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# AN UNCOMMON CARRIER: THE FCC'S UNINTENDED EFFECTS ON CONSTITUTIONAL USE TAXATION

Maricarmen Perez-Vargas\*

*Abstract:* The constitutional use taxation framework, which regulates the circumstances under which states can require out-of-state sellers to collect and remit use taxes on products sold for use within the state, has not been examined by Congress or the Supreme Court since the 1990s, and then only to reaffirm a rule that had been in place since the 1960s. Since the 1960s, the Supreme Court has held that states can only collect use taxes from sellers that have a physical presence within the state and whose connections to the state are beyond connections via common carriers. The Court interpreted this rule in the context of mail-order businesses in order to prevent states from taxing retailers that were simply mailing merchandise into the state, which the Court reasoned did not significantly use state resources. This bright-line rule has created settled expectations that businesses will not be subject to use taxation in a state where they do not have a physical presence, and where their only contacts with the state are through mail or common carrier.

In 2013, the New York State Court of Appeals deviated from the first half of this rule by holding that internet advertisers that were paid commission could constitute a “physical presence” that could subject a business to use taxation. The Supreme Court denied certiorari, and this decision reinvigorated the debate about what “physical presence” means in the modern economy.

The second half of the rule, that sellers must have connections with a state beyond connections through a “common carrier,” has traditionally not required much analysis by courts or legal scholars, since historically, a physical presence, by definition, provided a relationship with a state beyond one established exclusively through common carriers. In 2015, however, the Federal Communications Commission designated internet service providers as common carriers. This Comment argues that internet service providers’ common carrier designation precludes states from collecting use taxes from out-of-state sellers whose only connections with the state are through the internet, as was the case in New York. Furthermore, this Comment explores the implications of the policy goals of the new executive administration under Donald Trump,<sup>1</sup> which has initiated the reversal of the internet’s classification as a common carrier.<sup>2</sup> A reversal of the Federal Communications Commission’s rule would conceivably reinstate the internet as a means through which sellers would be able to establish a physical presence within a state.

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1. See Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 12, 2014, 10:58 AM), [https://twitter.com/realdonaldtrump/status/532608358508167168? \[https://perma.cc/F794-TTTS\]](https://twitter.com/realdonaldtrump/status/532608358508167168? [https://perma.cc/F794-TTTS]).

2. See *In re Restoring Internet Freedom*, 32 FCC Rcd. 4434, 4435 (2017).

## INTRODUCTION

In 2013, the New York State Court of Appeals did something that courts in the United States had not done since before the 1960s: impose use tax collection obligations on sellers that did not have physical presences within the state of New York.<sup>3</sup> Although the sellers, Amazon.com, Inc. (Amazon) and Overstock.com, Inc. (Overstock), appealed, the Supreme Court denied certiorari.<sup>4</sup> The *Overstock* decision sparked a debate that had been largely dormant since the early 1990s—what does a “physical presence” mean in the modern economy?<sup>5</sup>

Ever since the 1960s, states have been unable to collect use taxes from sellers without a physical presence within their borders.<sup>6</sup> Courts have consistently upheld this bright-line rule in order to comply with the Supreme Court’s interpretation of the dormant Commerce Clause.<sup>7</sup> Some states have recently attempted to relax this rule in order to recoup lost revenue due to the development of the internet economy.<sup>8</sup> In 2013, the state of New York subjected Amazon and Overstock to use taxation collection obligations, finding a physical presence through the sellers’ advertisements on websites that had owners located in New York.<sup>9</sup>

The internet’s recent classification as a common carrier through the Federal Communications Commission’s (FCC) 2015 Open Internet Order,<sup>10</sup> however, could preclude courts from reasoning that internet-based connections can produce a physical presence subjecting the seller to use taxation collection obligations within a state. Because the United States Supreme Court has recognized and upheld a distinction between sellers with a physical presence within a state and sellers that “do no more than communicate with customers in the State by mail or common carrier,” if the internet is a common carrier, then sellers whose only connections with a state are through the internet cannot establish a physical presence through that connection.<sup>11</sup>

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3. See *Overstock.com, Inc. v. State Dep’t of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013).

4. See *Amazon.com, LLC v. N.Y. State Dep’t of Taxation & Fin.*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 682 (2013) (cert. denied).

5. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

6. See *id.* at 318; *Nat’l Bellas Hess v. Dep’t of Revenue*, 386 U.S. 753, 758 (1967).

7. See *Quill*, 504 U.S. at 318; *Bellas Hess*, 386 U.S. at 758; *Overstock*, 987 N.E.2d at 625.

8. See *Overstock*, 987 N.E.2d at 623.

9. See *id.*

10. See *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) [hereinafter 2015 Open Internet Order].

11. See *Bellas Hess*, 386 U.S. at 758.

Notably, the Open Internet Order is not necessarily permanent. The Order has been challenged by litigants.<sup>12</sup> Furthermore, the FCC, now headed by Ajit Pai, recently proposed a new rule that would revoke the common carrier classification of internet service providers (ISPs).<sup>13</sup>

This Comment explores the impact of the FCC's 2015 classification of the internet as a common carrier on the current constitutional use taxation framework.<sup>14</sup> Part II describes the historical development of the constitutional use taxation framework through Supreme Court decisions. Part III describes the modern approach and the anomalous decision made by the New York State Court of Appeals allowing the state to tax sellers without a traditional physical presence within the state.<sup>15</sup> Part IV gives background on the FCC's designation of the internet as a common carrier and discusses potential changes to this designation under the new presidential administration.<sup>16</sup> Part V analyzes the effects of this reclassification on constitutional use taxation, and demonstrates the significance of the common carrier language in the *National Bellas Hess v. Department of Revenue*<sup>17</sup> rule when applied to the internet. This Comment concludes that under the current administrative framework, decisions such as the one in *Overstock.com, Inc. v. New York State Department of Taxation and Finance*<sup>18</sup> are precluded by the internet's status as a common carrier. This Comment notes, however, that this status is tenuous as it is dependent on impermanent administrative actions.

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12. Simone A. Friedlander, Note, *Net Neutrality and the FCC's 2015 Open Internet Order*, 31 BERKELEY TECH. L.J. 905, 924 (2016) (citing 2015 Open Internet Order, 30 FCC Rcd. at 5635).

13. See *In re Restoring Internet Freedom*, 32 FCC Rcd. 4434, 4435 (2017). For a discussion on the comment process for this proposed rule, see Devin Coldewey, *Today Is Your Last Chance to Comment on the Proposal to Kill Net Neutrality*, TECHCRUNCH (Aug. 30, 2017), <https://techcrunch.com/2017/08/30/today-is-your-last-chance-to-comment-on-the-proposal-to-kill-net-neutrality/> [<https://perma.cc/5BNK-E8MG>].

14. See 2015 Open Internet Order, 30 FCC Rcd. at 5604.

15. See *Overstock.com, Inc. v. State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013).

16. See 2015 Open Internet Order, 30 FCC Rcd. at 5601.

17. 386 U.S. 753 (1967).

18. 987 N.E.2d 621 (N.Y. 2013).

## I. THE HISTORICAL DEVELOPMENT OF CONSTITUTIONAL USE TAXATION: A STRUGGLE BETWEEN STATE SOVEREIGNTY AND AN EVOLVING ECONOMY

Courts have struggled throughout United States history with identifying the boundaries of the individual states' power to tax.<sup>19</sup> The Supreme Court has attempted to balance two competing goals. First, the Supreme Court seeks to prevent protectionism, defined as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."<sup>20</sup> One scholar commented that "[t]he quintessential instrument of protectionism is the protective tariff, a duty on imports of a certain good imposed for the purpose of securing a greater share of the home market for domestic producers of the good."<sup>21</sup> Second, the Supreme Court seeks to allow state governments to collect duly owed taxes. Part II of this Comment focuses on this historical development of one particular type of protective tariff, state use taxation, and the constitutional framework that limits it. It will discuss the doctrinal limitation on states' power to tax out-of-state businesses: the Dormant Commerce Clause, and the historical framework that existed before the Supreme Court's decision in *Bellas Hess*.

### A. *The Dormant Commerce Clause: The Doctrinal Limitation on States' Power to Tax Out-of-State Businesses*

The Dormant Commerce Clause limits the ability of states to tax businesses that are not located within their borders.<sup>22</sup> The Commerce Clause of the United States Constitution vests the power to regulate commerce "among the several states" in Congress.<sup>23</sup> The Dormant Commerce Clause precludes states from unduly burdening interstate commerce.<sup>24</sup> If a state action is protectionist or isolationist, particularly when it facially discriminates against out-of-state goods, services, or economic entities, then it violates the Dormant Commerce Clause.<sup>25</sup>

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19. See James L. Buchwalter, *Construction and Application of Dormant Commerce Clause, U.S. Const. Art. I, § 8, cl. 3—Supreme Court Cases*, 41 AM. L. REP. FED. 2d 1, § 2 (2009).

20. *Id.* § 11.

21. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1094 (1986).

22. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Nat'l Bellas Hess v. Dep't of Revenue*, 386 U.S. 753, 758 (1967).

23. U.S. CONST. art. I, § 8, cl. 3.

24. See *id.*

25. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978).

