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The Political Process Argument for Overruling *Quill*

Edward A. Zelinsky†

INTRODUCTION

Should the U.S. Supreme Court overrule *Quill Corp. v. North Dakota*?[1] In *Quill,* the Court held that, under the dormant Commerce Clause of the U.S. Constitution, the states cannot impose the obligation to collect sales taxes on out-of-state vendors that lack physical presence in the taxing state.[2] As Internet commerce has grown, *Quill*'s physical presence test has severely hampered the states' ability to enforce their sales taxes.

Two years ago, whether the Court should overturn *Quill* was an intellectually interesting question of little practical import. Three events have now made this an urgent inquiry. First, concurring in *Direct Marketing Association v. Brohl*,[3] Justice Anthony Kennedy indicated that, in "an appropriate case," the Supreme Court should "reexamine *Quill*"[4] and its rule that states may only impose sales tax collection responsibilities upon sellers with in-state physical presence.[5] Second, South Dakota, Alabama, and Wyoming have viewed Justice Kennedy's concurrence in *Direct Marketing Association* as an invitation to challenge *Quill,* an invitation that these three states have accepted by imposing sales tax collection duties on out-of-state Internet and mail-order vendors without in-state physical presence.[6] Third, the U.S. Court of Appeals for the Tenth

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1 504 U.S. 298 (1992).

2 *Id.* at 314–18.

3 135 S. Ct. 1124 (2015).

4 *Id.* at 1135 (Kennedy, J., concurring).

5 *Quill*, 504 U.S. at 314–18.

6 S. 106, 91st Leg. Assemb. Sess. § 1 (S.D. 2016) (imposing South Dakota sales tax collection responsibilities on "any seller" of "tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state"); ALA. ADMIN. CODE r. 810-6-2-.90.03 (2015) (imposing Alabama sales tax collection responsibilities on "out-of-state sellers who lack an Alabama

Circuit, in sustaining Colorado's remote sales reporting statute, signaled that it was placing *Quill* and its physical presence test on the path to "wash away with the tides of time."[7]

Much of the Supreme Court's case law suggests that, under the banner of stare decisis, the Court should not overturn *Quill*. This case law indicates that it is Congress's job to modify or reject the physical presence test established in *Quill* since *Quill* was decided under the dormant Commerce Clause and can thus be overturned by Congress.[8] The Court has repeatedly indicated, and stated in *Quill* itself, that Congress should correct the Court when Congress has the authority to do so.[9]

However, a careful assessment of the federal political process suggests a contrary conclusion, namely, that the Supreme Court itself should overturn *Quill* in the Court's role as guardian of the states against federal commandeering.[10] A combination of factors underlay this conclusion: the tactical advantage *Quill* bestows in the political process upon the Internet and mail-order industries, the importance of the states in the structure of federalism, the centrality of sales taxes to the financing of state government, the severe impediment *Quill* and its physical presence test impose upon the collection of these taxes, and the unique disadvantages of the states in the federal legislative process.

In our system of federalism as it exists today, the states are structurally important but politically disadvantaged. Federal legislators receive no political benefits from helping the states. This contrasts with the political support—votes and campaign contributions—private groups bestow for legislative backing. *Quill* effectively commandeers the states to subsidize Internet commerce by not taxing it. *Quill* also hands great political advantage to the defenders of the status quo, the Internet and mail-order sales industries that effectively sell their goods sales tax free because of *Quill*'s physical presence test. In the federal lawmaking process, defenders of current law have the politically easier task of blocking change in a

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physical presence but who are making retail sales of tangible personal property into the state"); H.B. 0019, 64th Leg., Gen. Sess. (Wyo. 2017) (imposing Wyoming sales tax collection responsibilities on "any seller of tangible personal property, admissions or services . . . who does not have a physical presence in" Wyoming).

[7] Direct Mtkg. Ass'n v. Brohl, 814 F.3d 1129, 1132, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

[8] *See infra* Section II.A.

[9] *Quill*, 504 U.S. at 318 ("Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.").

[10] *See infra* Section II.B.

process that affords them many opportunities to obstruct change. *Quill* gives that advantage to the Internet and mail-order industries which need merely impede legislation to preserve the status quo—as they have done successfully for over two decades.

All groups losing in the Supreme Court are at a political disadvantage in the subsequent political process. If *Quill* were merely a dispute between private commercial interests, concerns about stare decisis would counsel the Court to let Congress decide the fate of *Quill* and its physical presence test. However, more is at stake here than a dispute between private commercial interests. The Court should protect the states' sales taxes because collecting these taxes is a core function of state government that is severely impeded by *Quill*, because of the states' importance to the federal system of government, and because of the states' unique political disadvantages in the federal lawmaking process.

Federal legislators receive direct political benefits in the form of votes and campaign contributions for helping private interest groups overturn Supreme Court decisions. In contrast, these federal legislators derive no political benefits from helping the states. Senators and representatives have no political incentive to assist the states since the average voter does not credit his federal congressmen for that assistance.[11] The tangible political benefits of repealing *Quill*—more sales tax revenues that finance state and local services, reduced state tax rates, or both—will redound to state and municipal officials, not to the members of Congress who must overturn *Quill* legislatively. For this reason, the Court should protect the states from the commandeering effect of *Quill* in a way that the Court need not protect private interest groups that offer political awards to members of Congress for their assistance.

Quill stacks the political deck against the states that confront the difficult task of securing legislation over the opposition of well-organized interests defending the status quo. Consequently, the Court should follow Justice Kennedy's lead and, as protector of the states from federal commandeering, should itself overturn *Quill*.

This article proceeds in five steps. First, it describes the origins and current status of the *Quill* controversy. Second, this article explores the stare decisis argument for letting *Quill* stand subject to Congress's power to revise and the political process counterargument for the Court to itself overturn *Quill* in the Court's role as the protector of the states against

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11 *See infra* Section II.A.

commandeering by the federal government. The third section discusses the substantive merits of *Quill*'s physical presence test. One of these substantive arguments is weighty: Physical presence in the taxing state is a proxy for voice in the state's political process. However, ultimately this argument does not outweigh the political process considerations that should impel the Court to protect the states' sales taxes by overturning *Quill* and its physical presence test. The fourth section anticipates and responds to possible criticisms of my analysis. The fifth section recommends that, after *Quill* has been reversed, Congress should enact nationwide statutory standards establishing when an out-of-state retailer makes sufficient sales into any state for that state to impose upon the retailer the obligation to collect the state's tax.

This article concludes that the Court should overturn *Quill* in the Court's role as guardian of the states against federal commandeering in light of the combination of the relevant factors: the tactical advantage *Quill* bestows in the political process upon the Internet and mail-order industries, the importance of the states in the structure of federalism, the centrality of sales taxes to the financing of state government, the severe impediment *Quill* and its physical presence test impose upon the collection of these taxes, and the unique disadvantages of the states in the federal legislative process.

I. THE ORIGINS AND CURRENT STATUS OF THE *QUILL* CONTROVERSY

A. The Origins of the Quill *Controversy*

Complete Auto Transit Inc. v. Brady[12] is the U.S. Supreme Court's definitive statement of the dormant Commerce Clause restraints on state taxes impacting interstate commerce. Under *Complete Auto*, the constitutional status of a state tax affecting interstate commerce depends on the tax's "practical effect."[13] In particular, to survive dormant Commerce Clause challenge, a state tax affecting interstate commerce must satisfy four tests enunciated in *Complete Auto*: A state tax passes judicial muster under the dormant Commerce Clause if the "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against

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[12] 430 U.S. 274 (1977). *Complete Auto* has generated voluminous commentary. *See, e.g.*, WALTER HELLERSTEIN ET AL., STATE AND LOCAL TAXATION: CASES AND MATERIALS 131–32 (10th ed. 2014).

[13] *Complete Auto*, 430 U.S. at 279.

interstate commerce, and is fairly related to the services provided by the State."[14]

The *Complete Auto* framework has proven unforgiving. Once a state tax provision has been found to discriminate against interstate commerce or the taxing state has been deemed to lack substantial nexus to the taxed activity, the Court has stricken the challenged tax—with no opportunity for the state to mount an affirmative defense, such as a compelling state interest for its tax.[15]

Applying the stringent requirements of *Complete Auto*, the Supreme Court has struck a wide swath of state tax provisions under the dormant Commerce Clause. These stricken provisions include Ohio's tax credit against its motor vehicle fuel tax limited to sales of ethanol produced in-state,[16] Hawaii's exemption of certain locally produced beverages from Hawaii's tax on wholesale liquor sales,[17] and Maine's property tax exemption for charitable camps limited to camps serving Maine residents.[18] Most recently, in *Comptroller of the Treasury of*

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[14] *Id.*

[15] In contrast, when a state regulates interstate commerce outside the tax context, the Court's dormant Commerce Clause standards are less rigid. For example, *Maine v. Taylor*, 477 U.S. 131 (1986), addressed Maine's prohibition on the importation into that state of live baitfish from other states. *Id.* at 132–33. While this prohibition discriminated against interstate commerce, it nevertheless survived dormant Commerce Clause challenge since the Court concluded that the Maine law served "legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives." *Id.* at 151. Under the Court's tax-related dormant Commerce Clause case law as articulated in *Complete Auto* and its progeny, no such justification can be advanced to defend a tax which is deemed discriminatory for dormant Commerce Clause purposes.

A state law that does not discriminate against interstate commerce but that burdens such commerce is subject to so-called "*Pike* balancing," Dep't of Revenue v. Davis, 553 U.S. 328, 353 (2008), the inquiry exemplified by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In *Pike*, Arizona law required that "all cantaloupes grown in Arizona and offered for sale" be packaged in Arizona in state-approved packaging. *Id.* at 138. Bruce Church, Inc. grew cantaloupes in Arizona. *Id.* Rather than complying with that state's packaging law, Bruce Church, Inc. instead shipped its "uncrated cantaloupes" grown in Arizona to the company's facility in California "for packing and processing" in the Golden State. *Id.* "[C]andidly undertak[ing] a balancing approach," *id.* at 142, the *Pike* Court held that the dormant Commerce Clause prohibited Arizona from applying its in-state packaging requirement in this context. *Id.* at 145–46. Arizona's "tenuous interest" in that requirement, the Court determined, did not justify the burden on interstate commerce resulting from the prohibition of the company's shipment of its unpackaged cantaloupes from Arizona to California. *Id.* There is no such balancing under *Complete Auto*. A state tax statute that flunks one of *Complete Auto*'s four tests cannot be salvaged by the invocation of a counterbalancing state interest.

For a critique of *Pike* balancing by an important Commerce Clause commentator, see Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 453–59 (2008) (criticizing balancing as "both impossible and inappropriate," *id.* at 456).

[16] New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 271, 279–80 (1988).

[17] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984).

[18] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 567–71 (1997).

