

The Problems of State Taxation of Interstate Commerce and Why Congress Should Act

By Drew Newman

Introduction

Thanks largely to the Internet, businesses increasingly sell their products throughout the nation with ease. While the Internet has opened the channels of commerce in unimaginable ways, it has also subjected small businesses to over six thousand different taxing jurisdictions in America.¹

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Legal uncertainties about when a state or a city can tax an out-of-state business complicate matters further.² Seeking to increase tax revenue, more state and local governments are levying taxes on interstate corporations. The resulting maze of taxes and related litigation may hurt consumers by increasing the cost of doing business and encumber interstate commerce in ways that the Constitution sought to prevent.³

This article discusses the complexities and constitutionality of state taxation of interstate commerce. It then considers how Congress may clarify state taxation of interstate commerce and examines the implications of tax legislation on both small businesses and state taxing authorities. The article concludes with the recommendation that Congress enact the Business Activity Tax Simplification Act, which would create a bright line rule establishing when states may tax activities of out-of-state businesses and thereby foster interstate commerce.

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The Problem of Aggressive, Unclear, and Non-uniform Taxation of Interstate Commerce

States may impose a number of taxes on out-of-state businesses and in recent years, states have become particularly aggressive in taxing foreign corporations.⁴ A corporate income tax, the tax most frequently assessed on out-of-state companies, is levied by forty-six states and the District of Columbia.⁵ States may also impose a number of other business activity taxes on foreign corporations, such as franchise taxes, single business taxes, and taxes on gross sales.⁶

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Much of the controversy surrounding the imposition of these taxes arises not out of the amount levied, but out of the confusion caused by states imposing different types of taxes, methods of application, and standards. This lack of uniformity in application makes it difficult for businesses to know when they will be taxed as standards vary from state to state and municipality to municipality.⁷ In particular, state taxation of nonresident corporations engaged in interstate commerce has generated extensive litigation.⁸ In *National Bellas Hess v. Illinois*, the Supreme Court identified the burdens of having a non-uniform system of interstate taxation.⁹ In that case, the Court noted that “the many variations in rates of tax, in allowable

exemptions, and in administrative and record-keeping requirements could entangle [a company'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."¹⁰ Additionally, subjecting out-of-state businesses to dozens of different business activity taxes may create a regulatory burden for small businesses, which may further inhibit interstate commerce.

There are two rationales underlying why states vigorously tax out-of-state companies. First, these taxes act as a means of increasing state revenue. Second, states may also be making a strategic choice based on their belief that corporations find it more cost effective to pay taxes rather than incurring the expense of hiring local counsel to challenge the taxation in court.

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In *Quill v. North Dakota*, the Supreme Court explained that the Constitution protects interstate commerce from unreasonably inconsistent interstate taxation.¹¹ The *Quill* Court noted that, “the Framers [of the Constitution] intended the Commerce Clause as a cure for . . . structural ills” such as “state taxes and duties [that] hinder and suppress interstate commerce.”¹² Writing about these problems in *The Federalist*, Alexander Hamilton expressed concern that state taxation of interstate commerce would destroy the long-standing policy of free trade among the states, possibly leading to discontent between the states and severance of the union.¹³

There are numerous examples of how states are aggressively taxing foreign corporations. Tennessee taxed an out-of-state bank solely because it issued credit cards through the mail to Tennessee residents.¹⁴ In 2002, New Jersey stopped a Smithfield Foods truck passing through its state; though Smithfield had no physical presence in New Jersey, the state demanded a business activity tax payment in exchange for release of the driver and truck.¹⁵

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Other states have even speculated that an Internet service provider, which connects a company's website to the Internet, could be considered an agent for the company and therefore cause the company to be “doing business” in the state.¹⁶ “[T]he existence of a plethora of conflicting jurisdictional taxing criteria for out-of-state businesses burdens interstate commerce.”¹⁷