To analyze whether a state action violates the Dormant Commerce Clause, the Court first inquires whether the law facially discriminates against interstate commerce.<sup>26</sup> If a law is facially discriminatory, it is virtually per se invalid.<sup>27</sup> Absent facial discrimination, however, the law will be “upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the [local] benefits.”<sup>28</sup>

In the context of interstate taxation, determining facial discrimination is fairly simple. If a state attempts to tax businesses that are not located within the state at a higher rate than those located within the state, that constitutes facial discrimination and renders the law per se invalid.<sup>29</sup> For state taxes that burden in-state businesses as well as out-of-state businesses equally, however, the analysis is more complicated.

*B. Constitutional Use Taxation Analysis Before Bellas Hess: A “Minimum Contacts” Approach*

Taxation of out-of-state businesses is permissible under the Dormant Commerce Clause, to an extent. The framework for evaluating the burden and whether it is excessive has evolved over time. Before the United States Supreme Court’s decision in *Bellas Hess*, use taxes were analyzed similarly to the personal jurisdiction minimum contacts analysis.<sup>30</sup> Use taxes are state taxes applied to the use of goods purchased from out-of-state sellers within a given state, as opposed to sales taxes, which are applied to sales made by businesses within their state of residence.<sup>31</sup>

The minimum contacts analysis for personal jurisdiction allows states to subject residents of other states to their jurisdiction if the resident has sufficient “minimum contacts” with the forum state, such that maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”<sup>32</sup> *Miller Bros. Co. v. Maryland*<sup>33</sup> is a good example of the pre-*Bellas Hess* “minimum contacts” approach.<sup>34</sup> In

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26. See *Dep’t of Revenue v. Davis*, 553 U.S. 328, 338 (2008).

27. See *id.*

28. *Id.* at 338–39 (alteration in original) (internal quotation omitted) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

29. See *id.* at 338.

30. See *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342–43 (1954).

31. See *id.* at 343.

32. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

33. 347 U.S. 340 (1954).

34. See *id.* at 342–47.

*Miller Bros.*, the Supreme Court evaluated whether the state of Maryland could require a Delaware corporation to recover and remit use taxes for goods sold in Delaware to Maryland residents for use within Maryland.<sup>35</sup> Because the Delaware corporation did not solicit or exploit the consumer market in Maryland, and did not sell products within the state of Maryland, it could not be required to collect and remit use taxes to the state of Maryland.<sup>36</sup> The Court held that, in order to tax an out-of-state seller, there must be “some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax.”<sup>37</sup>

This rule was reaffirmed by the Court in *Scripto v. Carson*,<sup>38</sup> holding that there must be some “minimum connection” between a state and the “person, property or transaction it seeks to tax.”<sup>39</sup> In *Scripto*, the Court held that Florida could constitutionally impose a use tax collection obligation on a Georgia seller because the seller had ten salesmen conducting continuous local solicitation in the state of Florida.<sup>40</sup> This solicitation was seen as a sufficient “minimum connection” with the state for use taxation purposes.<sup>41</sup>

This was the dominant approach of the Court up until 1967 when *Bellas Hess* was decided.<sup>42</sup> The rise of mail-order retail changed the economic landscape in a way that necessitated a change in the constitutional use taxation framework.<sup>43</sup> A bright-line rule that could afford clarity to sellers and states was desirable, which is what the Court announced in *Bellas Hess*.<sup>44</sup>

### C. *Bellas Hess* Introduces the Physical Presence Requirement

The Supreme Court’s decision in *Bellas Hess* represented a departure from the vague “minimum connection” approach for constitutional use taxation. In *Bellas Hess*, the Court considered a use tax that the state of Illinois was attempting to impose on an out-of-state seller without a

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35. *See id.*

36. *See id.*

37. *Id.* at 344–45.

38. 362 U.S. 207 (1960).

39. *Id.* at 210–11 (quoting *Miller Bros.*, 347 U.S. at 344–45).

40. *See id.* at 210–12.

41. *See id.*

42. *See Nat’l Bellas Hess v. Dep’t of Revenue*, 386 U.S. 753, 758 (1967).

43. *See id.*

44. *Id.*

physical presence within the state.<sup>45</sup> The action was to recover taxes assessed by the Illinois Use Tax.<sup>46</sup> The seller, a mail-order business, did not maintain “any office, distribution house, sales house, warehouse or any other place of business; it [did] not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise.”<sup>47</sup> The seller did not own property or advertise within the state of Illinois.<sup>48</sup> The tax Illinois attempted to impose taxed businesses soliciting orders within Illinois using catalogues or other advertisements where the products that were sold were ultimately used within the state of Illinois.<sup>49</sup>

Although the Court did not overrule its previous “minimum connection” holdings, it clarified that a requirement to establish a sufficient connection was a physical presence within the taxing state.<sup>50</sup> The Court held that a state may not collect use taxes from sellers without “retail outlets, solicitors, or property within a State” that “do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.”<sup>51</sup> The holding specifically precluded states from taxing mail-order businesses simply for selling goods to customers located within the state.<sup>52</sup>

The Court reiterated situations where it had allowed a state to tax an out-of-state seller in the past, such as where local agents arranged the sales or where the mail-order seller maintained local retail stores.<sup>53</sup> The Court justified these impositions because “[i]n those situations the out-of-state seller was plainly accorded the protection and services of the taxing State.”<sup>54</sup> The Court cited *Scripto* as the case that represented “the furthest constitutional reach to date of a State’s power to deputize an out-of-state retailer as its collection agent for a use tax.”<sup>55</sup>

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45. *Id.*

46. *Id.*

47. *Id.* at 754.

48. *Id.*

49. *Id.* at 755.

50. *Id.* at 758.

51. *Id.*

52. *Id.* at 758.

53. *Id.* at 757 (citing *Nelson v. Sears Roebuck & Co.*, 312 U.S. 359 (1948); *Gen. Trading Co. v. State Tax Comm’n*, 322 U.S. 355 (1944); *Felt & Tarrant Mfg. Co v. Gallagher*, 306 U.S. 62 (1939)).

54. *Id.*

55. *Id.* (discussing *Scripto v. Carson*, 362 U.S. 207, 210–11 (1960)).



Turning to the facts at hand, the Court stated that it had “never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.”<sup>56</sup> The Court reasoned that this was because such sellers were not receiving the types of benefits from the states in question that would justify taxation.<sup>57</sup>

The Court thus created a new, clear distinction: out-of-state sellers could only be taxed where they had a physical presence within the state and their relationship with the state was more than a relationship through mail or common carrier.<sup>58</sup>

*D. The Modern Understanding: Complete Auto, Quill, and the “Substantial Nexus”*

Following the Court’s decision in *Bellas Hess*, confusion persisted as to how to apply the physical presence requirement. This was partially due to a more formalistic approach that the Court had applied in *Freeman v. Hewitt*<sup>59</sup> and *Spector Motor Service, Inc. v. O’Connor*.<sup>60</sup>

In *Freeman*, Indiana sought to impose an inheritance tax when a trustee of an Indiana estate instructed his local stockbroker, located within New York, to sell certain securities.<sup>61</sup> The Court “announced a blanket prohibition against any state taxation imposed directly on an interstate transaction.”<sup>62</sup>

A few years later, in *Spector*, the Court reaffirmed the prohibition against taxation of the “privilege” of doing business.<sup>63</sup> The *Spector* Court analyzed a Connecticut state tax imposed on a Missouri corporation that “engaged exclusively in interstate trucking.”<sup>64</sup> The Court struck down the tax, observing that “[t]his Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character.”<sup>65</sup>

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56. *Id.* at 758.

57. *Id.*

58. *See id.*

59. 329 U.S. 249 (1946).

60. 340 U.S. 602 (1951).

61. *Freeman*, 329 U.S. at 250–51.

62. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 280 (1977) (discussing *Freeman*, 329 U.S. at 253).

63. *Spector*, 340 U.S. at 603.

64. *Id.* at 603–04.

65. *Spector*, 340 U.S. at 609–10 (citing *Freeman*, 329 U.S. 249).

Due to the confusion that persisted in courts attempting to consolidate these precedents, the Court clarified the law in its decision in *Complete Auto v. Brady*.<sup>66</sup> The Court observed, “[w]e noted probable jurisdiction in order to consider anew the applicable principles in this troublesome area.”<sup>67</sup> In *Complete Auto*, the Court held that a Mississippi tax on the “privilege of doing business” within the state did not violate the Dormant Commerce Clause.<sup>68</sup> The Court announced a four-part test used to evaluate the constitutionality of a use tax imposed on an out-of-state seller: the tax needed to (1) be applied to interstate activity that had a “substantial nexus” with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state.<sup>69</sup>

In its decision in *Complete Auto*, the Court explicitly overruled its decision in *Spector*.<sup>70</sup> The Court did not, however, overrule its previous decision in *Bellas Hess*, implying that the physical presence rule announced in that decision was still valid.<sup>71</sup> The litigants in *Quill Corp. v. North Dakota*,<sup>72</sup> however, challenged this implication.<sup>73</sup>

In *Quill*, the Court again considered the constitutionality of use taxation collection obligations imposed on out-of-state sellers in the context of mail-order sales.<sup>74</sup> “This case, like *National Bellas Hess* . . . involves a State’s attempt to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State.”<sup>75</sup> North Dakota sought a declaratory judgment against Quill Corporation stating that it was obligated to collect and remit applicable use taxes to North Dakota, despite the fact that Quill Corporation was a Delaware corporation with offices and warehouses in Illinois.<sup>76</sup>

North Dakota argued that the Court’s decision in *Complete Auto* had overruled the physical presence rule established in *Bellas Hess*.<sup>77</sup>

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66. See *Complete Auto*, 430 U.S. at 274.