Maryland v. Wynne, the Supreme Court struck, on dormant Commerce Clause grounds, Maryland's county income tax because the tax failed to give a credit to Maryland residents for the out-of-state income taxes they pay.[19] In the tax setting, once the Supreme Court unsheathes its dormant Commerce Clause sword, the challenged state tax provision rarely survives.

Quill Corp. v. North Dakota is part of this unforgiving dormant Commerce Clause tax oeuvre.[20] In *Quill*, the Supreme Court held that the "substantial nexus" prong of the *Complete Auto* test precluded North Dakota from imposing the obligation to collect sales tax upon an Illinois corporation that lacked physical presence in North Dakota. The Illinois-based Quill Corporation had no stores or employees in North Dakota.[21] It reached North Dakota customers through "catalogs and flyers, advertisements in national periodicals, and telephone calls."[22] When a North Dakota consumer ordered a product from Quill Corporation, Quill shipped the product to the North Dakota customer "by mail or common carrier from out-of-state locations."[23] Quill made nearly $1 million in sales to roughly 3000 North Dakota residents.[24] *Quill* held that, for purposes of *Complete Auto* and the dormant Commerce Clause, Quill Corporation lacked "substantial nexus" to North Dakota since Quill had no physical presence in that state.[25] Hence, North Dakota could not impose upon Quill Corporation the obligation to collect North Dakota taxes on Quill's sales to its North Dakota customers.

Quill was decided in 1992 as a matter of stare decisis. In *National Bellas Hess, Inc. v. Department of Revenue of Illinois,* the Supreme Court in 1967 held, on facts similar to *Quill*, that a state lacked nexus to an out-of-state retailer with no in-state physical presence.[26] Hence, the taxing state in that case, Illinois, could not require National Bellas Hess to collect taxes on its sales to Illinois customers.

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[19] 135 S. Ct. 1787, 1792 (2015). *Wynne* has provoked much commentary. *See* Brannon P. Denning, *The Dormant Commerce Clause ~~Wynnes Won~~ Wins One: Five Takes on* Wynne *and* Direct Marketing Association, 100 MINN. L. REV. HEADNOTES 103, 104–16 (2016). For my thoughts on *Wynne*, see Edward A. Zelinsky, *The Enigma of* Wynne, 7 WM. & MARY BUS. L. REV. 797 (2016) (characterizing *Wynne* as a "decision as enigmatic as it is important").

[20] *Quill* also held that North Dakota's sales tax law satisfied the requirements of the Due Process Clause. Quill Corp. v. North Dakota, 504 U.S. 298, 305, 308 (1992).

[21] *Id.* at 302.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 312–18.

[26] Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 759–60 (1967).

A generation later in *Quill*, the Court acknowledged that, under subsequently prevailing circumstances, it might have decided *National Bellas Hess* differently than it did,[27] and that it might have decided *Quill* differently had there been no *National Bellas Hess*.[28] However, the *Quill* Court concluded that reliance interests and respect for precedent compelled adherence to the holding of *National Bellas Hess* as a matter of stare decisis:

> [T]he *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizable industry. The "interest in stability and orderly development of the law" that undergirds the doctrine of *stare decisis* therefore counsels adherence to settled precedent.[29]

Thus, under *Quill*, an out-of-state retailer without in-state physical presence lacks "substantial nexus" with the state into which the retailer sells and ships its goods by mail or common carrier. Consequently, this out-of-state retailer cannot be compelled to collect the state's sales and use taxes. The *Quill* Court took comfort in the fact that its decision under the dormant Commerce Clause could be reversed or modified by Congress, which is the ultimate arbiter under the Commerce Clause.[30]

Quill was decided when electronic commerce was in its infancy. Internet shopping is, of course, an infant industry no more. *Quill* today severely impedes the states' collection of their taxes on Internet sales since an Internet seller lacking physical presence in the taxing state cannot be compelled to collect tax on behalf of that state.[31]

As a matter of law, customers who do not pay sales tax on their Internet and mail-order purchases must declare such sales and pay use tax to their home state in lieu of the sales tax they do not pay.[32] In practice, compliance with the legal obligation to pay use tax is low. As electronic commerce has grown, state revenues have been seriously hurt by the states' inability to impose collection obligations upon out-of-state sellers.[33] This inability has also disadvantaged conventional "brick-and-mortar" retailers that operate old-fashioned retail stores. Because of their

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[27] *Quill*, 504 U.S. at 311 ("[C]ontemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today. . . .").

[28] *See id.*

[29] *Id.* at 317 (internal citation omitted) (quoting Runyon v. McCrary, 427 U.S. 160, 190–91 (1976) (Stevens, J., concurring)).

[30] *Id.* at 318 ("Congress has the ultimate power to resolve.").

[31] *See id.* at 321 (Scalia, J., concurring); Andrew J. Haile, *Affiliate Nexus in E-Commerce*, 33 CARDOZO L. REV. 1803, 1807 (2012).

[32] *See, e.g.*, OHIO REV. CODE ANN. §§ 5741.01–.02 (West 2015); HELLERSTEIN ET AL., *supra* note 12, at 785–800.

[33] *See infra* notes 50–53 and accompanying text.

in-state physical presence, these conventional retailers must collect sales taxes from their store-based customers while, per *Quill*, their out-of-state Internet and mail-order competitors need not collect such taxes because they lack physical presence within the taxing state.[34]

Since *Quill* affirmed the physical presence test of *National Bellas Hess*, *Quill* places the political burden of securing federal legislation on those who seek to overturn that test. The states want to overturn *Quill* to impose sales tax collection responsibilities on out-of-state vendors. In addition, in-state vendors operating brick-and-mortar stores want their out-of-state competitors to bear the same tax collection responsibilities as do these in-state firms.[35]

B. States' Responses to Quill*'s Physical Presence Test*

The states are troubled about the considerable sales tax revenue they in practice forego on their residents' Internet purchases. Additionally, states are concerned by the tax-based disadvantage imposed upon in-state brick-and-mortar sellers who must collect sales taxes that their out-of-state Internet competitors do not. The states have accordingly broadened the reach of their respective sales taxes to force Internet and mail-order sellers to collect such taxes. One state response to *Quill* and the growth of electronic commerce has been so-called "click through nexus" statutes like New York's.[36] Under these laws, Internet sellers are deemed to have the in-state physical presence required by *Quill* if such sellers have local in-state sales associates.[37]

Another approach is sometimes designated as "affiliate" nexus, and is epitomized by California's use tax statute. California imposes upon an out-of-state seller the obligation to collect California use tax on sales to California residents if the

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[34] *See infra* notes 50–53 and accompanying text.

[35] *See infra* Section I.B (discussion of Alabama, South Dakota, and Wyoming challenges to *Quill*).

[36] N.Y. TAX LAW § 1101(b)(8)(I)(B)(vi) (McKinney 2015); *see also* Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621, 629 (N.Y. 2013); Edward A. Zelinsky, *New York Appellate Division Upholds "Amazon" Law: Analysis*, 59 ST. TAX NOTES 93, 93 (2011) ("The appeals court correctly held that the New York statute, on its face, comports with the dormant commerce clause physical presence nexus test articulated in *National Bellas Hess v. Department of Revenue* and confirmed in *Quill Corporation v. North Dakota*.").

[37] The New York statute, for instance, defines such sales associates as "a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller." N.Y. TAX LAW § 1101(b)(8)(I)(B)(vi).

out-of-state seller receives services from a related corporation located in the Golden State.[38]

Colorado pioneered yet another policy toward the sales taxation of Internet commerce,[39] a policy based on information reporting. Colorado imposes three reporting requirements[40] upon firms that sell at least $100,000[41] of goods annually to Colorado residents but which do not collect Colorado tax on such sales. First, Colorado requires that a retailer that sells to a Colorado resident without collecting sales tax must notify the resident that "sales or use tax is due on certain purchases" and "that the state of Colorado requires the purchaser to file a sales or use tax return."[42] Second, the Colorado statute also requires the retailer to send to these purchasers an annual report analogous to federal Form 1099.[43] This statement summarizes

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[38] CAL. REV. & TAX CODE § 6203(c)(4) (West 2012) (An out-of-state seller is defined as one who, "pursuant to an agreement with or in cooperation with the retailer, performs services in this state in connection with tangible personal property to be sold by the retailer, including, but not limited to, design and development of tangible personal property sold by the retailer, or the solicitation of sales of tangible personal property on behalf of the retailer."). For my earlier discussion of the California act, see Edward A. Zelinsky, *California's Once and Future "Amazon" Law*, 62 ST. TAX NOTES 83 (2011) ("California's law may, in political terms, have provoked a game-changing response from Amazon and its Internet peers."). For another example of an affiliate nexus statute, see MINN. STAT. ANN. § 297A.66(1)(a)(1) (West 2014) ("directly or by a subsidiary or an affiliate"). *See* Haile, *supra* note 31, at 1805 ("'[A]ffiliate nexus' legislation . . . seeks to circumvent the physical presence requirement by imposing nexus on out-of-state retailers based on the in-state presence of an affiliate company (a parent, subsidiary, or sister corporation) . . . .").

[39] For my earlier discussions of the Colorado act, see Edward A. Zelinsky, *The Siren Song of State 'Amazon' Laws: The Colorado Example*, 59 ST. TAX NOTES 695 (2011); Edward A. Zelinsky, *The Constitutionality (and Futility) of Colorado's Amazon Law*, 58 ST. TAX NOTES 113 (2010). For an analysis which presaged the Tenth Circuit's decision, see generally Andrew J. Haile, *Defending Colorado's Use Tax Reporting Requirement*, 57 ST. TAX NOTES 761 (2010) ("[T]here are plausible, and perhaps even persuasive, arguments that [Colorado's law] should survive commerce clause review," *id.* at 761.).

[40] COLO. REV. STAT. ANN. § 39-21-112(3.5) (West 2010).

[41] By regulation, the department has declared that the Amazon law's reporting responsibilities will not apply to firms with "de minimis" Colorado sales and has further declared that annual sales to Colorado customers of less than $100,000 are presumptively de minimis. 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(1)(a)(iii) (2010). The statutory authority for this regulation is not apparent.

[42] COLO. REV. STAT. ANN. § 39-21-112(3.5)(c)(I).