There is an enormous amount of legal uncertainty surrounding when states can tax foreign corporations. In his Congressional testimony, Arthur Rosen, Chairman of the Coalition for Rational and Fair Taxation, stated that the uncertainty of tax liabilities and aggressiveness of states has “placed a real drag on American business, hurting American job growth and harming the entire U.S. Economy.”¹⁸ Lyndon William, tax counsel for Citigroup, testified that the present situation has “lead to a great uncertainly and unpredictability in the manner in which multi-state business are taxed...”¹⁹

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The Constitutionality of State Taxation of Interstate Commerce

The Constitution's Due Process and the Commerce Clauses govern the ability of states to tax interstate commerce.²⁰ While both clauses are "closely related,"²¹ each "pose[s] distinct limits on the taxing power of the States."²² Thus, although a state may have Due Process Clause jurisdiction to tax an out-of-state corporation engaged in interstate commerce, such taxation may still violate the Commerce Clause.²³

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A. To Impose a Tax on Out-of-State Businesses, States Must Prove that Such Businesses Have Minimum Contacts Pursuant to the Due Process Clause

The Fourteenth Amendment's Due Process Clause limits a state's authority to tax individuals and businesses residing outside its borders.²⁴ In discussing how the Due Process Clause limits state taxation, the *Quill* Court stated that

[t]he Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," and that the "income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.'"²⁵

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The Court further noted that a state may tax a corporation—even if it lacks physical presence in the state—if the business "purposefully avails itself of the benefits of an economic market in the forum State."²⁶

In *Quill*, the North Dakota Tax Commissioner required a mail order company that had no physical presence in the state to collect a use tax on goods the state's residents purchased from the company, and then remit the collections to that state.²⁷ On appeal, the Supreme Court held that since *Quill* intentionally and directly advertised and solicited customers in North Dakota, it purposefully availed itself of the North Dakota market.²⁸

These actions were therefore sufficient to establish minimum contacts with the state.²⁹ Because the tax imposed was related to the benefits *Quill* received from its advertising and soliciting in the state, the Court ruled that the Due Process Clause permitted the State Tax Commissioner to require *Quill* to collect and remit a use tax.³⁰ While "notice" and "fair warning" are the cornerstones of due process nexus analysis,³¹ "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."³²

B. To Impose Tax on Out-of-State Businesses, Commerce Clause Nexus Must Be Satisfied to Prohibit Undue Burden on Interstate Commerce

The Commerce Clause grants Congress the authority to "regulate Commerce ... among the several States."³³ The Supreme Court has interpreted the Commerce Clause not only as a grant of power to Congress but also as a limitation on states' power to interfere with interstate commerce,³⁴ a doctrine is known as the Dormant Commerce Clause.

In *Complete Auto Transit v. Brady*, the Supreme Court found that a tax on interstate commerce does not violate the Commerce Clause if it meets the following criteria: [1] it "is applied to an activity with a substantial nexus with the taxing State;" [2] it "is fairly apportioned;" [3] it "does not discriminate against interstate commerce;" and [4] it "is fairly related to the services provided by the State."³⁵ The challenge in applying this test is determining what constitutes a "substantial nexus" between an out-of-state company and a state because neither the Supreme Court nor Congress has explicitly defined the term.

Bellas Hess was a mail order company based in Missouri whose sole contacts with Illinois were mailing catalogs, receiving orders for merchandise, and shipping ordered goods—all of which were sent via U.S. mail or common carrier.³⁶ The Illinois Supreme Court found that, under a state statute, *Bellas Hess*' activities were sufficient for the out-of-state company to be considered a retailer in Illinois, requiring it to collect use taxes from its customers, remit the collected taxes to the state, and be subject to Illinois reporting requirements and regulations.³⁷ In reversing the Supreme Court of Illinois, the Supreme Court of the United States held that a physical presence in a state is required for the state to impose sales or use taxes.³⁸

The Court reasoned that if Illinois was allowed to tax *Bellas Hess*, then every state and locality could tax the Missouri company as well.³⁹ The Court noted "if Illinois can impose such burdens, so can every other State . . . and every other political subdivision throughout the Nation with power to impose sales and use taxes."⁴⁰ It further explained that the "very purpose of

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the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements.”⁴¹