67. *Id.* at 275.

68. *Id.* at 279.

69. *Id.*

70. *Id.* at 289.

71. *Id.*

72. 504 U.S. 298 (1992).

73. See *id.* at 301–04.

74. *Id.*

75. *Id.* at 301.

76. *Id.* at 302.

77. *Id.* at 310.

*Complete Auto*'s four-part test for constitutional use taxation did not mention the physical presence requirement articulated in *Bellas Hess*, using instead the "substantial nexus" language.<sup>78</sup> The Court clarified, however, that *Complete Auto* did not render *Bellas Hess* obsolete.<sup>79</sup> Although the Court did overrule the due-process analysis that the Court had used in *Bellas Hess*,<sup>80</sup> it maintained that a physical presence was still required in order to establish a substantial nexus within a taxing state.<sup>81</sup> The Court noted that *Bellas Hess* was not inconsistent with *Complete Auto* and its recent cases, stating that under *Complete Auto*'s four-part test, "*Bellas Hess* concern[ed] the first of these tests and [stood] for the proposition that a vendor whose only contacts with the taxing State [were] by mail or common carrier lack[ed] the 'substantial nexus' required by the Commerce Clause."<sup>82</sup>

The Court distinguished *Bellas Hess* from the other cases the Court had overruled in its decision in *Complete Auto*.<sup>83</sup> The Court clarified that "*Complete Auto* rejected *Freeman* and *Spector*'s formal distinction between 'direct' and 'indirect' taxes on interstate commerce because that formalism allowed the validity of statutes to hinge on 'legal terminology,' 'draftsmanship and phraseology.'"<sup>84</sup> The Court renounced the *Freeman* approach because it "attach[ed] constitutional significance to a semantic difference."<sup>85</sup> *Bellas Hess*, on the other hand, made a distinction between mail-order sellers with a physical presence in the taxing state and mail-order sellers who only communicate with customers in the state by mail or common carrier as a part of their general interstate business.<sup>86</sup> The Court concluded that its reasoning in recent cases did not compel it to reject the rule that *Bellas Hess*

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78. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

79. *Quill*, 504 U.S. at 310.

80. *Id.* at 308, 312 (holding that, to comply with the Due Process Clause of the Federal Constitution, a physical presence within a taxing state is not required because the Due Process Clause seeks to protect different interests than the Commerce Clause. "[T]o the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process . . . [d]espite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical").

81. *Id.* at 311.

82. *Id.*

83. *Id.*

84. *Id.* at 310 (first discussing *Complete Auto*, 430 U.S. at 285; and then discussing *Freeman v. Hewitt*, 329 U.S. 249 (1946)).

85. *Id.* (quoting *Complete Auto*, 430 U.S. at 285) (discussing *Freeman*, 329 U.S. at 250–51).

86. *Id.* at 311 (quoting *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 559 (1977)).

established in the area of sales and use taxes.<sup>87</sup> “To the contrary, the continuing value of a bright-line rule in this area and the doctrine and the principles of *stare decisis* indicate[ed] that the *Bellas Hess* rule remain[ed] good law.”<sup>88</sup>

Thus, *Bellas Hess*, *Complete Auto*, and *Quill* taken together forged a new, modern understanding of constitutional use taxation. *Bellas Hess* created the physical presence rule.<sup>89</sup> *Complete Auto* created the four-part test, beginning with the requirement for a “substantial nexus.”<sup>90</sup> *Quill* consolidated these two rulings to clarify that a substantial nexus required a physical presence, preserving the *Bellas Hess* ruling as the definition of the first prong of *Complete Auto*’s four-part test.<sup>91</sup>

## II. THE MODERN APPROACH IN THE MODERN ECONOMY: CONSTITUTIONAL USE TAXATION AND THE RISE OF THE INTERNET ECONOMY

In *Bellas Hess* and *Quill*, the Court re-shaped the constitutional use taxation framework in light of a significant and sharp change in the economy: the rise of mail-order businesses.<sup>92</sup> This Part discusses the application of the physical presence rule to the internet economy, showing that there is controversy over whether the rule should remain in place in the modern economy.

### A. *The Internet Economy Has Changed the Landscape of Constitutional Use Taxation*

The economy has changed significantly since *Quill* was decided in 1992. This change has introduced a debate regarding the propriety of the physical presence rule. Some defend the physical presence rule, arguing that it provides certainty for both states and retailers,<sup>93</sup> ensures free trade among states,<sup>94</sup> and it would be inappropriate for the Court to change this longstanding doctrine.<sup>95</sup> Those who oppose the physical presence

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87. *Id.* at 317.

88. *Id.*

89. *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753, 758 (1967).

90. *Complete Auto*, 430 U.S. at 279.

91. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992).

92. *Quill*, 504 U.S. at 317; *Bellas Hess*, 386 U.S. at 758.

93. *Quill*, 504 U.S. at 314–15.

94. *Bos. Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 328 (1977) (citing *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)).

95. *Quill*, 504 U.S. at 314–15.

rule argue that it is outdated and inappropriate in the context of the internet economy.<sup>96</sup>

Since 1992, “[t]he [i]nternet has caused far-reaching systematic and structural changes in the economy.”<sup>97</sup> In 2011, “nearly 70% of American consumers shopped online.”<sup>98</sup> Retailers can now easily and affordably conduct business in many states with a physical location in just one.<sup>99</sup> This, in turn, has caused states to attempt to circumvent the physical presence requirement to tax businesses selling products into the states without being physically located in the states.<sup>100</sup> This is exactly the type of change in the economy that the Court confronted both in *Bellas Hess* and in *Quill*: simply substitute “mail-order” retailer with “online retailer.”<sup>101</sup>

The Court has persisted in its application of the physical presence rule despite a “wholesale change[]” in the economy.<sup>102</sup> In *Quill*, the North Dakota Supreme Court had decided that changes in both the economy and the law made it inappropriate to follow *Bellas Hess*.<sup>103</sup> The United States Supreme Court noted the remarkable growth of the mail-order business “from a relatively inconsequential market niche” in 1967 to a “goliath” market with annual sales reaching “the staggering figure of \$183.3 billion in 1989.”<sup>104</sup> The Supreme Court acknowledged these changes, but ultimately affirmed the physical presence rule despite them.<sup>105</sup> In his dissent, Justice White observed that “in today’s economy,

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96. See, e.g., John L. Mikesell, *Remote Vendors and American Sales and Use Taxation: The Balance Between Fixing the Problem and Fixing the Tax*, 53 NAT’L TAX J. 1273, 1278 (2000) (“The *Quill* physical presence line may be ‘bright’ in the eyes of the judiciary, but the new forms of remote commerce have blurred the line enough to make it an un-reliable standard if the sales and use tax is to be fair, non-distorting of channels of commerce, and productive.”).

97. *Direct Mktg. Ass’n v. Brohl*, \_\_ U.S. \_\_, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

98. *Id.* (citing PRICEWATERHOUSECOOPERS, UNDERSTANDING HOW U.S. ONLINE SHOPPERS ARE RESHAPING THE RETAIL EXPERIENCE 3 (2012)).

99. Curtis Mitchell, *Why Traditional Retailers Are Feeling the Ecommerce Heat*, WIRED (June 7, 2013), <http://insights.wired.com/profiles/blogs/6-reasons-why-traditional-retailers-are-feeling-theecommerce> [https://perma.cc/X34Q-V5BZ].

100. See *Overstock.com, Inc. v. N.Y. State Dep’t of Taxation & Fin.*, 987 N.E.2d 621, 625–26 (N.Y. 2013).

101. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992); *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753, 758 (1967).

102. See *Quill*, 504 U.S. at 303 (quoting *State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 213 (N.D. 1991)).

103. *Id.* at 301.

104. *Id.* at 302 (quoting *Heitkamp*, 470 N.W.2d at 208–09).

105. *Id.* at 301–02.

physical presence frequently has very little to do with a transaction a State might seek to tax.”<sup>106</sup> The same debate has emerged in light of the rise of the internet economy.

The ease of conducting interstate commerce through the internet has given rise to prevalent online retailers.<sup>107</sup> Large and small businesses have been able to easily increase the volume of their sales throughout the country through the internet.<sup>108</sup> As a result, physical presence has become increasingly difficult to define.

### *1. Arguments Favoring the Physical Presence Rule*

Those favoring the physical presence rule in light of the modern economy argue that it provides predictability and foreseeability both for states and for businesses, it is consistent with the Commerce Clause, and stare decisis favors preserving the rule.<sup>109</sup> Proponents of the rule cite *Quill*, which stated, “[u]ndue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation.”<sup>110</sup>

Furthermore, the purpose of the Commerce Clause is to protect “free trade among the several states.”<sup>111</sup> The Court in *Quill* observed that “the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy.”<sup>112</sup>

Additionally, stare decisis cautions the Court against lightly setting aside precedent such as the physical presence rule.<sup>113</sup> When the Court does consider overruling itself, “its judgment is customarily informed by a series of prudential and pragmatic considerations . . . .”<sup>114</sup> These considerations include whether the rule is unworkable, whether the rule

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106. *Id.* at 328 (White, J., dissenting).

107. *Direct Mktg. Ass’n v. Brohl*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

108. *Mitchell*, *supra* note 99.