[43] *Id.* § 39-21-112(3.5)(d)(II)(A); *see* I.R.C. § 6041 (2012) (authorizing what is now called Form 1099 reflecting "the amount of such gains, profits, and income, and the name and address of the recipient of such payment"). By regulation, this obligation does not apply as to any Colorado purchaser who buys less than $500 annually from the noncollecting retailer. 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(3)(c)(i). The statutory authority for this regulatory exemption is also not apparent. Even if a Colorado resident's purchases are too small to trigger the new law's annual reporting requirement, the resident remains liable for Colorado use tax on his Internet purchases. COLO. REV. STAT. ANN. § 39-26-202(1) ("[T]here is imposed and shall be collected from *every* person in this state a tax or excise at the rate of three percent of storage or acquisition charges or costs for the privilege of storing, using, or consuming in this state *any* articles of

for the Colorado resident all of her purchases from the Internet or mail-order retailer for the year and again reminds the Colorado resident of her legal obligation to pay sales and use taxes under Colorado law. Third, also similarly to Form 1099,[44] the Colorado law requires the retailer to send to the Colorado Department of Revenue information about its sales to particular Colorado residents.[45] These statutory reporting requirements are evidently designed to prod Colorado residents to pay use taxes on their Internet and mail-order purchases from out-of-state vendors. These reporting requirements also facilitate the enforcement by the Colorado tax department of the use tax by informing the department of the amount of the sales and the identities and addresses of the Colorado residents purchasing from out-of-state Internet and mail-order firms.[46]

When the Colorado reporting act was challenged in the federal courts, a preliminary question was whether the federal Tax Injunction Act (TIA)[47] precluded this challenge. The Supreme Court held that it did not.[48] The TIA prevents a federal court from impeding "the assessment, levy or collection of any tax under State law."[49] The Colorado reporting statute, the Supreme Court held, governs an earlier stage of the process, when information is reported to the taxpayer and to the tax collector.[50] Assessment, collection, and levy—the high court held—come later. Consequently, the TIA does not preclude a challenge in the federal courts to the Colorado reporting statute as that statute governs an earlier step in the process.[51]

Concurring in this conclusion about the TIA, Justice Kennedy also called for reconsideration of *Quill* and its physical presence test: *Quill* results in "a serious, continuing injustice" by denying the states the ability to require out-of-state sellers to collect sales and use tax.[52] "[I]n view of the dramatic technological and social changes that ha[ve] taken place in our

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tangible personal property purchased at retail." (emphasis added)). It is, of course, difficult for Colorado (and the other states) to collect the use tax owed by such purchasers.

[44] The statutory basis for IRS Form 1099 is I.R.C. § 6041 (2012).

[45] COLO. REV. STAT. ANN. § 39-21-112(3.5)(a)(II)(A).

[46] 1 COLO. CODE REGS. § 201-1: 39-21-112.3(4).

[47] Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1127 (2015); *see* 28 U.S.C. § 1341 (2012).

[48] *Direct Mktg. Ass'n*, 135 S. Ct. at 1131.

[49] 28 U.S.C. § 1341. However, the federal courts can provide relief against "the assessment, levy or collection" of a state tax if the courts of the taxing state fail to provide "a plain, speedy and efficient remedy" to a challenging taxpayer. *Id.*

[50] *Direct Mktg. Ass'n*, 135 S. Ct. at 1124, 1129–31.

[51] *Id.* at 1131.

[52] *See id.* at 1134–35 (Kennedy, J., concurring).

increasingly interconnected economy,"[53] Justice Kennedy wrote, the physical presence test enunciated in *National Bellas Hess* and confirmed in *Quill* "now inflict[s] extreme harm and unfairness on the States."[54]

> When the Court decided *Quill,* mail-order sales in the United States totaled $180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States.
>
> Because of *Quill* and *Bellas Hess*, States have been unable to collect many of the taxes due on these purchases. California, for example, has estimated that it is able to collect only about 4% of the use taxes due on sales from out-of-state vendors. The result has been a startling revenue shortfall in many States, with concomitant unfairness to local retailers and their customers who do pay taxes at the register. The facts of this case exemplify that trend: Colorado's losses in 2012 are estimated to be around $170 million. . . . States' education systems, healthcare services, and infrastructure are weakened as a result.[55]

Because of these substantial harms, and because "a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term,"[56] Justice Kennedy concluded, "[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[57]

When the Tenth Circuit subsequently addressed the constitutionality of the Colorado reporting statute, the appeals court similarly signaled dissatisfaction with *Quill* and a consequent determination to read *Quill* and its physical presence test as narrowly as possible. *Quill,* the appeals court stated, is "confined to the sphere of sales and use tax collection."[58] "*Quill* does not establish that out-of-state retailers are free from all regulatory requirements—only tax collection and liability."[59] Accordingly, *Quill* "is not controlling" as to the Colorado reporting act, which just imposes "notice and reporting requirements"[60] upon firms that do not collect Colorado sales tax.

In his concurring opinion, then-Judge Gorsuch was even blunter about the determination to minimize and ultimately undermine *Quill*. We should expect, Judge Gorsuch opined, other

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[53] *Id.* at 1135.
[54] *Id.* at 1134.
[55] *Id.* at 1135 (internal citations omitted).
[56] *Id.*
[57] *Id.* For discussion of Justice Kennedy's concurrence, see Denning, *supra* note 19, at 117–20.
[58] Direct Mtkg. Ass'n v. Brohl, 814 F.3d 1129, 1147 (10th Cir. 2016).
[59] *Id.* at 1145.
[60] *Id.* at 1147.

states to adopt information reporting statutes like Colorado's law and thus "erode over time" the "precedential island" established in *National Bellas Hess* and confirmed in *Quill*.[61]

Judge Gorsuch analogized *National Bellas Hess* and *Quill* to *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*[62] and *Toolson v. N.Y. Yankees, Inc.*[63] *Federal Baseball* created, and *Toolson* confirmed, the antitrust exemption of professional baseball.[64] These decisions were subsequently affirmed by *Flood v. Kuhn*.[65] These high-profile cases are the classic Supreme Court decisions which, on the merits, would have been decided differently de novo but remain in force because of stare decisis considerations.[66]

According to Judge Gorsuch, the import of these baseball-related decisions is that, even as they have "manage[d] to survive indefinitely," these decisions have now been "surrounded by a sea of contrary law" rather than being enlarged and followed.[67] The same treatment, he argues, is appropriate for *National Bellas Hess* and *Quill*. These decisions should be interpreted narrowly so that they "never expand,"[68] but instead, "wash away with the tides of time."[69]

South Dakota accepted Justice Kennedy's implicit invitation to challenge *Quill*.[70] South Dakota has, by statute, now imposed the obligation to collect that state's sales tax on "any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota."[71] This expanded statutory obligation to collect South Dakota tax applies if the seller lacks "physical presence in the state"[72] provided either that "[t]he seller's gross revenue" from South Dakota sales in the current or previous year "exceeds one hundred thousand

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[61] *Id.* at 1151 (Gorusch, J., concurring).

[62] 259 U.S. 200 (1922).

[63] 346 U.S. 356 (1953).

[64] Flood v. Kuhn, 407 U.S. 258, 272–73 (1972).

[65] *Id.* at 282–84.

[66] *See* Edward A. Zelinsky, Gobielle v. Liberty Mutual*: An Opportunity to Correct the Problems of ERISA Preemption*, 100 CORNELL L REV. ONLINE 24, 35–36 (2015) (discussing *Flood*).

[67] Direct Mtkg. Ass'n v. Brohl, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorusch, J., concurring).

[68] *Id.*

[69] *Id.*

[70] *See* Maria Koklanaris, *South Dakota Quickly Implementing Nexus Law That Could Challenge* Quill, TAX NOTES (Apr. 21, 2016), http://www.taxnotes.com/state-tax-notes/electronic-commerce-taxation/south-dakota-quickly-implementing-nexus-law-could-challenge-quill/2016/04/25/18466676; *see also* S. 106, 91st Leg. Assemb. Sess. § 7(7) (S.D. 2016) (citing Justice Kennedy's concurring opinion in *Direct Marketing Ass'n v. Brohl*).

[71] S.D. CODIFIED LAWS § 10-64-2 (2016).

[72] *Id.*

dollars"[73] or that the out-of-state seller has "two hundred or more separate transactions" in South Dakota during the current or prior year.[74] Wyoming has adopted similar legislation.[75]

Alabama has by regulation also challenged *Quill*'s physical presence test.[76] The Alabama regulation imposes the obligation to collect Alabama's sales tax upon "out-of-state sellers who lack an Alabama physical presence but who are making retail sales of tangible personal property into the state . . . when, [the] Seller's retail sales of tangible personal property sold into the state exceed $250,000 per year based on the previous calendar year's sales."[77]

The Marketplace Fairness Act (MFA),[78] passed by the Senate in 2013, would, if enacted into law, establish nationwide standards for states seeking to impose sales tax collection responsibilities on out-of-state Internet and mail-order sellers. A state complying with these standards could require sales tax collection by any "remote seller [with] gross annual receipts in total remote sales in the United States in the preceding calendar year exceeding $1,000,000."[79]

II. STARE DECISIS, THE POLITICAL PROCESS, AND COMMANDEERING

A. *Stare Decisis and the Political Process*

The Supreme Court distinguishes between the Court's responsibility to overrule its constitutional decisions and the Court's substantially more limited role overturning its statutory interpretations: "*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'"[80] "[*S*]*tare decisis* carries enhanced force when a decision . . . interprets a statute.

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[73] *Id.* § 10-64-2(1).

[74] *Id.* § 10-64-2(2).

[75] H.B. 0019, 64th Leg., Gen. Sess. (Wyo. 2017).

[76] ALA. ADMIN. CODE r. 810-6-2-.90.03 (2015).

[77] *Id.* § (1)(a).

[78] Market Fairness Act, S. 743, 113th Cong. (2013). The MFA was not passed in the House of Representatives. It has been introduced in subsequent Congresses. *See, e.g.*, Market Fairness Act of 2015, S. 698, 114th Cong (2015); Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. (2015).

[79] Market Fairness Act, S. 743, 113th Cong. § 2(c) (2013).

[80] Payne v. Tennessee, 501 U.S. 808, 828 (1991) (internal citations omitted) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)).

Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees."[81]

In certain respects, these statements oversimplify: A losing litigant unhappy with the Court's construction of the Constitution can also walk "across the street" to Congress and seek a constitutional amendment. The Congress that sits today may be different from the Congress that earlier passed the legislation in question. Most obviously, Congress may be controlled currently by a different party than controlled the House and Senate when the disputed statute was enacted.

Despite these qualifications, the distinction between the Supreme Court overruling its constitutional decisions and the Court overturning its statutory interpretations is sensible. The instances in which the Constitution has been amended to overrule the Court can literally be counted on the fingers of one hand.[82] Accordingly, if the Court's constitutional decisions are to be corrected, the Court itself must do the correcting. In contrast, statutes are ultimately creatures of Congress and can be altered by the regular legislative process.

Characterizing the federal political process in optimistic terms, the Court, once it decides a statutory matter, has played in full its appropriate role by implementing Congress's will as expressed in the statute. Any change of law should thereafter come from the members of Congress, the elected representatives of the people and the ultimate authors of the statutes the Court applies. From this optimistic perspective, *Quill,* decided under the dormant Commerce Clause, falls into the same category as statutory decisions that Congress can overturn with the president's consent.[83] If *Quill* is wrong, Congress can say so by

[81] Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015); *see* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1460 (2014) ("The Supreme Court has long held that statutory precedents are entitled to a super-strong stare decisis effect, stronger than either constitutional or common law precedents.").