In *Bellas Hess*, the Supreme Court created a bright line rule for sales and use taxes. It held that a company whose sole contacts with a State are by mail or common carrier lacks the “substantial nexus” required by the Commerce Clause for sales and use taxes to be imposed.⁴² “Thus, the [Commerce Clause] ‘substantial nexus’ requirement is not, like due process’ ‘minimum contacts’ requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce.”⁴³

This bright line rule clarified states’ legal authority to impose sales and use taxes and enabled interstate commerce, particularly the mail order industry, to thrive.⁴⁴ It has helped the national economy by “reduc[ing] litigation concerning those taxes . . . , encourag[ing] settled expectations and, in doing so, foster[ing] investment by businesses and individuals.”⁴⁵ Having a bright line rule is particularly beneficial in the area of Commerce Clause nexus, the Supreme Court explained, because “law in this area is something of a quagmire and the application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.”⁴⁶

The Supreme Court has yet to create a similar standard for business activity taxes. The Court’s inaction does not, however, suggest that a bright line rule for business activity taxes should not exist.⁴⁷ Rather, the Supreme Court believes the creation of a clear standard for when states can levy taxes on out-of-state

businesses appropriately falls under the authority of Congress. The *Quill* Court noted that “Congress has the power to protect interstate commerce from intolerable or undesirable burdens” and is best suited for resolving the issue through legislation.⁴⁸

In *Quill*, the Supreme Court essentially empowered Congress to act and decide when states may tax interstate commerce.⁴⁹ In choosing not to overrule *Bellas Hess*, the Court explained that its decision was easier because the issue of state taxation of interstate commerce “is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.”⁵⁰ The Court further held that Congress can choose when to

allow states to burden interstate commerce by levying taxes.⁵¹



Congressional Attempts To Solve State Taxation of Interstate Commerce

A. Public Law 86-272 Does Not Successfully Protect Interstate Commerce

In 1959, Congress enacted Public Law 86-272⁵² in response to the Supreme Court’s decision in *Northwestern States Portland Cement Co. v. Minnesota*.⁵³ In that case, the Court held that states can tax foreign corporations as long as the tax is not discriminatory, is apportioned to in-state activities, and the entity establishes a “sufficient nexus” to the taxing state.⁵⁴ In passing Public Law 86-272, Congress reacted to the business community’s concern that “mere solicitation” in a particular state would enable the state to impose taxes since *Northwestern States* did not define “sufficient nexus.”⁵⁵ In enacting this law, Congress implicitly decided that the “[s]tate’s interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy.”⁵⁶

Presently, Public Law 86-272 prohibits states from taxing the profits of foreign corporations that sell goods through interstate commerce where their only contact with the state is limited to the solicitation of orders.⁵⁷ By enacting 86-272, Congress responded to “considerable concern and uncertainty” and “serious apprehension in the commercial community.”⁵⁸

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At the time of the legislation's enactment, the House and Senate committees viewed Public Law 86-272 as only a "temporary solution[] to meet only the most pressing problems" and expected "more comprehensive legislation" to follow after the problem was studied in depth.⁵⁹ While Congress generated several reports on the topic of interstate taxation,⁶⁰ it failed to act on the issue.

Although Public Law 86-272 provides clarity on the taxation of interstate commerce, the legislation is insufficient for three reasons. First, it fails to define "solicitation," a term that courts have interpreted differently.⁶¹ Courts' varying interpretations of "solicitation" have created unpredictability in state taxation of interstate commerce.⁶² Second, Public Law 86-272 is limited to just the sale of goods and does not protect the interstate sale of services.⁶³ This limitation has important implications for the business community because the "rise of the digital, service-based economy has made non-resident sellers of intangible goods and services vulnerable to taxation by distance state and local taxing officials."⁶⁴ Third, Public Law 86-272 applies only to net income taxes and fails to protect out-of-state companies from franchise, single business, gross sales, and other business activity taxes.⁶⁵

BATSA's 2005 sponsor in the U.S. House of Representatives, Congressman Bob Goodlatte, explained that the purpose of BATSA is to: (1) create a "bright line" rule governing when states may collect business activity taxes from out-of-state companies; (2) establish a physical presence requirement for out-of-state businesses to be taxed; (3) promote a fair, stable business climate with less litigation; and (4) ensure that state and local governments are fairly compensated for services actually provided to out-of-state businesses.