109. *See generally Quill*, 504 U.S. 298.

110. *Id.* at 314–15.

111. *Bos. Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 328 (1977) (citing *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)).

112. *Quill*, 504 U.S. at 312.

113. *See id.* at 317.

114. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

“is subject to a kind of reliance that would lend a special hardship to the consequences of overruling,” and whether “related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.”<sup>115</sup> The physical presence rule’s simplicity, decades-long history, and consistent application are arguments cited to support stare decisis in this instance.<sup>116</sup> One scholar has observed that “[t]he potential administrative snafus resulting from the taxation of e-commerce are similar to those recognized in *Bellas Hess*. Currently there are approximately 7,000 taxing entities throughout the United States with varying tax rates and exemptions, and each is capable of imposing a sales or use tax.”<sup>117</sup>

Supporters of the physical presence requirement also argue that it would be Congress’s role, not the Court’s, to change this established rule. Supporters cite *Quill*, where the Court commented:

[O]ur decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.<sup>118</sup>

## 2. *Arguments Against the Physical Presence Rule*

There are some who argue that the physical presence rule is out of date in the context of the modern internet economy.<sup>119</sup> One scholar has observed that “[t]he *Quill* physical presence line may be ‘bright’ in the eyes of the judiciary, but the new forms of remote commerce have blurred the line enough to make it an unreliable standard if the sales and use tax is to be fair, non-distorting of channels of commerce, and productive.”<sup>120</sup> In particular, those who oppose the physical presence rule in the modern economy argue that it is difficult to define and apply

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115. *Id.* at 854–55.

116. *See, e.g.*, W. Ray Williams, *The Role of Caesar in the Next Millennium? Taxation of E-Commerce: An Overview and Analysis*, 27 WM. MITCHELL L. REV. 1703, 1716 (2001).

117. *Id.*

118. *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946)).

119. *See, e.g.*, Mikesell, *supra* note 96, at 1278 (“The problem is that economic and technological change has made untenable the physical presence rule that *National Bellas Hess, Inc. v. Department of Revenue . . .* and *Quill v. North Dakota . . .* established to determine when remote vendors must register as sales and use tax collectors.”).

120. *Id.* at 1279.

in the context of the internet and prevents states from collecting duly owed taxes, causing significant deficits in state budgets.<sup>121</sup>

One example of the potential ambiguity created by the physical presence rule is its role in retailer-teacher book programs with no formal agency or representative agreements. At least three states currently allow a physical presence to be established on the basis of an “implied agency relationship” even if the agent is not formally employed by or dependent on income from the seller.<sup>122</sup> However, at least two other states claim that physical presence cannot be established for nearly identical relationships.<sup>123</sup> This ambiguity pales in comparison to confusion that exists in relation to large online retailers.<sup>124</sup>

Some argue that this test, in the context of the rise of the internet economy, hurts the ability of states to collect duly owed use taxes.<sup>125</sup> In his concurrence in the *Brohl* decision, Justice Kennedy observed that the physical presence test “inflict[s] extreme harm and unfairness on the States.”<sup>126</sup>

There has been a correlation in the rise of internet retailers and the decline of state revenues.<sup>127</sup> The National Conference of State Legislatures “estimates that states lost out on \$23.2 billion in revenue in 2012 due to their inability to collect sales taxes from online purchases.”<sup>128</sup> More traditional brick-and-mortar retailers complain

121. See *Direct Mktg. Ass’n v. Brohl*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1124 (2015) (Kennedy, J., concurring).

122. See *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 207 Cal. App. 3d 734 (1989); *In re Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996); *Scholastic Book Clubs, Inc. v. Comm’r of Revenue Servs.*, 38 A.3d 1183, 1197 (Conn. 2012).

123. See *Scholastic Book Clubs, Inc. v. State Dep’t of Treasury*, 567 N.W.2d 692, 694–95 (Mich. 1997); *Pledger v. Troll Book Clubs, Inc.*, 871 S.W.2d 389, 392–93 (Ark. 1994).

124. See *Direct Mktg.*, 135 S. Ct. at 1128 (discussing a state statute that would require online retailers to provide the state with a list of customers who had purchased their goods within the state so that the state could collect the use taxes that were owed).

125. See *id.*

126. See *id.* at 1134 (Kennedy, J., concurring).

127. See, e.g., CAL. ST. BD. OF EQUALIZATION, REVENUE ESTIMATE: ELECTRONIC COMMERCE AND MAIL ORDER SALES 7 tbl.3 (rev. 2013) (estimating that the State of California is able to collect only four percent of the use taxes due on out-of-state vendors).

128. Darla Mercado, *The Holiday Is Over: Amazon Will Collect Sales Taxes Nationwide on April 1*, CNBC (Mar. 24, 2017, 2:12 PM), <http://www.cnbc.com/2017/03/24/the-holiday-is-over-amazon-will-collect-sales-taxes-nationwide-on-april-1.html> [https://perma.cc/N84K-WGAW] (citing *Collecting E-Commerce Taxes: E-Fairness Legislation*, NCSL (Nov. 14, 2014), <http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/http://www.ncsl.org/research/fiscal-policy/collecting-ecommerce-taxes-an-interactive-map.aspx#2> [https://perma.cc/Q9JD-XKVV] (compiling data for state-by-state sales tax figures)).



about what they view as an unfair advantage held by online retailers.<sup>129</sup> Retailers that used to require a physical presence within a state in order to do a substantial amount of business in that state no longer need such a physical presence to have a substantial economic presence.<sup>130</sup> “In 2008, e-commerce sales . . . totaled \$3.16 trillion per year in the United States.”<sup>131</sup> The rise in internet retailers that are exempt from state taxes has prompted both state legislatures and traditional brick-and-mortar retailers to lobby for a legislative solution.<sup>132</sup> Although there have been several efforts to change the use taxation framework through legislation,<sup>133</sup> these bills “have stalled in Congress, despite bipartisan support.”<sup>134</sup>

*B. Testing the Physical Presence Rule in the Internet Economy:  
Overstock*

The broader debate surrounding the benefits and disadvantages of the physical presence rule was ongoing when New York’s highest court upheld a use tax statute that applied to out-of-state sellers without offices, personnel, or retail locations in New York in *Overstock*.<sup>135</sup> The court found a sufficient “physical presence” where the sellers (Overstock and Amazon) contracted with New York residents to refer customers.<sup>136</sup>

The majority’s approach did not contravene the physical presence rule, observing that “[t]he world has changed dramatically in the last two

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129. Chris Isidore, *Amazon to Start Collecting State Sales Tax Everywhere*, CNN TECH (Mar. 29, 2017, 2:59 PM), <http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/> [<https://perma.cc/YD7G-SFHS>].

130. See, e.g., CAL. ST. BD. OF EQUALIZATION, *supra* note 127, at 7 tbl.3 (estimating that the State of California is able to collect only four percent of the use taxes due on out-of-state vendors).

131. See *Direct Mktg. Ass’n v. Brohl*, \_\_ U.S. \_\_, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

132. Matt Egan, *Rise of Amazon Leaves Even More Retailers in Intensive Care*, CNN MONEY (Mar. 9, 2017, 11:33 AM), <http://money.cnn.com/2017/03/06/investing/retail-stress-great-recession-amazon/index.html?iid=EL> [<https://perma.cc/U5WG-YCWS>] (“The report is a sobering reminder of the consequences of the rise of e-commerce, especially Amazon . . . ‘It’s been a downward spiral for traditional retailers.’”).

133. See, e.g., Marketplace Fairness Act, S. 698, 114th Cong. (2015); Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong.; Marketplace and Internet Tax Fairness Act, S. 2609, 113th Cong. (2014); Marketplace Fairness Act, S. 743, 113th Cong. (2013); Marketplace Fairness Act, H.R. 684, 113th Cong. (2013); Marketplace Fairness Act, S. 1832, 112th Cong. (2011); Main Street Fairness Act, S. 1452, 112th Cong. (2011); Marketplace Equity Act, H.R. 3179, 112th Cong. (2011); Main Street Fairness Act, H.R. 2701, 112th Cong. (2011).

134. Isidore, *supra* note 129.

135. 987 N.E.2d 621, 625–27 (N.Y. 2013).

136. *Id.*

decades, and it may be that the physical presence rule is outdated,” but “[t]hat question, however, would be for the United States Supreme Court to consider.”<sup>137</sup> The court acknowledged that it was bound by precedent and adjudicated the controversy under those Supreme Court precedents that established the physical presence rule.<sup>138</sup>

Instead of disavowing the physical presence rule, the court found a physical presence in an unlikely and controversial source: online referrals made by other businesses with a physical presence.<sup>139</sup> The court reasoned that an in-state physical presence, while necessary, “need not be substantial” and that the physical presence requirement would be satisfied if economic activities performed in New York were performed by the seller’s employees or on the seller’s behalf.<sup>140</sup>

The court noted the parallels between a mail-order business and an online retailer.<sup>141</sup> Both are able to maintain their operations without a physical presence in a particular state.<sup>142</sup> In fact, websites are designed to reach a national audience from a single server “whose location is of minimal import.”<sup>143</sup> The difference, the court reasoned, was that the statute “attached significance to the physical presence of a resident website owner.”<sup>144</sup> Websites are often predominantly geared toward local audiences, so the physical presence of the website owner can be relevant.<sup>145</sup> The court described the relationship between Amazon, Overstock, and the locally owned websites as providing Amazon and Overstock with “an in-state sales force.”<sup>146</sup> The court held that the statute plainly satisfied the substantial nexus requirement because the amount of revenue produced qualified as “demonstrably more than a slightest presence.”<sup>147</sup> Because a vendor was paying New York residents to actively solicit business within New York, the court concluded that

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137. *Id.* at 625.