[82] The Eleventh Amendment to the Constitution (protecting each state from federal lawsuits initiated "by Citizens of another State"), U.S. CONST., amend. XI, overturned *Chisholm v. Georgia*, 2 U.S. (1 Dall.) 419, 479 (1793). The Fourteenth Amendment (providing that "[a]ll persons born . . . in the United States . . . are citizens of the United States"), U.S. CONST. amend. XIV, overturned *Scott v. Sandford*, 19 U.S. (1 How.) 393, 452 (1857). The Sixteenth Amendment (authorizing Congress "to lay and collect taxes on incomes"), U.S. CONST. amend. XVI, overruled *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 652 (1895). The Twenty-Sixth Amendment (guaranteeing the right to vote to "citizens of the United States, who are eighteen years of age or older"), U.S. CONST. amend. XXVI, overruled the part of *Oregon v. Mitchell*, 400 U.S. 112 (1970), which held that Congress lacked the authority to extend the right to vote for state offices to eighteen year olds, *id.* at 280.

[83] Quill Corp. v. North Dakota, 504 U.S. 298, 318–19 (1992).

adopting, under the Commerce Clause,[84] the MFA or similar legislation that would enable states to impose sales tax collection responsibilities upon out-of-state Internet and mail-order firms.

However, an optimistic story of the political process confronts two complications in a context like *Quill*. First, the Supreme Court's construction of a statute has significant effect upon that process. Indeed, the Court's interpretation of a statute can, in practice, determine the outcome of the political process by deciding who is the prevailing party and who is the losing party. The party losing in the Supreme Court has the formidable political burden of securing legislation to overturn the Court's decision. In contrast, the party prevailing in the Court has the easier task of preserving the status quo by blocking legislation that would overrule the Court's decision in favor of that party.

Second, in comparison with private interests seeking to overturn a decision of the Supreme Court, the states are uniquely disadvantaged in the federal political process, even though the states play a critical role in the structure of federalism. Federal legislators receive no direct political benefits from helping the states in contrast to the political support private groups bestow for legislative backing.

The features of the federal political process bolstering the status quo and its defenders are well known.[85] Bicameralism requires those who would change the status quo to obtain passage of the exact same legislation twice in the same Congress, once in the Senate and once in the House of Representatives. As Judge Mikva and Professor Lane observed, "[t]he intent and consequence of this division of American legislatures into separate but equal chambers is to make the adoption of legislation very difficult."[86] In this context, the history of the MFA is instructive: The MFA cleared the Senate in 2013 but

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[84] *See* U.S. CONST. art. I, § 8 ("Congress shall have Power . . . [t]o Regulate Commerce . . . among the several States.").

[85] *See, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES 15 (2014) ("Congressional organization—with its many decision points—can frustrate coherent decisionmaking . . . ."); WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 18 (9th ed. 2014) (discussing "the existence of multiple decision points for most pieces of legislation"); Christiansen & Eskridge, *supra* note 81, at 1460 (noting "the formidable veto gates that render legislation quite difficult"); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1452 (2001) ("[I]nstitutional features of Congress such as its bicameral structure, the committee system, and even the subcommittee system, make it difficult for Congress to overturn a Supreme Court decision . . . .").

[86] ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 556 (3d ed. 2009); *see id.* at 558 ("overcoming the centrifugal forces of bicameralism takes considerable focus, energy and ingenuity").

has never been approved by the House where defenders of the status quo have mounted a (so far) successful defense against efforts to overturn *Quill* legislatively.[87]

Congressional committees and subcommittees also create many bottlenecks for blocking legislation. Judge Mikva and Professor Lane refer to the "singular power of a committee to kill legislation."[88] Here again, the history of the MFA is revealing: There has never been a full vote on this legislation on the floor of the House of Representatives. The MFA is effectively bottled up in the House Judiciary Committee, which has jurisdiction over that legislation.[89]

Then there is the Senate's rule that filibusters in that body can only be shut down by a supermajority vote of sixty of one hundred senators.[90] As Walter J. Oleszek observes, "the filibuster is a powerful bargaining and blocking device."[91] The MFA overcame the filibuster barrier in 2013, passing the Senate with sixty-nine votes.[92] However, with changes of party and personnel in the Senate, there is no guarantee that this can happen again.

There is also the president's veto.[93] If the president opposes legislation that has passed both houses of Congress, his veto requires that the legislation subsequently surmount that veto with a two-thirds override vote in both the House and the Senate.[94] The net result of this decentralized political process is that defenders of the status quo have many opportunities to block change, while the proponents of change must overcome every bottleneck to prevail.

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[87] Billy Hamilton, *State Tax Merry-Go-Round: Why Does Chaffetz Hate the Internet So Much?*, 77 ST. TAX NOTES 43, 44 (2015) ("NetChoice, a trade association of e-commerce businesses and online consumers whose members include Facebook, eBay, LivingSocial, and Oracle Corp. . . . has opposed the MFA.").

[88] MIKVA & LANE, *supra* note 86, at 126; *see also* OLESZEK, *supra* note 85, at 184 (discussing how procedures to discharge legislation from congressional committees "are difficult to implement").

[89] *See* Jennifer DePaul, *Goodlatte Explains Hybrid Sourcing Proposal*, 80 ST. TAX NOTES 616 (2016); Maria Koklanaris, *Heitkamp Says U.S. Senate Could Act on Chaffetz's Online Sales Tax Bill*, 80 ST. TAX NOTES 921 (2016).

[90] KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING ch. 5 (1998) (discussing "the filibuster pivot"); MIKVA & LANE, *supra* note 86, at 267 (noting that changes to the Senate's traditional filibuster rule "has made the filibuster almost painless and encouraged its use").

[91] OLESZEK, *supra* note 85, at 307.

[92] *See* Edward A. Zelinsky, *Three Attorneys General Are Wrong*, OUPBLOG (July 1, 2013), http://blog.oup.com/2013/07/marketplace-fairness-act-2013-constitutional/ [https://perma.cc/4TFG-ZJCE].

[93] KREHBIEL, *supra* note 90, at ch. 6 (discussing "the veto pivot").

[94] U.S. CONST. art. I, § 7 (describing presidential veto).

Professor Eskridge's study of statutory overrides[95] confirms that the federal political process is biased against change. Consequently, the Supreme Court bestows considerable political advantage upon the prevailing party, which, armed with the Court's decision, has the comparatively easy task of blocking legislation to protect the status quo in a process that affords many opportunities for such blocking.[96]

The states (like other constituencies) can often persuade Congress to overturn their defeats in the high court when there is no coherent interest group on the other side defending the Court's decision. However, Congress does not typically reverse the Supreme Court's statutory decisions when a well-organized party prevails in the Court and therefore opposes legislative override. As Professor Eskridge formulates this political reality, "Congress is unlikely to pass legislation on an issue that produces a 'conflictual' demand pattern, where important interest groups differ sharply over what should be done."[97] Thus, for example, states can induce Congress to overrule Supreme Court decisions in the area of criminal law since there is no coherent constituency pushing against the states in this context.[98]

When, however, there is "a 'conflictual' demand pattern"[99] for overriding the Court, the result is typically a legislative stalemate. Congress does not overturn the Court when the pressure to overturn is counterbalanced by similarly coherent pressure to preserve the status quo as embodied in the Court's decision.

B. Federal Commandeering of the States

Moreover, when cases like *Quill* are decided against the states, the features of the legislative process favoring the status quo are compounded by the unique weakness of the states in the federal political process. While the states play a pivotal role in the structure of federalism, the states are also at

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[95] William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 331–35 (1991).

[96] *Id.* at 359–61.

[97] *Id.* at 365 ("In the last twenty-four years, there have been only a handful of overrides in which Congress acted against the strong opposition of an important interest group, and the overrides in those cases required a herculean effort, *id.* at 367."). The concept of "conflictual demand" does not play the same prominent role in Professor Eskridge's updating of his earlier study. However, he acknowledges that, in the context of ERISA, Congress "has done nothing to clarify and improve this area of law, presumably because the relevant interest groups (banks versus unions) are politically balanced." Christiansen & Eskridge, *supra* note 81, at 1366–67.

[98] Eskridge, *supra* note 95, at 362.

[99] *Id.* at 365.

a particular disadvantage in Congress when they contend against well-organized private interest groups.[100] Senators and representatives have no political incentive to assist the states since the average voter does not credit his federal congressmen for that assistance.[101] The tangible benefits of repealing *Quill*—more sales tax revenue which finances state and local services, reduced tax rates, or both—will redound to the political advantage of state and municipal officials, not to the members of Congress who must overturn *Quill* legislatively.

In the context of standing, the Court recognizes that "States are not normal litigants" but are entitled to "special solicitude."[102] So too, in a dormant Commerce Clause context like *Quill*, the states' importance to the structure of federalism combined with their weakness in the federal legislative process makes the states different from private litigants. It is even more difficult for states to obtain a congressional override of a Supreme Court decision than it is for private interests, as private interests can directly bestow political benefits upon members of Congress in the form of votes and campaign contributions. Here too, the states need "special solicitude" from the Court.

The political weakness of the states is reflected in the unfunded mandates imposed upon the states by the federal government. Such mandates stem from the general electorate's difficulties monitoring elected officials, the self-interested behavior of those officials, and the consequent ability of well-organized interest groups to prevail in the congressional process at the expense of states and localities.[103] Elected officials impose unfunded mandates upon lower levels of government to obtain the support of the organized groups benefitting from such mandates. Federal mandates foist the costs of compliance upon the state and local officials who must implement and pay for such mandates.[104]

The mandate-awarding senator or congressman acquires the political support of the mandate-receiving interest group at no cost to the senator or congressman. The cost of the mandate

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[100] Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO N.U. L. REV. 741, 745 (1997) [hereinafter Zelinsky, *Unsolved Problem*]; Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1407 (1993) [hereinafter Zelinsky, *Hidden Taxation*].

[101] Zelinsky, *Unsolved Problem*, *supra* note 100, at 744; Zelinsky, *Hidden Taxation*, *supra* note 100, at 1374.

[102] Massachusetts v. EPA, 549 U.S. 497, 518, 520 (2007).

[103] Zelinsky, *Unsolved Problem*, *supra* note 100, at 744; Zelinsky, *Hidden Taxation*, *supra* note 100, at 1374.

