have upheld the legislation because "the existence of facts supporting the legis-

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137. *Id.*
138. *See Prudential,* 328 U.S. at 423.
139. 304 U.S. 144 (1938).
140. *Id.* at 154.

lative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests on some rational basis."[141]

It is thus plain that the Court gives great deference to Congress' economic judgment.[142] Applying the *Carolene Products* standards to the validity of a congressional enactment requiring an out-of-state mail-order seller to collect a state use tax, Congress should have a rational basis for aiding state policy and requiring the collection. Those reasons have been stressed throughout much of this Article.

VIII. Summary Comment and Conclusions on Collection of Use Taxes from Out-of-State Mail-Order Sellers

No definitive judicial decisions deal with either (1) overturning *Bellas Hess* or (2) sustaining congressional legislation that would negate *Bellas Hess*. On both counts, however, the prospects should be pretty good for escaping the limitations *Bellas Hess* places on the collection of state use taxes from out-of-state mail-order sellers. The seller in *Bellas Hess*, as noted by the dissent, derived benefits from the taxing state through large-scale, systematic, continuous solicitation and exploitation of that state's consumer market.

Even if *Bellas Hess* is overruled by the Court, some congressional action should prove useful in establishing fair compliance costs. There appears to be no adequate judicial machinery to establish such costs. Spasmodic and unrelated litigation of use tax collections from out-of-state mail-order sellers cannot establish reasonable guidelines for compliance costs that are fair to both the taxing state and the out-of-state mail-order seller who must collect the use tax. Whether *Bellas Hess* receives its just demise at the hands of the Court or in the halls of Congress, reasonable compliance costs should be established. As noted earlier, a de minimis rule should be applied, which would exempt all sellers with gross sales below a fixed dollar amount. In addition, a uniform rate is needed when both state and local sales taxes are imposed. These are the two main factors in the establishment of compliance costs.

The ACIR has put forth a legislative proposal for adoption by Congress for corrective federal legislation that would enable states

141. *Id.* at 152.

142. See J. Nowak, R. Rotunda & J. Young, Treatise on Constitutional Law: Substance and Procedure § 15.4 (1986) (Court continues to pay high deference to Congress).

to enforce use tax collection. That proposal is worth noting in full:

> The Commission recognizes that significant changes have occurred in the composition and technology of the retail sales market in the 18 years since National Bellas Hess. It is also keenly aware of the need to equalize the competitive position of the in-state and out-of-state vendors and to safeguard state sales and use tax bases and revenues. To achieve these aims, the Commission recommends that Congress enact legislation that would negate the National Bellas Hess decision by requiring mail order vendors to collect a state's use tax on interstate sales delivered in that state, if the mail order vendor engages in regular or systematic solicitation of sales in that state through catalogs, advertising, or other means. To relieve the compliance cost burden on small businesses, the legislation sbould contain a de minimis rule, exempting vendors with national sales and/or sales in the destination state below a specified threshold dollar amount. The de minimis figure(s) should be determined by Congress, but should be no less than ($5 million) ($12.5 million) in gross sales. To minimize compliance costs for firms operating in multiple jurisdictions, states in which there are local sales and use taxes should determine a non-discriminatory single rate, either (a) the state rate only or (b) a combined state and local rate that the out-of-state seller may elect to charge in lieu of applying the combined state and local rates for all jurisdictions which are the destinations of the sales.[143]

The use of a state rate only, or a combined state and local rate that the out-of-state seller may elect to pay, could greatly reduce compliance costs burdens for a far-flung out-of-state seller. It would reduce the number of use tax rates facing a multistate firm to a maximum of 46, rather than the estimated 6,400 to 7,000 local taxing jurisdictions with which the seller might be faced in the use tax collection process.[144] At the present time, 45 states and the District of Columbia, plus upwards of 7,000 local governments, impose sales and use taxes.[145]

Of course, the cut-off of small business from the requirement of collecting the use tax meets opposition. It would give an unfair competitive advantage to companies falling below the floor. The proposed congressional net catches the large fish, but lets the small ones slip through.

The importance of relegating *Bellas Hess* to the ash can is demonstrated by the mushrooming of mail-order sales by out-of-state sellers, and predictions are that the mail-order business will take over a larger portion of the market. In part, this increase in sales is attributable to the development of sophisticated technological advances in communications. It also has been suggested that the *Bellas Hess* decision caused the out-of-state mail-order busi-

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143. ACIR, *supra* note 2, at 25.
144. *Id.* at 8.
145. *Id.*

ness to spiral. Technological changes in communications and automated accounting systems, when coupled with the two main features of the proposed congressional legislation, seem to take most of the sting out of the *Bellas Hess* Court's claim that use tax collection could involve interstate business in a welter of complicated obligations and entanglements, especially in local jurisdictions. Thus, there is little reason why the leak in the state and local revenue dike resulting from the inability to collect the use tax on out-of-state mail-order sales should not be plugged by negating *Bellas Hess* through judicial and/or congressional action. This action would remove the competitive advantage enjoyed by the out-of-state seller over the local seller.

So long as we have a federal system of government, the taxation of multistate businesses will cause controversy. The collection of the use tax from out-of-state mail-order sellers generates its share of that controversy. There must, of course, be a proper accommodation between the interests of the states' taxing power and the proper concerns of the Nation. The economic growth of the Nation must not be hobbled by unreasonable and myopic state and local tax policies that not only would create retaliation and trade wars among the states, but also would stunt the national economic growth from which the federal and state governments must collect enormous and burgeoning amounts of taxes.

Sophisticated modern technological developments have caused out-of-state mail-order sales to flourish, accompanied by mushrooming amounts of use taxes that cannot be collected from those out-of-state sellers, so long as *Bellas Hess* remains misguided law. Under technological advances, the present-day out-of-state mail-order seller has invaded the consumer market of the taxing state for the generation of profits through toll-free (800) telephone sales and through newspaper, magazine, radio, and television advertisements placed by the seller. Additionally, the out-of-state seller uses computer marketing via home computer linkups, and new developments such as computer terminal "catalogs" for direct sales have been placed in such readily available places as factory cafeterias, supermarkets, and other strategic locations. These easily accessible technological advances enable the out-of-state mail-order seller to engage in market-creating and market-supporting activities, which have been thought by the Court to be hallmarks for satisfying commerce clause and due process clause requirements in

the area of multistate taxation.[146] On the other side of the shield, sophisticated technological advances have greatly sapped much of the *Bellas Hess* judicially perceived "welter of entanglements" argument thought by the Court to outlaw the collection of the *Bellas Hess* tax. Thus, the increased use of computer software in connection with automated accounting systems makes it possible for a nationally organized sales concern automatically to bill and remit for the appropriate state and local tax in thousands of jurisdictions. Consequently, satisfactory reconciliation of the competing demands of a proper, workable balance between state and national interests would not unreasonably be hampered or curtailed by the collection of the use tax from out-of-state mail-order sellers, especially when coupled with congressional clearing of this use tax collection briar patch.

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146. *See* General Motors Corp. v. Washington, 377 U.S. 436, 448 (1964).