138. *Id.*

139. *Id.* at 626.

140. *Id.* at 625–26.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* (“Indeed, the Appellate Division record in this case contains examples of such websites urging their local constituents to support them by making purchases through their Amazon links.”).

146. *Id.*

147. *Id.* (internal quotation marks omitted) (clarifying that a substantial nexus would certainly be lacking if New York residents were merely engaged to post passive advertisements on their websites).

the vendor should shoulder the appropriate tax burden.<sup>148</sup> The majority's opinion focused more on economic connections than it did on physical presence.<sup>149</sup> Amazon appealed the decision to the United States Supreme Court, but the Court denied certiorari.<sup>150</sup>

This attenuated means of finding a physical presence through an internet connection diminishes the physical presence rule's appeal as a "bright-line" guide to both businesses and states.<sup>151</sup> *Overstock* represents the first ever application of a use-tax to an out-of-state business without a traditional physical presence within a state.<sup>152</sup> Although the court in *Overstock* justified this application by holding that there was a physical presence, that physical presence was ultimately achieved through an internet connection.<sup>153</sup>

### III. THE FCC'S DESIGNATION OF THE INTERNET AS A COMMON CARRIER

As discussed above, many courts have summarized the language in *Bellas Hess* as the "physical presence" rule.<sup>154</sup> However, there is more to the rule than the physical presence requirement. The exact language of the rule reads:

In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within a State, *and those*

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148. *Id.* (noting that vendors are not required to pay these taxes out-of-pocket, but rather merely collect the taxes and remit them to the state).

149. *Id.* at 625 ("The presence requirement will be satisfied if economic activities are performed in New York by the seller's employees or on its behalf.").

150. *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, \_\_ U.S. \_\_, 134 S. Ct. 682 (2013). As of April 1, 2017, Amazon began collecting sales taxes nationwide. Mercado, *supra* note 128. This was due to the expansion of Amazon's business model, particularly to emphasize same-day and next-day delivery, which has required Amazon to establish more distribution centers across the country. See Isidore, *supra* note 129. Amazon would thus likely be subject to use taxation collection obligations in the state of New York at this point, even without the court's decision in *Overstock*. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992); Darla Mercado, *Despite President Trump's Tweet, Amazon Already Collects Sales Taxes*, CNBC (June 28, 2017, 11:44 AM), <https://www.cnbc.com/2017/06/28/despite-president-trumps-tweet-amazon-already-collects-sales-taxes.html> [<https://perma.cc/YGT3-Z7JQ>].

151. *Quill*, 504 U.S. at 317.

152. See *id.* at 298; *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Nat'l Bellas Hess v. Dep't of Revenue*, 386 U.S. 753, 758 (1967).

153. *Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 987 N.E.2d 621, 625–26 (N.Y. 2013).

154. See, e.g., *Quill*, 504 U.S. at 317; *Overstock*, 987 N.E.2d at 625–26.

*who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.*<sup>155</sup>

The Court “decline[d] to obliterate” this distinction.<sup>156</sup>

In determining whether a seller has a physical presence within a state for use taxation purposes, courts often focus on whether the seller has a physical presence within the state, rather than focusing on whether the seller’s relationship with the state is conducted exclusively through mail or common carrier.<sup>157</sup> In the context of the more traditional economy, this is unsurprising. Assuming that a seller had a physical presence within a state, that would de facto ensure that the seller’s relationship with that state went beyond communication through a common carrier. In the context of the internet economy, however, and the decision in *Overstock*, that language becomes more relevant.

In 2015, the FCC re-classified the internet as a common carrier.<sup>158</sup> The FCC did so in order to promote net neutrality,<sup>159</sup> “the principle that Internet service providers (ISPs) should give consumers access to all legal content and applications on an equal basis, without favoring some sources or blocking others.”<sup>160</sup> One scholar has pointed out that, although “net neutrality is a highly charged term that means many different things to many different people, the regulatory debate surrounding net neutrality revolves around the statutory language of the Communication Act, the Telecommunication Act, the FCC’s declaratory rulings and orders, and the judicial decisions.”<sup>161</sup> This Part discusses the motivating forces behind the common carrier classification and the context surrounding the common carrier classification both before and after the FCC’s order.

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155. *Bellas Hess*, 386 U.S. at 758 (emphasis added).

156. *Id.*

157. *See, e.g., Quill*, 504 U.S. at 317–18; *Complete Auto*, 430 U.S. at 276–77.

158. *See* 2015 Open Internet Order, 30 FCC Red. at 5615–16.

159. *See infra* section III.D.

160. Mike Snider et al., *What Is Net Neutrality and What Does It Mean for Me?*, USA TODAY (Feb. 24, 2015, 8:04 PM), <https://www.usatoday.com/story/tech/2015/02/24/net-neutrality-what-is-it-guide/23237737/> [<https://perma.cc/5MAB-9X4V>].

161. Friedlander, *supra* note 12, at 908.

A. *Net Neutrality: The Motivation for the Internet's Classification as a Common Carrier*

Network neutrality is “the principle that Internet service providers (ISPs) should give consumers access to all legal content and applications on an equal basis, without favoring some sources or blocking others.”<sup>162</sup> The freedom of the internet has been debated broadly and encompasses various concerns, “including fears of ISPs blocking access to certain content for political, anti-competitive, or censorship reasons; vertically integrated companies favoring or only allowing access to their subsidiaries; and larger, more well-funded competitors denying market entry to smaller sites.”<sup>163</sup>

Content creators such as Google and Netflix tend to support net neutrality, because “[w]ithout network neutrality, these companies would likely need to redesign their business models in order to accommodate the added costs of doing business with unregulated telecommunications providers.”<sup>164</sup> Typical examples include Netflix and YouTube because net neutrality rules prevent “fast lane” policies, which require companies to pay to guarantee “competitive transmission speeds.”<sup>165</sup> Internet and general rights organizations, such as the Electronic Frontier Foundation, SaveTheInternet, and the American Civil Liberties Union also support net neutrality due to ideological reasons.<sup>166</sup> “[P]olicy reasons to support net-neutrality include concerns about ISPs being able to block content for censorship or anti-competitive reasons.”<sup>167</sup>

Telecommunication companies, however, tend to oppose net neutrality.<sup>168</sup> SBC Communications Inc. chairman, Edward E. Whitacre

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162. Snider et al., *supra* note 160.

163. Friedlander, *supra* note 12, at 907–08.

164. *Id.* at 909.

165. *See id.* at 907 (citing Jon Brodtkin, *FCC Votes for Net Neutrality, a Ban on Paid Fast Lanes, and Title II*, ARS TECHNICA (Feb. 26, 2015, 9:59 AM), <http://arstechnica.com/business/2015/02/fcc-votes-for-net-neutrality-a-ban-on-paid-fast-lanes-and-title-ii> [<https://perma.cc/9UCR-F2V3>]). *But see* Jeffrey Dorfman, *Net Neutrality Puts Everyone in the Internet Slow Lane*, FORBES (Feb. 27, 2015, 7:50 AM), <http://www.forbes.com/sites/jeffreydorfman/2015/02/27/net-neutrality-puts-everyone-in-the-internet-slow-lane/#15b2a2a29ab7> [<https://perma.cc/FQ57-UJYC>].

166. Friedlander, *supra* note 12, at 907–08 (citing *Net Neutrality*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/net-neutrality> [<https://perma.cc/MV9V-VBWK>]; *Take Action, SAVE THE INTERNET*, <http://www.savetheinternet.com/sti-home> [<https://perma.cc/GJR6-6VSL>]; *What Is Net Neutrality?*, AM. CIVIL LIBERTIES UNION (June 2017), <https://www.aclu.org/feature/what-net-neutrality> [<https://perma.cc/2Q8V-5VBW>]).

167. *Id.* at 909.

168. *See id.* at 910.

Jr., compared SBC's cable lines to "pipes" and commented that content creators wanted to use his "pipes for free."<sup>169</sup> This debate prompted the FCC's 2015 Open Internet Order, which subjected the internet to Title II common carriage principles of the Telecommunications Act.<sup>170</sup>

*B. The FCC's Regulatory Authority Was Unclear Before the Internet's Classification as a Common Carrier*

Before the Open Internet Order, the FCC's authority to regulate the internet was questionable. In 2004, the FCC Chairman announced four principles of internet freedom at the Silicon Flatirons Symposium in Boulder, Colorado.<sup>171</sup> These were (1) the "Freedom to Access Content"; (2) the "Freedom to Use Applications;" (3) the "Freedom to Attach Personal Devices;" and (4) the "Freedom to Obtain Service Plan Information."<sup>172</sup>

The FCC's involvement in the net neutrality debate is regulatory in nature.<sup>173</sup> This debate involves the language of the Communication Act, the Telecommunication Act, the FCC's declaratory rulings and orders, and judicial decisions.<sup>174</sup>

In 2005, the Supreme Court decided *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>175</sup> which began to define the FCC's ability to regulate the internet and provide a framework for judicial oversight.<sup>176</sup> The Court held that "(1) the *Chevron* framework applied to the FCC's construction of the Telecommunications Act; (2) the FCC's interpretation of 'telecommunications service' was a lawful construction of the Act under *Chevron*; and (3) the FCC's ruling was not arbitrary or capricious under the Administrative Procedure Act."<sup>177</sup>

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169. *Id.* at 910 (quoting Arshad Mohammed, *SBC Head Ignites Access Debate*, WASH. POST (Nov. 4, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110302211.html> [<https://perma.cc/C9HF-8VAK>]).