[104] Zelinsky, *Unsolved Problem*, *supra* note 100, at 745–46; Zelinsky, *Hidden Taxation*, *supra* note 100, at 1367–68.

falls upon the governors, state legislators, and mayors who must implement the federal mandate by raising taxes or by reducing other spending to pay for the mandated services. The average voter does not monitor this dynamic, and thus blames state and local tax increases or service contractions on the governors, legislators, and municipal officials who must implement the mandate imposed upon them from above in Washington.[105]

The average voter does not perceive that the ultimate authors of these state and local taxes and service reductions are the federal legislators who force the states to provide mandated services and thereby burden the states with costs which culminate in higher taxes or fewer services (or both). On the other hand, the well-organized interest group benefitting from a congressionally imposed mandate understands that the mandate-imposing members of Congress are responsible for the largesse bestowed upon them by the federal mandate.[106] That group can award its votes and campaign contributions to the federal legislators who enacted that mandate for the group's benefit.[107]

Governors, mayors, and state legislators are at a distinct disadvantage when they lobby in Washington to avoid new mandates or to seek repeal of existing mandates. As a practical matter, state and local officials cannot be too critical of any mandate-imposing congressman or senator because the states and their municipalities simultaneously depend on these legislators for federal funding of other programs.[108] In the past, strong party organizations and vibrant party ties helped

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[105] Much legal and economics literature addresses the problem of "agency costs," i.e., the difficulties principals have monitoring their agents and the consequently self-interested behavior in which poorly monitored agents engage at such principals' expense. *See, e.g.*, Wendy Netter Epstein, *Public-Private Contracting and the Reciprocity Norm*, 64 AM. U. L. REV. 1, 18 (2014); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 623 (2004). The unfunded mandate is fundamentally an agency-cost phenomenon. *See* Zelinsky, *Hidden Taxation*, *supra* note 100. More generally, the political weakness of the states in Congress is a problem of agency costs as the average voter does not monitor or understand the costs Congress can inflict upon him by burdening the states.

[106] Zelinsky, *Unsolved Problem*, *supra* note 100, at 744; Zelinsky, *Hidden Taxation*, *supra* note 100, at 1374.

[107] Professor Schick advances a similar analysis when he contrasts the politics of the Social Security trust fund with the politics of the now-defunct trust fund that financed federal revenue sharing with state and local governments. ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 43–44 (3d ed. 2007). The Social Security trust fund is politically secure because members of Congress respond to the concerns of current and future benefit recipients. *Id.* The political heft of these beneficiaries makes the Social Security fund "politically sensitive." *Id.* at 44. On the other hand, the revenue sharing trust fund "made payments to state and local governments rather than to individuals or households." *Id.* "Its advocates were too weak to deter Congress from abolishing the fund when it wanted the money for other programs." *Id.*

[108] *See generally* Zelinsky, *Unsolved Problem*, *supra* note 100; Zelinsky, *Hidden Taxation*, *supra* note 100.

governors and state legislators to resist federal mandates.[109] A governor in an earlier era of robust party bonds could call an influential party chairman who could, in turn, ask the state's U.S. senators and representatives to refrain from hurting the party by forcing the governor to raise taxes to pay for federally mandated services.

No more. In an era of weak party ties,[110] a U.S. congressman or senator is as likely to view a governor or a state legislator as a potential rival rather than as a fellow party member to be succored.

Quill resembles an unfunded mandate imposed upon the states and their localities.[111] That mandate denies the states and their municipalities the ability to impose sales tax collection responsibilities on out-of-state Internet and mail-order sellers. By blocking legislation to overturn *Quill* and its physical presence test, federal representatives and senators preserve this judicially imposed mandate and thereby reward the Internet sales and mail-order industries by keeping purchases from out-of-state vendors effectively sales tax free.

While the political advantages of protecting *Quill* redound to the benefit of federal legislators, the costs of that decision fall upon governors, mayors, and state legislators. These elected officials must either curtail government services in light of lower sales tax revenues or must increase sales tax rates to squeeze more out of narrower sales tax bases which effectively omit Internet and mail-order sales by out-of-state vendors.[112]

Members of Congress have no political incentive to help the states protect their respective sales tax bases. The Internet sales and mail-order industries can (inaccurately but powerfully) label strengthened use tax enforcement as a new tax.[113] Most

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[109] *See generally* Zelinsky, *Unsolved Problem*, *supra* note 100; Zelinsky, *Hidden Taxation*, *supra* note 100.

[110] Much literature on American politics documents the weakening of party ties. *See, e.g.*, Joseph Fishkin & Heather K. Gerken, *The Party's Over:* McCutcheon, *Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 176 (2014). In contrast, Professor Kramer, while acknowledging the evolution of political parties, believes that they still protect the states' interests in the federal political process. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000). As I make clear in the text, I disagree.

[111] Brian Galle, *Congressional Control of State Taxation: Evidence and Lessons for Federalism Theory*, *in* THE LAW AND ECONOMICS OF FEDERALISM 1, 3 (Jonathan Klick ed., 2017).

[112] *See generally* Zelinsky, *Unsolved Problem*, *supra* note 100; Zelinsky, *Hidden Taxation*, *supra* note 100.

[113] *See, e.g.*, Carl Szabo, *Why This Tax Bill Is Unfair*, CNBC (Apr. 14, 2016), http://www.cnbc.com/2016/04/14/why-this-tax-bill-is-unfair-commentary.html [https://perma.cc/DTM9-3KCD] ("At both the federal and state levels big box stores are lobbying for new unfair taxes on our nation's small internet retailers.").

politicians seek to avoid the perception that they are imposing a new tax. Federal senators and representatives get no political credit for lower state sales tax rates resulting from better enforcement of purchasers' use tax obligations. Nor do such senators or representatives obtain political benefits from any state spending financed by the revenue raised by enhanced enforcement of the use tax.[114] These senators and representatives may, moreover, perceive a risk that they will be blamed for the tax burdens if they authorize enhanced enforcement of the sales and use taxes on remote sales.

In short, Congress will generally not overturn the Court's decision when there is a well-organized interest favoring the status quo created by that decision. The Internet sales and mail-order industries are such interests that have the political advantage of defending current law under *Quill*. Federal senators and representatives have strong political interests in accommodating the Internet sales and mail-order industries and have no countervailing incentives to protect the states or the states' sales taxes since federal legislators get no political credit for state programs or reduced state tax rates. While the states are critical to the structure of federalism, they are uniquely disadvantaged in the federal political process in comparison to private interest groups, which bestow political benefits in the form of votes and contributions on senators and representatives who assist in overturning Supreme Court decisions.[115]

Against this background, the surprise is not that the MFA has failed but that it even passed the Senate once. The most compelling political explanation for that passage is that the conventional retail industry, which must collect sales taxes at its brick-and-mortar retail stores, convinced one house of Congress to overturn the Court and thereby override the pro-*Quill* preferences of the Internet and mail-order sales industries. But one should not assume that this one-time political victory can be replicated or extended. If the interest of the states in the effective enforcement of their sales taxes is to be protected, the Court must do the protecting by reversing *Quill* and its physical presence test, thereby permitting the states to impose sales tax collection responsibilities on out-of-state vendors that lack physical presence in the taxing state.

The Supreme Court has been ambivalent about its role as protector of the states from untoward interference from the

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[114] *See generally* Zelinsky, *Unsolved Problem*, *supra* note 100; Zelinsky, *Hidden Taxation*, *supra* note 100.

[115] Galle, *supra* note 111, at 7–8, 17.

national government. Sometimes, the Court has acted as the umpire of federalism, shielding the states from the "commandeering" acts of the national government.[116] At other times, the Court has told the states that they must themselves defend their interests politically in Congress rather than look to the judiciary for relief from such commandeering acts.[117] Justice John Paul Stevens criticizes the Court for restraining alleged "commandeering"[118] since, inter alia, the "members [of Congress] represent the interests of the several states."[119] Justice Stevens's perspective is shared by important scholars who similarly conclude that the states can and should protect their interests in the halls of Congress without help from the judiciary.[120]

I come to a different vantage in a dormant Commerce Clause context like *Quill*. In this setting, the states are significantly disadvantaged in the political process in competition with private interest groups, which, in return for support, bestow tangible political benefits in the form of votes and campaign contributions. One could view the Senate's passage of the MFA as a sign that the political process is working as the invariable tug and pull of democratic debate plays out. This perspective would counsel the Court to stay its hand in the name of stare decisis and let the legislative process determine the fate of *Quill* and its physical presence test.

However, the political framework in which the MFA is being debated is a framework that the Court itself created by deciding *Quill*. Had *Quill* gone the other way, the Internet sales and mail-order industries, as the losers in the litigation, would likely be seeking federal legislation to provide uniform national rules for the taxation of remote sales. Instead, under *Quill*, these industries have the stronger political hand of defending the status quo under which they effectively sell sales tax free into states where they have no in-state physical

[116] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (Court "strike[s] down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes."); Printz v. United States, 521 U.S. 898, 925–27 (1997) (Court strikes as improper "Federal commandeering of state governments" the provisions of the Brady Act that required a state or local "chief law enforcement officer" to perform certain federally mandated activities in connection with the transfer of handguns.); Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Court strikes legislation which "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions.").

[117] *Garcia*, 469 U.S. at 557 (overturning *National League of Cities v. Usery* out of "respect for the reach of congressional power").

[118] JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 15–30 (2014).

[119] *Id.* at 24.

[120] *See, e.g.*, Kramer, *supra* note 110, at 259–60.

presence. The states (and their allies in the brick-and-mortar retail sales industry) are playing with a political deck that *Quill* stacked against them.

Given the political realities that uniquely disadvantage the states, the Court should not rely on Congress to correct *Quill*. The Court should instead embrace its role as the protector of the states and should itself correct *Quill* and its physical presence test, which effectively commandeers the states for the cause of a sales-tax-free Internet.

III. THE POLICY MERITS OF *QUILL*'S PHYSICAL PRESENCE TEST

I have so far told a political process story of procedural bottlenecks, interest group pressures, commandeering, and the states' unique political disadvantages in contrast to private interests that provide political benefits—votes and campaign contributions—to the members of Congress who help them overturn the Supreme Court's decisions. This kind of argument today is largely advanced under the heading of public choice theory.[121] Let us now consider *Quill* and its physical presence test on their substantive merits.

Justice Kennedy's concurrence in *Direct Marketing Association* summarized the pragmatic argument that *Quill*, whatever its validity in an earlier age, is wrong for today: As a result of "dramatic technological and social changes,"[122] namely, the rise of electronic commerce, the states lose enormous sales tax revenues because they cannot require out-of-state vendors to collect sales taxes. The resulting revenue losses weaken the "States' education systems, healthcare services, and infrastructure."[123] Moreover, the effectively tax-free status of Internet sales is unfair to "local retailers and their customers who do pay taxes at the register."[124] Finally, today "a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term."[125]

Judge Posner highlighted instances in which the Supreme Court has reversed its decisions on pragmatic

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[121] Public choice theory has become central to much legal scholarship. *See, e.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209 (2016).