170. 2015 Open Internet Order, 30 FCC Rcd. at 5615–16.

171. Friedlander, *supra* note 12, at 915 (citing Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 1 (2004)).

172. *Id.*

173. *Id.*

174. *Id.*

175. 545 U.S. 967 (2005).

176. Friedlander, *supra* note 12, at 916 (discussing *Brand X*, 545 U.S. at 974).

177. *Id.*

After *Brand X*, “the FCC reclassified DSL Internet from a telecommunications service to an information service.”<sup>178</sup> Wireless internet was classified as an information service, so all broadband ISPs were free from common carrier regulation under Title II of the Communications Act of 1934.<sup>179</sup>

In 2005, the FCC adopted four non-binding principles for the “Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities.”<sup>180</sup> These principles stated that consumers were entitled to access lawful internet content of their choice, run applications and use services of their choice, and connect their choice of legal devices that do not harm the network.<sup>181</sup> They encouraged competition among network providers, application and service providers, and content providers.<sup>182</sup> These goals represented the FCC’s attempt to create a net neutrality regime after its policy statement in 2004.<sup>183</sup> The FCC’s authority to do so, however, was questionable.<sup>184</sup>

The FCC’s authority to regulate the internet was challenged in *Comcast v. FCC*.<sup>185</sup> The question before the Court was “whether the Federal Communications Commission [had] authority to regulate an Internet service provider’s network management practices.”<sup>186</sup> The FCC argued that it was exercising ancillary authority, which allows the FCC to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of [the FCC’s] functions.”<sup>187</sup> Such an action must be “‘reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.’”<sup>188</sup> The D.C. Circuit held that the FCC had “failed to tie its assertion of ancillary authority over Comcast’s internet service to any ‘statutorily mandated responsibility.’”<sup>189</sup> The FCC’s net neutrality regime was thus defeated.

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178. *Id.* at 919.

179. *Id.*; 47 U.S.C. § 201 (2012).

180. Friedlander, *supra* note 12, at 919 (citing FCC Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities Rule, 70 Fed. Reg. 60222 (Oct. 17, 2005)).

181. *Id.* at 919.

182. *Id.*

183. *Id.*

184. *Id.*

185. 600 F.3d 642 (D.C. Cir. 2010).

186. *Id.* at 644.

187. *Id.* at 644–45 (quoting 47 U.S.C. § 154(i) (2012)).

188. *Id.* at 644 (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

189. *Id.* at 661 (quoting *Am. Library*, 406 F.3d at 692).

C. *The 2010 Open Internet Order*

After *Comcast*, in 2010, the FCC released the 2010 Open Internet Order.<sup>190</sup> The order “created two classes of Internet access: wired/fixed and wireless.”<sup>191</sup> Wired policies are stricter than wireless policies, likely because wireless internet is still developing.<sup>192</sup> The rules required (1) transparency for fixed and mobile broadband providers; (2) a no-blocking provision; and (3) an anti-discrimination rule for fixed providers preventing them from unreasonably discriminating against lawful network traffic.<sup>193</sup>

At the time, the internet was classified as an “information service.”<sup>194</sup> The D.C. Circuit subsequently held that the FCC could not impose the no-blocking or anti-discrimination limitations on the internet as a Title I “information service” because these were common carrier regulations.<sup>195</sup>

We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers. Given the Commission’s still-binding decision to classify broadband providers not as providers of “telecommunications services” but instead as providers of “information services,” such treatment would run afoul of section 153(51): “A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services.” Likewise, because the Commission has classified mobile broadband service as a “private” mobile service, and not a “commercial” mobile service, treatment of mobile broadband providers as common carriers would violate section 332: “A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this [Act].”<sup>196</sup>

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190. *In re Preserving the Open Internet*, 25 FCC Rcd. 17905, 17931–66 (2010) [hereinafter 2010 Open Internet Order].

191. Friedlander, *supra* note 12, at 921 (citing the 2010 Open Internet Order).

192. *Id.*

193. *Id.*

194. *See id.* at 919 (citing *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853 (2005)) (noting that the FCC “essentially categoriz[ed] all broadband ISPs as information service providers not subject to common carrier regulation under Title II”).

195. *Verizon Commc’ns, Inc. v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014) (citations omitted).

196. *Id.* at 650 (citations omitted).



The Court ultimately concluded that the anti-blocking and anti-discrimination rules were, in fact, common carrier limitations.<sup>197</sup>

*D. The FCC Classifies the Internet as a Common Carrier in the 2015 Open Internet Order to Allow Stronger Regulations Promoting Net Neutrality*

The FCC addressed the problem identified by the Court in *Verizon* by reclassifying the internet as a common carrier in the 2015 Open Internet Order.<sup>198</sup> “[T]he FCC stated that a net neutrality regime is necessary in order to uphold the principles of an open Internet because broadband providers are economically incentivized to, and actually capable of, limiting Internet openness.”<sup>199</sup> By classifying the Internet as a common carrier, the FCC could promote net neutrality by passing regulations that it was previously unable to enforce.<sup>200</sup>

The Open Internet Order has already been challenged in court. It is possible that the new presidential administration, with the FCC headed by Ajit Pai, may revoke the 2015 Open Internet Order and rescind the internet’s classification as a common carrier.<sup>201</sup> After President Trump’s election in 2016, “Pai indicated that a top priority under the new administration would be dismantling net neutrality. In a letter, he wrote that he intended to ‘revisit . . . the Title II Net neutrality proceeding . . . as soon as possible.’”<sup>202</sup>

This will be somewhat difficult, as an administration cannot revoke a rule that has been implemented through proper notice and comment proceedings without providing a reasoned analysis for the change.<sup>203</sup> The FCC has already proposed a rule that would remove the Title II classification of ISPs, reclassifying the internet as an information service.<sup>204</sup> The decision to revoke the 2015 Open Internet Order would be subject to hard look review by courts, which is a high standard used to review the adequacy of an agency’s reasoning.<sup>205</sup>

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197. *Id.*

198. 2015 Open Internet Order, 30 FCC Rcd. at 5615–16.

199. Friedlander, *supra* note 12, at 924 (citing 2015 Open Internet Order, 30 FCC Rcd. at 5635).

200. *Id.* at 923.

201. Jacob Kastrenakes, *Trump’s New FCC Chief Is Ajit Pai, and He Wants to Destroy Net Neutrality*, VERGE (Jan. 23, 2017, 4:45 PM), <http://www.theverge.com/2017/1/23/14338522/fcc-chairman-ajit-pai-donald-trump-appointment> [https://perma.cc/DCE4-WXSZ].

202. *Id.*

203. *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 42 (1983).

204. *In re Restoring Internet Freedom*, 32 FCC Rcd. 4434, 4435 (2017).

205. 5 U.S.C. § 706(2)(A) (2012); *see also State Farm*, 463 U.S. at 41.

The comment period for the FCC's proposed rule reversing the 2015 Open Internet Order closed on August 30, 2017.<sup>206</sup> If the FCC votes to pass a final rule changing the internet's classification, and that rule becomes effective, that action would have significant ramifications for net neutrality practices. However, the impact of the 2015 Open Internet Order, as well as the rescission of that order, on constitutional use taxation has yet to be explored.

#### IV. IF THE INTERNET IS A COMMON CARRIER, IT CAN NO LONGER BE USED AS A CONTACT THAT CAN ESTABLISH A "SUBSTANTIAL NEXUS"

Since the *Bellas Hess* decision, and its re-affirmation in *Quill*, courts have referred to the constitutional use taxation rule as the "physical presence" rule.<sup>207</sup> The *Bellas Hess* ruling upheld the distinction between "mail order sellers with retail outlets, solicitors, or property within a State and those who do no more than communicate with customers in the state by mail or common carrier."<sup>208</sup> Thus, under *Bellas Hess*, a seller must have a physical presence within a state *and* connections with the state beyond communication with customers within the state through mail or common carrier in order to be subject to use taxation collection obligations.<sup>209</sup>

The language "retail outlets, solicitors, or property within a State" has produced the "physical presence" shorthand, without much analysis of the second clause: "and those who *do no more than communicate with customers in the State by mail or common carrier* as part of a general interstate business."<sup>210</sup>

Courts have not significantly analyzed the "common carrier" language in the *Bellas Hess* decision.<sup>211</sup> This Comment argues that this language is significant given (1) the New York State Court of Appeals' decision in *Overstock* and (2) the FCC's treatment of the internet.

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206. *In re Restoring Internet Freedom*, No. DA17-761, 2017 WL 3474062, at \*1 (FCC Aug. 11, 2017).

207. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 309–19 (1992); *Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 987 N.E.2d 621, 625–26 (N.Y. 2013).

208. *Nat'l Bellas Hess v. Dep't of Revenue*, 386 U.S. 753, 758 (1967).

209. *See id.*

210. *Id.* (emphasis added).