[122] Direct Mtkg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

[123] *Id.*

[124] *Id.*

[125] *Id.*

grounds.[126] Such reversals are prompted by "the consequences of" existing cases "for their bearing on sound public policy."[127] Overturning *Quill* would be an example of such a pragmatic reversal. The Court would overturn *Quill* based on experience with the physical presence test and the unsatisfactory results of that experience in light of the growth of Internet commerce and the concomitant losses of substantial state sales tax revenues.

There is considerable force to this pragmatic argument. Indeed, I argue below[128] that this argument distinguishes *Quill* (which the Court itself should reverse) from the Court's other dormant Commerce Clause cases, which the Court, under the banner of stare decisis, should instead let Congress evaluate.

However, a purely pragmatic approach does not explain why the Court, rather than Congress, should overturn *Quill*. The losing party can always point to the bad consequences it suffers from having lost in the Court. As a matter of stare decisis, it requires more than one side's bad results for the Court to overrule itself. The states' importance in the structure of federalism combined with their unique political disadvantage in the federal political process are the additional considerations required to buttress the pragmatic case for overturning *Quill*: States, unlike private interests, do not bestow votes and campaign contributions on the federal legislators who assist the states to overrule the Court's decision.

The prime rationale that *Quill* and *National Bellas Hess* advance for the physical presence test is the protection of the retail sales industry from the burden of collecting sales taxes from multiple jurisdictions with multiple rates and multiple bases.[129] Many localities have their own sales tax rules.[130] The Court used the physical presence test to spare mail-order firms from the burden of complying with the sales taxes of any state or municipality into which such firms merely sell goods without having a store, employee, or other physical presence in the jurisdiction.[131] The *National Bellas Hess* Court articulated its concern with the potential burden created by myriad sales tax collection responsibilities in these terms:

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[126] RICHARD A. POSNER, HOW JUDGES THINK 54–55 (2008) (characterizing *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), as "a triumph of pragmatism").

[127] *Id.* at 13.

[128] *See infra* pp. 1210–11.

[129] Quill Corp. v. North Dakota, 504 U.S. 298, 313 & n.6 (1992); Nat'l Bellas Hess Inc. v. Dep't of Revenue, 386 U.S. 753, 759–60 (1967), *overruled by Quill*, 504 U.S. 298.

[130] HELLERSTEIN ET AL., *supra* note 12, at 652.

[131] *Id.*

> [I]f Illinois can impose such [sales tax collection] 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."[132]

In this same vein, the *Quill* Court warned that, if it upheld North Dakota's imposition of sales tax collection responsibilities on an out-of-state vendor with no physical presence in North Dakota, "similar obligations might be imposed by the Nation's 6,000-plus taxing jurisdictions."[133]

However, Justice Fortas's *National Bellas Hess* dissent has proved more prescient than these forebodings. Justice Fortas dismissed the concern that vendors will be overburdened by the duty to collect different states' and localities' respective sales taxes.[134] Writing for himself and for Justices Black and Douglas, Justice Fortas asserted that the burden of collecting a variety of different sales taxes is well within "the skill of contemporary man and his machines."[135]

That indeed has been the case. Today, many of the nation's leading retailers, including Staples[136] and Wal-Mart,[137] pursue a "click-and-brick" strategy[138] whereby they sell both electronically and through their conventional retail stores. Since those stores constitute physical presence under *Quill*, these nationwide firms must collect sales tax on their Internet sales wherever they have a physical store—which is pretty much everywhere. These click-and-brick firms appear to be collecting in satisfactory fashion sales taxes on their Internet sales throughout the nation.[139]

An interesting development in this context has been the evolution of Amazon's business model. Once the epitome of the completely virtual Internet vendor, Amazon today has physical presence throughout the nation via local distribution centers[140]

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[132] *Nat'l Bellas Hess*, 386 U.S. at 759–60 (footnotes omitted).

[133] *Quill*, 504 U.S. at 313 & n.6.

[134] *Nat'l Bellas Hess*, 386 U.S. at 766 (Fortas, J., dissenting).

[135] *Id.*

[136] *See* STAPLES, www.staples.com [https://perma.cc/3QNP-7VUY].

[137] *See* WALMART, www.walmart.com [https://perma.cc/PA8C-6PPU].

[138] Haile, *supra* note 31, at 1804.

[139] To validate this claim, I engaged in primary research: I purchased on these websites. With no bother, both collected the appropriate sales tax.

[140] Nick Wingfield, *Amazon's Profits Grow More Than 800 Percent, Lifted by Cloud Services*, N.Y. TIMES (July 28, 2016), http://www.nytimes.com/2016/07/29/technology/amazon-earnings-profit.html?_r=0 [https://perma.cc/W973-KXJA] ("In a conference call,

as well as retail stores.[141] When Amazon establishes an in-state physical location, it collects the sales taxes of that state on its Internet sales to consumers in that state.[142] Again, this collection of sales tax on Internet purchases is occurring with no significant problems.[143]

A better rationale for the physical presence test is that physical presence is a rough, but administrable, proxy for voice in the political process of the taxing state.[144] From this vantage, taxing a person without physical presence is the proverbial "taxation without representation." This is the weightiest argument for *Quill*'s physical presence test but is ultimately not weighty enough.

Consider in this context the aftermath of the Supreme Court's decision in *Moorman Manufacturing Co. v. Bair*.[145] The best interpretation of this aftermath is that, in light of *Moorman*, many states shifted their corporate tax burdens onto corporations with less in-state physical presence and thus less voice in the political processes determining state tax policy.

Before *Moorman,* most states apportioned the income of multistate corporations using a three-factor formula derived from the Uniform Division of Income for Tax Purposes Act.[146] Under this then-standard formula, a taxing state calculated three fractions: the percentage of a multistate corporation's total sales which occurred in the taxing state, the percentage of the corporation's total payroll incurred in the taxing state, and the percentage of the corporation's total property located in the taxing state.[147] These three fractions were then averaged to

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Amazon's chief financial officer, Brian Olsavsky, said that the company would open 18 new fulfillment centers—the warehouses from which it processes customer orders—in the third quarter of this year, three times the number it opened in the same period last year."); Mark Faggiano, *Where Are the Amazon Fulfillment Centers*, TAXJAR (Mar. 22, 2017), http://blog.taxjar.com/amazon-warehouse-locations/ [https://perma.cc/WH8N-NQ8C].

[141] John Cook, *Amazon Venturing onto Powell's Home Turf, Picks Portland for Third Brick-and-Mortar Bookstore*, GEEKWIRE (June 17, 2016), http://www.geekwire.com/2016/amazon-ventures-onto-home-turf-powells-plans-third-brick-mortar-bookstore-portland/ [https://perma.cc/ZHN3-FLRF].

[142] Tripp Baltz, *Top E-Retailers, States Battle in Evolving Digital Sales Tax*, BLOOMBERG (July 6, 2016), https://www.bna.com/top-eretailers-states-n57982076588/ [https://perma.cc/754L-EKMN] ("Amazon.com now remits sales taxes in 28 states, covering more than three-quarters of its customer base . . . .").

[143] I suspect that many readers have recently made purchases on Amazon and had sales tax withheld. The doubters may visit www.amazon.com for themselves.

[144] Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 51–59 (2008).

[145] 437 U.S. 267 (1978).

[146] *See* Kimberly-Clark Corp. v. Comm'r of Revenue, 880 N.W.2d 844, 846–47 (Minn. 2016) (discussing the Multistate Tax Compact and the Uniform Division of Income for Tax Purposes Act); *see also* Gillette Co. v. Franchise Tax Bd., 363 P.3d 94, 96–100 (Cal. 2015) (same).

[147] *See* cases cited *supra* note 146.

determine the portion of the multistate corporation's total profits assigned to the taxing state for corporate income tax purposes.[148]

Suppose, for example, that Corporation *X* had annual profits of $1,000,000. Suppose further that Corporation *X* for this year made 10% of its sales in State *Q* while having 20% of its payroll and 30% of its property in State *Q*. The average of these three fractions is 20%.[149] On these assumptions in the pre-*Moorman* world, Corporation *X* was required to report $200,000 of its total profit to State *Q* for corporate income tax purposes.[150]

Moorman held that, as a constitutional matter, states have "wide latitude" to determine their respective formulas for apportioning to themselves the income of multistate corporations.[151] Accepting *Moorman* as an invitation to depart from the three-factor apportionment formula, many states chose to weigh more heavily the sales fraction.[152] Typically, in these states, the sales fraction is double counted. To continue this example, with the sales factor double counted, the apportionment fraction for Corporation *X* would decline to 17.5%[153] and thus the income of multistate Corporation *X* apportioned to State *Q* would be reduced to $175,000.[154]

Consider now Corporation *Y* which is identical to Corporation *X* in all respects except that *Y* has minimal in-state physical presence in State *Q*, but makes substantial sales into State *Q*. Assume in particular that, for the year in question, *Y* (like *X*) had total profits of $1,000,000, but that its sales in State *Q* represented 19% of *Y*'s total sales. Assume further that 1% of *Y*'s payroll and 1% of its property were located in State *Q*. Under the pre-*Moorman* formula, which weighed sales, payroll, and property equally, Corporation *Y* paid State *Q* income tax on $70,000 of its profits.[155] Under the post-*Moorman* formula which double weights sales, the amount of *Y*'s income reportable to State *Q* rises to $100,000.[156]

As a matter of tax policy, these results are counterintuitive. Why should State *Q* reduce state income taxes for Corporation *X* and increase state income taxes for Corporation *Y*? Corporations *X* and *Y* are identical in all respects except that *Y* made more of its sales in State *Q* while Corporation *X* had fewer

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148 *See* cases cited *supra* note 146.

149 *(10% + 20% + 30%)/3 = 20%.*

150 *20% x $1,000,000 = $200,000.*

151 Moorman Mfg. Co. v. Bair, 437 U.S. 267, 274 (1978).

152 HELLERSTEIN ET AL., *supra* note 12, at 501.

153 *(10% + 10% + 20% + 30%)/4 = 17.5%.*

154 *17.5% x $1,000,000 = $175,000.*

155 *(19% + 1% + 1%)/3 = 7%; 7% x $1,000,000 = $70,000.*

156 *(19% + 19% + 1% + 1%)/4 = 10%; 10% x $1,000,000 = $100,000.*

sales but more of its payroll and property in State *Q*. Corporation *X* is a heavier user of *Q*'s public services than is Corporation *Y* since *X* has more of its operations in State *Q*. Corporation *X*, for example, is a heavier user of State *Q*'s police and fire services than is Corporation *Y* since *X* has more of its plant and employees in the state and thus has more property and personnel covered by these protective services. Corporation *X* has more employees driving on the roads of State *Q* to commute to work than does Corporation *Y*. Yet, the post-*Moorman* change to State *Q*'s apportionment formula, by double counting the sales factor, reduced *X*'s corporate income taxes and increased *Y*'s corporate income taxes.