211. *See, e.g., Quill*, 504 U.S. at 315–18 (acknowledging *Bellas Hess*'s common carrier language without analyzing it extensively); *Overstock*, 987 N.E.2d at 625–26 (same).

A. *Courts Have Historically Ignored the “Common Carrier” Language in Bellas Hess*

In considering cases involving constitutional use taxation, courts have historically focused on the “physical presence” aspect of the *Bellas Hess* holding and ignored the common carrier language.<sup>212</sup> In *Quill*, the Court referred to the rule from *Bellas Hess* as both a “bright-line” rule and as a “physical presence test.”<sup>213</sup>

The Court’s characterization of the rule as a bright-line rule or physical presence test was essentially dicta, as the Court was not doing anything to re-interpret the rule. *Quill*’s short hand designation of the *Bellas Hess* rule as a “physical presence” rule and a “bright-line” were useful references, but were not meant to add or take away any meaning from *Bellas Hess*’s holding.<sup>214</sup> The Court was explicitly re-affirming *Bellas Hess* without altering its Commerce Clause analysis.<sup>215</sup> Thus, the Court’s designation of the *Bellas Hess* rule as a physical presence rule did not eliminate the common carrier distinction articulated in *Bellas Hess*.

Subsequent courts, intentionally or not, have similarly focused on the physical presence aspect of the rule without analyzing the common carrier provision.<sup>216</sup> Only one court has held that physical presence is sufficient, but not necessary, to establish a substantial nexus for taxation purposes within a state.<sup>217</sup>

In *Crutchfield Corp. v. Testa*,<sup>218</sup> the Ohio State Supreme Court reasoned:

We hold today that although a physical presence in the state may furnish a sufficient basis for finding a substantial nexus, *Quill*’s holding that a physical presence is a *necessary condition* for

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212. See, e.g., *Quill*, 504 U.S. at 317–18; *Overstock*, 987 N.E.2d at 625–26.

213. See *Quill*, 504 U.S. 298.

214. See *id.* at 317–18.

215. See *id.* at 301–02 (“[W]e must either reverse the State Supreme Court or overrule *Bellas Hess*. While we agree with much of the state court’s reasoning, we take the former course.”). The Court did overrule *Bellas Hess*’s Due Process Clause analysis. See *id.* at 308 (“We therefore agree with the North Dakota Supreme Court’s conclusion that the Due Process Clause does not bar enforcement of that State’s use tax against *Quill*.”).

216. See, e.g., *Direct Mktg. Ass’n v. Brohl*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1124, 1127 (2015); *Borders Online, LLC v. State Bd. of Equalization*, 129 Cal. App. 4th 1179, 1196 (2012); *Overstock*, 987 N.E.2d at 625–26. *But see* *Crutchfield Corp. v. Testa*, \_\_\_ Ohio St. 3d \_\_\_, 2016-Ohio-7760, \_\_\_ N.E.3d \_\_\_, at ¶ 42 (holding that a physical presence is sufficient, but not necessary, to establish a substantial nexus for taxation purposes).

217. *Crutchfield*, 2016-Ohio-7760, at ¶ 42.

218. See *id.*

*imposing the tax obligation* does not apply to a business-privilege tax such as the CAT, as long as the privilege is imposed with an adequate quantitative standard that ensures that the taxpayer's nexus with the state is substantial.<sup>219</sup>

The court in *Crutchfield* was considering a business-privilege-tax, not a use tax, so it is distinguishable from *Quill* and the other cases discussed in this Comment.<sup>220</sup> *Quill* was dealing specifically with use taxation, which has a more direct impact on interstate commerce. The *Crutchfield* court further explained that “the case law post-*Complete Auto* establishes that for purposes of applying the four-prong Commerce Clause test, business privilege taxes should be distinguished from transaction taxes such as the sales and use tax.”<sup>221</sup>

The “common carrier” language has likely been lost in discussion of the rule because historically, it has been superfluous. With traditional business models, it was almost impossible to have a relationship with a state exclusively through a common carrier while also establishing a traditional physical presence. Requiring a physical presence within a state and a relationship with that state through means other than common carriers has historically been redundant; a physical presence almost by definition indicated a connection beyond one through a common carrier.

With the exception of *Overstock*, no court has upheld a use tax on a seller without a physical presence within the state. The physical presence requirement is thus a well-established and accepted component of the *Bellas Hess* rule.<sup>222</sup> Although the common carrier component has received less attention, it is relevant in the context of the modern internet economy and the FCC's designation of the internet as a common carrier.<sup>223</sup>

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219. *Id.* (emphasis in original).

220. Compare *Crutchfield*, 2016-Ohio-7760, at ¶ 3 (holding that physical-presence requirement applicable to use-tax collection does not extend to business-privilege taxes), with *Direct Marketing*, 135 S. Ct. at 1127 (considering a use tax); *Quill*, 504 U.S. at 301 (same); *Overstock*, 987 N.E.2d at 625–26 (same); *Borders Online*, 129 Cal. App. 4th at 1184 (same).

221. *Crutchfield*, 2016-Ohio-7760, at ¶ 42.

222. See, e.g., *Direct Marketing*, 135 S. Ct. at 1127; *Overstock*, 987 N.E.2d at 625–26; *Borders Online*, 129 Cal. App. 4th at 1184. But see *Crutchfield*, 2016-Ohio-7760, at ¶ 42.

223. See, e.g., *Direct Marketing*, 135 S. Ct. at 1128 (involving use tax as applied to out-of-state internet and catalog retailers); *Overstock*, 987 N.E.2d at 623–26 (involving use tax that assumed physical presence on the basis of online retailers' sales volumes and online advertisers' physical presence); *Borders Online*, 129 Cal. App. 4th at 1196–97 (involving use tax as applied to out-of-state internet retailer on the basis of its extensive cooperation with in-state brick-and-mortar retailers). But see *Crutchfield*, 2016-Ohio-7760, at ¶ 3 (declining to apply use tax physical presence requirement to business-privilege taxes).

B. *The Current State of the Law: The Court's Reasoning in Overstock Is Impeded by the 2015 Open Internet Order*

In *Overstock*, for the first time, a court found a physical presence through the internet. The court reasoned that, although physical presence is not typically associated with the internet because many websites are designed to reach a national or global audience, New York's statute attached significance to the physical presence of the resident website owner.<sup>224</sup> The court noted that “[t]he presence requirement will be satisfied if economic activities are performed in New York by the seller’s employees or on its behalf.”<sup>225</sup> Notably, the websites that advertised on behalf of the retailers in *Overstock*, which did have a physical presence in New York, were independent contractors with “no employment relationship” with Amazon or Overstock.<sup>226</sup> The sellers’ only connections with these websites were thus their internet advertisements, through internet links, for which the websites received commission when they produced sales.

Although the court did find it to be significant that the out-of-state sellers were paying commissions to in-state advertisers to solicit customers, the connection between the sellers and the advertisers was in the form of internet links.<sup>227</sup> This is distinguishable from *Scripto*, where the Supreme Court imposed use tax collection obligations on an out-of-state seller that employed independent contractors to solicit sales within the state.<sup>228</sup> In *Scripto*, the independent contractors were individuals located within the taxing state, who had the title of “salesman,” and who were “furnished catalogs, samples, and advertising material, and [were] actively engaged in Florida as [representatives]” of the seller.<sup>229</sup> In *Overstock*, the entirety of the relationship between the sellers and the advertisers occurred over the internet, including the advertisers’ solicitation of customers.<sup>230</sup>

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224. *Overstock*, 987 N.E.2d at 625–26.

225. *Id.* at 625 (citing *Orvis Co. v. Tax Appeals Tribunal*, 654 N.E.2d 954, 960–61 (N.Y. 1995)). Although *Orvis* asserts that activity on the seller’s behalf, not necessarily by a direct employee, may be sufficient, *Orvis* does not cite any federal cases that support this proposition.

226. *Id.* at 623.

227. *Id.* at 626 (describing the advertisers as an “in-state sales force” and observing that “no one disputes that a substantial nexus would be lacking if New York residents were merely engaged to post passive advertisements on their websites”).

228. *Scripto v. Carson*, 362 U.S. 207, 207–10 (1960)

229. *Id.* at 209.

230. *Overstock*, 987 N.E.2d at 623.

The Court did not analyze the “common carrier” language from *Bellas Hess*.<sup>231</sup> At the time that *Overstock* was decided in 2013, the FCC had not yet designated the internet as a common carrier.<sup>232</sup> The internet was a viable means through which a seller could establish a physical presence in a state without violating the *Bellas Hess* rule because the internet was not considered a common carrier.<sup>233</sup> Thus, a connection established via the internet could be “more than communicat[ion] with customers in the State by mail or common carrier as part of a general interstate business.”<sup>234</sup>

The FCC’s designation of the internet as a common carrier is directly relevant to the second aspect of the *Bellas Hess* holding.<sup>235</sup> If the internet is a common carrier, then any connection through the internet is a connection through a common carrier.

In *Overstock*, the Court reasoned that because a physical presence “need not be substantial . . . in the Internet world, many websites are geared toward predominantly local audiences . . . such that the physical presence of the website owner becomes relevant to Commerce Clause analysis.”<sup>236</sup>

This may have been true in 2013, before the internet was a common carrier.<sup>237</sup> Now, however, a connection through the physical presence of a website owner has become a connection via a common carrier.<sup>238</sup> The FCC’s designation of the internet as a common carrier therefore precludes courts from finding a physical presence through an internet connection.<sup>239</sup>

If the FCC had issued its 2015 Open Internet Order before the court’s decision in *Overstock*, the court would not have been able to find a physical presence through a relationship established solely over the internet.<sup>240</sup> The court was particularly concerned with adhering to established Supreme Court precedent,<sup>241</sup> which precludes finding a

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231. *See id.* at 625–26.