The most compelling explanation for this shift of State *Q*'s corporate tax burden from *X* to *Y* is political, in particular, disparity between the political voice of these two corporations: Corporation *X* with more in-state employees and property has (along with its similarly situated peer companies) more influence in the political process assigning *Q*'s corporate tax burden. Most obviously, *X*, in contrast to *Y*, has more in-state employees who vote. When *X* proclaims that it needs lower state taxes to remain in-state, that claim will resonate with the legislators of State *Q* who represent the more numerous *X* employees.

Factories and distribution centers don't vote. But governors and legislators don't like closed buildings. Again, Corporation *X*'s larger operational presence in State *Q* adds heft to its political voice. The president of *Y* can also threaten to leave the state, but his employee-based constituency is smaller, as is *Y*'s physical footprint in State *Q*. The president of *Y* can vow to stop selling to consumers in State *Q* unless *Y*'s state corporate taxes are reduced. However, that is not likely to be perceived as a serious threat. Corporation *Y* can hire lobbyists and can form a political action committee (PAC) to intervene in State *Q*'s election. But, at the end of the day, *Y*'s political voice is not as great as *X*'s in State *Q*'s political process.

Let us now postulate a third multistate corporation, Corporation *Z* which is identical to *X* and *Y* except that Corporation *Z* has no payroll or property in State *Q*. Corporation *Z* just sells product into *Q* by the Internet or by mail order. Corporation *Z* is not without political resources. It can also hire lobbyists and form a PAC. But *Z*, lacking employees and physical operations in *Q*, has less political voice in *Q* than even *Y*.

The post-*Moorman* experience confirms the intuition that in-state physical presence is an administrable proxy for political voice. The states which have rejiggered their respective corporate income tax laws have thereby shifted more of the corporate tax burden onto corporations with relatively less in-state physical presence to the benefit of corporations with greater in-state physical presence and thus greater voice in the taxing state's political process.

Like all administrable proxies, in-state physical presence is not a perfect indicator. But physical presence is a serviceable proxy for in-state political voice and thus provides a stronger rationale for the physical presence test.

Consider again the decisions of Alabama, South Dakota, and Wyoming to challenge *Quill* and its physical presence rule by demanding that out-of-state vendors collect tax on their sales to Alabama, South Dakota, and Wyoming residents.[157] The firms affected by these new rules have neither employees nor physical presence in these three states. They can thus credibly assert that they are being taxed without representation.

A potential retort is that all source-based taxation is taxation without representation. If a resident of State *A* owns a rental property in State *B*, she must pay state income taxes to *B* on the rent she receives even though she votes in State *A*.[158] On the other hand, property owners are an important interest group in the political process. Though a resident of State *A* does not vote in State *B*, she can support, through contributions and lobbying, the association of State *B* property owners, a group that will include residents (and thus voters) of State *B*. When the legislators of State *B* favor property owners, the benefits flow to all property owners. This might be viewed as a form of virtual representation,[159] as the property owners who vote in State *B* effectively protect the interests of the absentee property owners who live in State *A*.

When, however, a resident of State *A* sells products on the Internet to a resident of State *B*, no State *B* legislator has an incentive to protect the interests of this out-of-state resident on the subject of sales taxes. Indeed, the interests of State *A* residents who sell to consumers in State *B* conflict with the interests of the sellers who are physically resident in State *B*. The seller located in State *A* wants continued *Quill*-based immunity from the obligation to collect State *B* sales taxes. The

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[157] S. 106, 91st Leg. Assemb. Sess. § 1 (S.D. 2016); ALA. ADMIN. CODE r. 810-6-2-90.03(1) (2015); H.B. 0019, 64th Leg., Gen. Sess. (Wyo. 2017).

[158] *See, e.g.*, N.Y. TAX LAW § 631(b)(1)(A) (McKinney 2010) (A nonresident's New York income includes income "attributable to: (A) the ownership of any interest in real or tangible personal property" located in New York.).

[159] *See generally* Smith v. Bayer Corp., 564 U.S. 299, 315 (2011) (discussing "virtual representation").

seller resident in State *B*, in contrast, wants his obligation to collect State *B* sales taxes extended to the seller physically located in State *A*. In this case, there is no virtual representation of out-of-state sellers by in-state sellers. Rather, the in-state sellers with physical presence in State *B* have precisely the opposite interests as the out-of-state sellers located in State *A* but selling into State *B*.

These considerations had earlier led me to conclude that *Quill*'s physical presence test was a sensible measure that precluded the states from exporting their tax burdens while Congress came to a reasonable resolution of the problem of the sales taxation of Internet sales.[160] This vantage has proved overly optimistic since Congress is not providing that reasonable resolution and does not appear likely to provide that resolution.[161]

However, to revisit *Quill*, the Court need not confront the question whether the physical presence test is persuasive in other contexts such as state corporate income taxes.[162] The issue presented by such revisitation is whether, as to sales and use taxes, *Complete Auto*'s "substantial nexus" test should continue to be construed as requiring in-state physical presence.

I conclude that it should not because of the importance of the states to the structure of federalism and the pronounced disadvantage of the states in the federal political process. *Quill* commandeers the states to provide a sales-tax-free Internet and thus should be corrected by the Supreme Court itself to protect the states' sales taxes—a critical state function.

IV. CRITICISMS

In this section, I anticipate and respond to possible criticisms of my analysis. Consider first the potential criticism that I press the concept of "commandeering" farther than the

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160 Zelinsky, *supra* note 144, at 71–78.

161 I still perceive potential value in other contexts of the physical presence test as a proxy for political voice. While taxes are specialized and technical in nature, they are simultaneously and intensely political. Taxes are ultimately about allocating the cost of government, an inherently political task as the post-*Moorman* experience has demonstrated. It is tempting for governors and state legislators to export the cost of government by taxing more heavily corporations with less in-state physical presence, thereby taxing more lightly corporations with in-state employees and physical presence through offices, factories, and similar facilities.

162 Another context in which physical presence is a useful (indeed, constitutionally compelled) consideration is the taxation by some states, most notably New York, of the incomes nonresidents earn outside the taxing state. Edward A. Zelinsky, Hillenmeyer, *"Convenience of the Employer," and the Taxation of Nonresidents' Incomes*, 64 CLEV. ST. L. REV. 303, 304 (2016) ("*Hillenmeyer* properly implements the due process case law of the United States Supreme Court barring extraterritorial taxation. *Hillenmeyer* also reaches better results as a matter of tax policy.").

Supreme Court has taken it. The cases in which the Court has protected the states under the commandeering label have involved statutes by which Congress imposed obligations upon the states to affirmatively act to implement federal policies. For example, *Printz v. United States*[163] invalidated as improper "Federal commandeering of state governments"[164] the provisions of the Brady Act that required a state or local "chief law enforcement officer" to perform certain federally mandated activities in connection with the transfer of handguns.[165]

In contrast, I borrow the notion of commandeering to describe the consequences of *Quill*'s judicially created dormant Commerce Clause restraint on states' abilities to enforce their sales taxes: The physical presence test effectively commandeers the states to serve the cause of a sales-tax-free Internet. *Quill*'s physical presence test does not impose an affirmative duty on the states. Rather, this judge-made test prevents the states from enforcing their sales taxes by precluding the states from imposing collection duties upon out-of-state Internet and mail-order sellers.

The Court has never applied the "commandeering" label to this kind of judicially imposed restraint. However, that label illuminates the considerations which should lead the Court to overturn *Quill* rather than defer to Congress to correct that decision as a matter of stare decisis: The sales tax is a bulwark of state and local finance, today seriously hampered by *Quill*'s physical presence test, which prevents the states from imposing sales tax collection responsibilities upon out-of-state sellers. The commandeering case law, even if it addresses the factually different circumstances of congressionally imposed affirmative duties, highlights the severe impediment *Quill* creates for a core state function, namely, enforcing the states' sales taxes in light of the shift to electronic commerce. It is not necessary for the Court, when it reconsiders *Quill*, to literally extend the "commandeering" label to *Quill*. It is necessary, to overcome the force of stare decisis, to recognize the urgent need for the Court itself to overturn *Quill* rather than rely on the legislative process. The states are at a significant political disadvantage as they seek to overturn *Quill* in the halls of Congress.

A variant of this critique would contend that my analysis (like the commandeering doctrine as applied by the Court) proves too much. Much federal law impacts the states.

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163 521 U.S. 898 (1997).

164 *Id.* at 925.

165 Brady Handgun Violence Prevention Act, 18 U.S.C § 922 (2012).

The effort to protect the states judicially from untoward federal interference, the argument goes, is not subject to any principled standards. This is the perspective the Court embraced in *Garcia v. San Antonio Metro. Transit Authority*:[166] There is no "organizing principle"[167] for determining when the Court should protect the states from federal regulation.

No one doubts that a state legislator flying to the state capital for a legislative session must go through TSA screening even though she is undertaking the flight to execute her duties as a state official. There is no good way, the argument runs, to distinguish this kind of federal activity that can permissibly impact the states from federal regulation that so disrupts the states that such regulation should be invalidated as "commandeering." In this vein, Justice Stevens criticizes the notion of "commandeering" as "an arbitrary rule of etiquette."[168]

I use the commandeering label to summarize the considerations that should lead the Court itself to overturn *Quill* rather than rely on Congress to correct *Quill* under the banner of stare decisis. At the end of the day, I am confident that, if the Court overturns *Quill* on these grounds, it can leave for the future the identification of other areas (if any) in which the states deserve protection from untoward federal interventions in their affairs.

A related criticism is that judicial reversal of *Quill* would open the door to a broader attack on the Supreme Court's dormant Commerce Clause case law. My assessment of that case law is mixed. I conclude that the Court's tax-related nondiscrimination decisions are incoherent,[169] while the Court's apportionment and nexus case law under the dormant Commerce Clause is largely correct[170]—*Quill* being the chief exception.

The Court can reverse *Quill* without addressing the broader debate about the validity *vel non* of the dormant Commerce Clause. Here, the pragmatic concerns identified by

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166 469 U.S. 528 (1985).

167 *Id.* at 539.

168 STEVENS, *supra* note 118, at 28–29.

169 Edward A. Zelinsky, Essay, *The Incoherence of Dormant Commerce Clause Nondiscrimination: A Rejoinder to Professor Denning*, 77 MISS. L.J. 653, 653 (2007) ("[T]he notion of dormant commerce clause tax nondiscrimination currently rests on two untenable distinctions: the distinction between tax incentives and direct expenditures and the distinction between tax provisions which are deemed discriminatory and those which are not. . . . [N]either of these distinctions is today workable or persuasive."); Edward A. Zelinsky, Davis v. Department of Revenue*: The Incoherence of Dormant Commerce Clause Nondiscrimination*, 44 ST. TAX NOTES 941 (2007), *reprinted at* 118 TAX NOTES 57 (2007).

170 Zelinsky, *supra* note 144, at 59.

Justice Kennedy play a critical role.[171] By their severity, these practical concerns distinguish *Quill* from the Court's other dormant Commerce Clause cases. *Quill* severely hampers a core state function, i.e., the ability of the states to collect sales taxes in the face of the growth of electronic commerce. No other dormant Commerce Clause decision has such serious contemporary consequences for the states. On these pragmatic grounds, the Court can legitimately overturn *Quill* as sui generis while simultaneously relinquishing to Congress the job of evaluating the Court's other dormant Commerce Clause cases.

Consider, for example, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, which struck a Maine property tax exemption limited to camps that predominantly served Maine residents rather than out-of-staters.[172] The Supreme Court held that this resident-based property tax exemption impermissibly discriminated against nonresidents under the dormant Commerce Clause.[173] I think that *Camps Newfound/Owatonna* is wrongly decided since an economically equivalent direct subsidy for residents is apparently deemed constitutional. However, for present purposes, the point is that the Court's outlawing of resident-based property tax subsidies does not severely impede a critical state function, unlike the barriers to sales tax collection raised by *Quill* and its physical presence test.[174] Of course, when the Court decided *Quill* in 1992, no one foresaw that that decision would have such drastic consequences for the states' sales taxes in the new world of electronic commerce. Today, those consequences are obvious.

In short, an important factor distinguishes *Quill* from other dormant Commerce Clause decisions, namely, the severity of the impediments the physical presence test today imposes upon the states' sales taxes, taxes that are central to the functioning of the states that levy them.[175] This distinction credibly permits the Court to itself overturn *Quill* while adhering to a policy of stare decisis for its other, less impactful dormant Commerce Clause decisions.

Consider as well the possible argument that my invocation of the "commandeering" label in the Commerce Clause context might threaten both legislation that Congress

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[171] *See supra* pp. 1188–89, 1203–04.

[172] 520 U.S. 564 (1997).

[173] *Id.* at 581 ("[T]he Maine statute facially discriminates against interstate commerce. . . . .").

[174] Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 36 (2002).

[175] HELLERSTEIN ET AL., *supra* note 12, at 651–52.

has adopted under the Commerce Clause to coordinate the states' tax laws[176] and similar laws that Congress might adopt in the future.[177] Here again, reasonable distinctions can and should be drawn. *Quill* and its physical presence test for sales tax purposes have a severe impact upon the states and are thus appropriately reversed under the rubric of commandeering. In contrast, existing and proposed Commerce Clause legislation, while substantively significant, does not impede core state functions as does *Quill*.

Illustrative in this context is the federal statute governing the state taxation of "retirement income."[178] This law prevents any state from taxing "any retirement income of an individual" unless such individual is "a resident or domiciliary" of the taxing state.[179] Thus, for example, a California resident who retires to Nevada need not pay California income tax on the individual retirement account (IRA) this individual accumulated in California but liquidates in Nevada, which has no state income tax.[180]

California undoubtedly considers it significant that it cannot tax the IRA withdrawals of its former residents. However, it does not appear to me (and I think to most others who study state and local taxation) that this prohibition is a burden comparable to the impact of *Quill* and its physical presence test on California's ability to collect its sales taxes on Internet and mail-order purchases. Thus, the "commandeering" label ought not apply to this legislation.

Those who think the Court was right in *Garcia* will rejoin that this is a subjective judgment. But judgment is what we hire judges to do. In this case, the more compelling judgment is that the federal law which prevents a former state of residence from taxing the retirement distributions of individuals who are now nonresidents does not have a drastic effect on a core state function similar to *Quill*'s impact on states' sales taxes.

Consider finally the rejoinder that the pragmatic case against *Quill* is by itself enough for the Court to overturn that decision rather than relegate the topic to Congress. However, bad consequences are by themselves not enough to overcome the force of stare decisis. The losing party can always point to

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[176] *See, e.g.*, 46 U.S.C. § 11108(b)(2)(B) (2012); 49 U.S.C. §§ 11502(a), 14503(a) (2012); *see also* Zelinsky, *supra* note 144, at 36–37.

[177] *See* Edward A. Zelinsky, *Pass the Multi-state Worker Act Also*, 80 ST. TAX NOTES 719 (2016).

[178] 4 U.S.C. § 114 (2012).

[179] *Id.* § 114(a).

[180] 142 CONG. REC. 2189 (1996) (statement of Sen. D'Amato).

its adverse results from its loss in the Court. When Congress can overturn the Court, it requires more than bad consequences for the Court to reverse itself, particularly when there has been extensive political debate as there has been about *Quill*.

To justify the Court overruling *Quill* requires, in addition to the pragmatic argument about *Quill*'s bad consequences, the other elements of my analysis—i.e., the tactical advantage *Quill* bestows in the political process upon the Internet and mail-order industries, the importance of the states in the structure of federalism, the importance of sales taxes to the financing of state government, the severe impediment *Quill* raises to the collection of those taxes, and the unique disadvantages of the states in the federal legislative process.

V. THE POST-*QUILL* WORLD

If the Court were to overturn *Quill* and its physical presence test, the next issue would be whether Congress should legislate to provide nationwide standards governing when an out-of-state retailer makes sufficient sales into a state for the state to impose upon that retailer the obligation to collect the state's tax. This question would present an interesting tactical quandary for the Internet and mail-order industries in the post-*Quill* world: whether to seek federal legislation defining the threshold for the obligation to collect sales taxes or to fight over such thresholds state-by-state.

Consider again, in this context, the South Dakota, Alabama, and Wyoming challenges to *Quill*. South Dakota's statute[181] imposes the duty to collect sales tax on an out-of-state retailer if, in the current or previous year, the retailer's gross revenues in South Dakota exceed $100,000[182] or if, in the current or prior year, the retailer has "two hundred or more separate transactions" in South Dakota.[183] Wyoming's bill is similar.[184] Alabama's regulation is not triggered by a particular number of Alabama sales or by the volume of the current year's sales. Rather, the Alabama regulation imposes the obligation to collect sales tax on an out-of-state Internet or mail-order firm with total sales to Alabama customers over $250,000 in the prior year.[185]

In the post-*Quill* world, each state could establish its own standard, subject to ultimate judicial determination that a

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181 S. 106, 91st Leg. Assemb. Sess. § 1 (S.D. 2016).

182 *Id.* § 1(1).

183 *Id.* § 1(2).

184 H.B. 0019, 64th Leg., 2017 Gen. Sess. (Wyo. 2017).

185 ALA. ADMIN. CODE r. 810-6-2-.90.03(1)(a) (2015).

state's threshold for sales tax collection duty is too low to establish "substantial nexus" to the taxing state to satisfy *Complete Auto*.

An important issue in this context would be the identification of affiliated entities. If a state or federal rule were to apply separately to each legally distinct but commonly owned retail entity, a company could establish multiple subsidiaries to keep the sales of each subsidiary below the statutory minimum. More sensibly, commonly controlled corporations, partnerships, and limited liability companies should, for these purposes, be aggregated and treated as a single entity so that the obligation to collect sales tax could not be avoided by dividing sales among legally separate, but commonly controlled, entities. The Internal Revenue Code contains a variety of formulas for aggregating legally distinct, but commonly controlled, businesses.[186] One of these formulas could be incorporated by any state or could be incorporated into federal legislation establishing rules for the states to follow.

On balance, I conclude that federal legislation would be useful in the post-*Quill* world to establish when states can impose sales tax collection responsibilities on out-of-state retailers lacking in-state physical presence and to aggregate legally distinct but commonly controlled entities to assess that responsibility.[187]

Federal legislation could provide that the states could adopt tests more lenient than the federal rule. Suppose, for example, that Congress were to declare that any state can impose sales and use tax collection responsibilities on any out-of-state retailer if the retailer and its affiliated entities sold $100,000 of merchandise or services into the state in the prior year. Federal legislation could permit states to impose a higher threshold, e.g., $200,000 of in-state sales. However, I suspect that, in practice, the federal minimum standard would become the nationwide norm.

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[186] *See* I.R.C. § 267 (2012) (losses disallowed and deductions deferred based on common ownership and family affiliation); *id.* § 318 (constructive ownership of stock for certain corporate tax purposes); *id.* §§ 414(a), 414(b), 414(m), 414(o) (constructive ownership rules for pension purposes); *id.* § 1504 (affiliated group for consolidated return purposes); *id.* § 1551(b) (controlled group for purposes of disallowing graduated corporate rates); *id.* § 1563 (definition of controlled group).

[187] If enacted into law, the Marketplace Fairness Act would utilize Internal Revenue Code § 267 and § 707 to aggregate legally distinct entities. *See* Marketplace Fairness Act, S. 698, 114th Cong. § 2(c)(1) (2015); Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. (2015).

CONCLUSION

If the combatants over *Quill* were just the remote sales industries and their brick-and-mortar competitors, stare decisis considerations would counsel that Congress, not the Court, should decide the fate of *Quill*'s physical presence test. The conventional retail industry has the challenging political burden of securing *Quill*'s repeal while the Internet and mail-order industries have the politically easier task of blocking legislation which would overturn *Quill* and its physical presence test. This theoretical situation would not differ from the political environment that exists whenever one private interest prevails in the Supreme Court and another loses.

However, *Quill* is a dormant Commerce Clause decision that effectively commandeers the states to subsidize Internet commerce by not effectively taxing it. When the states are commandeered in this fashion, the states, despite their important role in the structure of federalism, are at a significant political disadvantage. The states, unlike private interests, do not bestow votes and campaign contributions on members of Congress. Federal legislators have no politically compelling reason to help the states overturn a decision like *Quill*. The benefits from the repeal of *Quill*—more state sales tax revenues resulting in increased state spending, lower state tax rates, or both—redound to the political advantage of the governors, mayors, and state legislators who will control these revenues. Federal legislators, in contrast, get no political benefit from the state revenues raised by the repeal of *Quill*.

If *Quill* and its physical presence test are to be overturned, it is, as a matter of political process, the Supreme Court that must do the overturning to preserve the states' sales tax in the face of the growth of Internet commerce. The Court should overturn *Quill* in the Court's role as guardian of the states against federal commandeering in light of a combination of relevant factors: the tactical advantage *Quill* bestows in the political process upon the Internet and mail-order industries, the importance of the states in the structure of federalism, the centrality of sales taxes to the financing of state government, the severe impediment *Quill* raises to the collection of those taxes, and the unique disadvantages of the states in the federal legislative process. Cumulatively, these considerations suggest that the Supreme Court should overturn *Quill* rather than letting Congress do so.