232. It did not do so until 2015. *See* 2015 Open Internet Order, 30 FCC Rcd. at 5615–16.

233. *See* Nat’l *Bellas Hess v. Dep’t of Revenue*, 386 U.S. 753, 758 (1967).

234. *Id.*

235. *See id.*

236. *Overstock*, 987 N.E.2d at 625–26.

237. It was not designated as such until 2015. *See* 2015 Open Internet Order, 30 FCC Rcd. at 5615–16.

238. *Id.*

239. *See Bellas Hess*, 386 U.S. at 758.

240. *See Overstock*, 987 N.E.2d at 625–26.

241. *See id.* at 625.

physical presence through a relationship limited to common carriers.<sup>242</sup> The *Overstock* court supported its physical presence finding by holding that the physical presence of affiliated web advertisers within the state was sufficient to extend to Amazon and Overstock.<sup>243</sup> Amazon's and Overstock's connections to those web advertisers, however, were entirely limited to the internet.<sup>244</sup> The web advertisers also solicited customers over the internet.<sup>245</sup> The attenuated nature of Amazon's and Overstock's relationships with New York, established solely through the internet, would impede the *Overstock* court's reasoning in light of the FCC's 2015 Open Internet Order.

Now that the 2015 Open Internet Order has been promulgated, it creates an avenue for litigants to argue against decisions such as the one in *Overstock*. There are parties, such as state legislatures and traditional brick-and-mortar retailers, that have interests in imposing use tax collection obligations on internet retailers without traditional physical presences in states in which they do business.<sup>246</sup> The Open Internet Order in conjunction with the rule established in *Bellas Hess* creates an obstacle for such arguments. By designating the internet as a common carrier, the FCC has precluded courts from finding a physical presence through an internet connection under the current framework.

### C. *The New Administration Attempts to Reverse the Open Internet Order*

As discussed in this Comment,<sup>247</sup> the FCC designated the internet as a common carrier for net neutrality purposes, not to impact the existing use taxation framework.<sup>248</sup> This Comment argues that that designation potentially has unintended implications for the current constitutional use taxation jurisprudence.<sup>249</sup> The FCC's designation, however, is an administrative decision; the FCC can change it depending on the views of the executive branch.<sup>250</sup>

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242. See *Bellas Hess*, 386 U.S. at 758; *Overstock*, 987 N.E.2d at 625–26.

243. See *Overstock*, 987 N.E.2d at 625–26.

244. See *id.*

245. *Id.* at 622–23.

246. See *supra* section III.A.

247. See *supra* Part V.

248. See 2015 Open Internet Order, 30 FCC Rcd. at 5603; Friedlander, *supra* note 12, at 905.

249. See *supra* section IV.B.

250. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 37 (1983).

The FCC is an independent administrative agency, and as such, the President has less direct control over its actions compared to executive agencies.<sup>251</sup> Although the FCC is “sheltered . . . from the President,” it is not sheltered from politics.<sup>252</sup> The FCC is composed of “five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.”<sup>253</sup> The President’s appointment of commissioners allows him to exert some influence over the agency.

President Barack Obama supported the FCC’s efforts toward net neutrality.<sup>254</sup> In particular, “President Obama asked the Federal Communications Commission (FCC) to take up the strongest possible rules to protect net neutrality, the principle that says Internet service providers (ISPs) should treat all internet traffic equally.”<sup>255</sup> President Obama supported the effort to “reclassify consumer broadband services under what’s known as Title II of the Telecommunications Act.”<sup>256</sup> The White House acknowledged that “[u]ltimately, the FCC is an independent agency and the decision is theirs alone.”<sup>257</sup> The FCC received nearly four million comments as part of the comment period surrounding this rule, with “overwhelming support” for the internet’s reclassification.<sup>258</sup>

In 2017, Donald Trump became the President of the United States.<sup>259</sup> President Trump is less supportive of net neutrality.<sup>260</sup> In 2014, President

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251. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (“The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from Presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628–30 (1935).

252. See *Fox Television Stations*, 556 U.S. at 523.

253. Communications Act of 1934, 47 U.S.C. § 154 (2012).

254. See Ezra Mechamber, *President Obama Urges FCC to Implement Strong Net Neutrality Rules*, WHITE HOUSE BLOG (Nov. 10, 2014, 9:15 AM), <https://obamawhitehouse.archives.gov/blog/2014/11/10/president-obama-urges-fcc-implement-stronger-net-neutrality-rules> [https://perma.cc/8A2J-J64W].

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html?mcubz=2> [https://perma.cc/RN2H-SEHG].

260. See Clint Finley, *This Is the Year Donald Trump Kills Net Neutrality*, WIRED (Jan. 2, 2017, 7:00 AM), <https://www.wired.com/2017/01/year-donald-trump-kills-net-neutrality/> [https://perma.cc/Q7JA-R34F].



Trump tweeted “Obama’s attack on the internet is another top down power grab. Net neutrality is the Fairness Doctrine. Will target conservative media.”<sup>261</sup> Immediately after his election, Donald Trump’s transition team indicated its opposition to net neutrality.<sup>262</sup> Some members of the Republican Party are similarly opposed, as “[t]he two Republican FCC commissioners have already vowed to overturn the FCC’s current net neutrality rules and other regulations.”<sup>263</sup>

The evidence suggests that the internet’s common carrier status may change soon.<sup>264</sup> It is possible that Congress may intervene.<sup>265</sup> Without intervention from Congress, however, as discussed above in this Comment, President Trump’s administration may not revoke the rule without a reasoned analysis and a new notice and comment process.<sup>266</sup> The FCC, however, has already begun the formal process to rescind the 2015 Open Internet Order.<sup>267</sup>

On May 23, 2017, the FCC released a notice of proposed rulemaking that would reverse the 2015 Open Internet Order.<sup>268</sup> This rule would remove the regulations placed on the internet under the 2015 Open Internet Order and “end the utility-style regulatory approach that gives government control of the Internet.”<sup>269</sup> Specifically, this rule would remove the Title II classification of ISPs that subjects them to common carrier regulations, and would reclassify the internet as an information service.<sup>270</sup>

This rule, however, is not yet final. The comment period for the rule ended on August 30, 2017,<sup>271</sup> and depending on the comments, the FCC may choose to abandon the process, adopt a final rule developed in light

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261. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 12, 2014, 10:58 AM), <https://twitter.com/realdonaldtrump/status/532608358508167168?lang=en> [https://perma.cc/F794-TTTS].

262. Jon Brodtkin, *Trump’s Latest FCC Advisor Opposes Title II, Supports Data Cap Exemptions*, ARS TECHNICA (Nov. 30, 2016, 9:27 AM), <https://arstechnica.com/tech-policy/2016/11/trump-appoints-another-net-neutrality-opponent-to-oversee-fcc/> [https://perma.cc/9Z4U-DXMJ].

263. Finley, *supra* note 260.

264. See Restoring Internet Freedom Act, S. 993, 115th Cong. (2017); Brodtkin, *supra* note 262; Finley, *supra* note 260; Trump, *supra* note 261.

265. See Restoring Internet Freedom Act, S. 993, 115th Cong. (2017).

266. *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

267. *In re Restoring Internet Freedom*, 32 FCC Rcd. 4434, 4435 (2017).

268. *Id.*

269. *Id.* at 4435–36.

270. *Id.* at 4441.

271. *In re Restoring Internet Freedom*, No. DA17-761, 2017 WL 3474062, at \*1 (F.C.C. Aug. 11, 2017).

of the comments, or begin the process over again. Even if the FCC does adopt a final rule reclassifying the internet, however, the rule likely will not take effect for at least sixty days following its publication, allowing time for litigants to challenge the rule.<sup>272</sup> It is thus unclear whether, how, or when the internet's common carrier status will change.

A reversal of the Open Internet Order would potentially enable the reasoning that the court relied upon in *Overstock* given that the internet would no longer be a common carrier. The internet's role in the current constitutional use taxation framework thus depends on the actions of the FCC from administration to administration.

## CONCLUSION

The FCC's designation of the internet as a common carrier has potentially precluded courts from finding that sellers have a physical presence within a state through internet connections for use taxation purposes.<sup>273</sup> This change highlights the relevance of the second half of the rule established in *Bellas Hess* that a physical presence requires connections beyond common carrier because it precludes the internet from being a means through which a seller can establish a taxable connection with a state.<sup>274</sup> More specifically, this precludes the New York Court of Appeals' holding in *Overstock* and re-enforces a more traditional, bright-line physical presence rule in the context of the internet economy.<sup>275</sup> This change, however, may be fleeting, as it could be reversed by the Trump administration.<sup>276</sup>

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272. See generally OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS, [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) [<https://perma.cc/GQS2-FE4K>].

273. See *supra* Part V.

274. Nat'l *Bellas Hess v. Dep't of Revenue*, 386 U.S. 753, 758 (1967).

275. See *Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 987 N.E.2d 621, 625–26 (N.Y. 2013).

276. See *In re Restoring Internet Freedom*, 32 FCC Rcd. 4434, 4435 (2017).