B. The Business Activity Tax Simplification Act Provides Clarity and Uniformity to the Taxation of Interstate Commerce

The Business Activity Tax Simplification Act ("BATSA") has been proposed as an attempt to provide clarity and uniformity to the taxation of interstate commerce.⁶⁶ BATSA proposes a bright-line physical presence requirement in order for states to collect business activity taxes on out-of-state corporations.⁶⁷ BATSA establishes the conditions required for a corporation to have a physical presence and what activities should be ignored. Specifically, BATSA would restrict states from taxing interstate commerce of tangible and intangible goods, and certain services, unless foreign corporations establish a "substantial physical presence" in the state.⁶⁸ BATSA defines "substantial physical presence" as the employment of a person in the state for more than twenty-one days in a year, the ownership of property in the state, or contracting with an exclusive agent in the state.⁶⁹ It is important to note, however, that BATSA excludes the news media, activities related to the purchase of goods, and persons engaged in charitable, educational, or governmental activities from the

definition of activities that establish a "substantial physical presence."⁷⁰ BATSA is a significant improvement over Public Law 86-272 because it expands protection to services, not just goods, and protects against all business activity taxes, not just net income taxes.

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BATSA was introduced in each of the three previous Congresses in 2001, 2003, and 2005 and this legislation has enjoyed bipartisan support.⁷² In 2005, Congressman Goodlatte, a Republican, and his Democratic colleague Rick Boucher introduced BATSA in the House of Representatives.⁷³ In the Senate, BATSA's 2005 sponsor was Democratic Senator Chuck Schumer.⁷⁴ The House Committee Report explains that goal of the 2005 bill was to “promote[] interstate commerce by creating certainty for both States and businesses to know when a business has a taxable nexus within a State.”⁷⁵ To date, BATSA has yet to be reintroduced in the 110th Congress.

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C. BATSA Has a Marginal Impact on States

Critics of BATSA argue that creating a bright line rule that establishes when foreign corporations may be taxed will adversely and severely affect state tax revenue. The Congressional Budget Office (“CBO”) estimated that enacting BATSA would increase federal revenues by a total of 3.1 billion dollars over the next ten years,⁷⁶ and would cost states and local governments approximately 3 billion dollars annually.⁷⁷

BATSA's impact on states, however, likely will not be as drastic as the raw numbers suggest. The CBO estimated that enacting BATSA would result in states losing only two percent of the business activity taxes they already collect.⁷⁸ In total, states collected about 650 billion dollars in tax revenue in 2005.⁷⁹ The CBO predicts that for the year following BATSA's enactment, states would lose less than one percent of the total taxes they collect and three percent of the corporate income taxes collected.⁸⁰ The states that would

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be most hurt by BATSA are California, Florida, Illinois, Michigan, New Jersey, New York, Pennsylvania, Tennessee, Texas, and Washington, as these ten states collect about seventy percent of the business activity taxes BATSA would prohibit.⁸¹

States vigorously oppose BATSA and other attempts to restrict their taxing authority. They argue that BATSA will upset settled law, encourage more litigation, and allow companies to avoid paying business activity taxes all together.⁸² State tax officials believe that BATSA is “an unwarranted federal intrusion into state affairs” that will hurt small, local in-state businesses that pay business activity taxes.⁸³

Others are concerned that lowering state tax revenue will negatively impact essential state services. Educators have warned that BATSA “would impair the ability of state and local governments to fund essential services, including education, by constraining state authority to establish and operate revenue systems.”⁸⁴



These concerns have been overstated. The reason why BATSA would eliminate two percent of the business activity taxes currently levied is because the out-of-state businesses being taxed have insufficient contact with the taxing state to satisfy Commerce Clause nexus. Therefore, arguing that BATSA should not be enacted because it will decrease state tax revenue is unpersuasive since the taxes that BATSA would elimi-

nate are unconstitutional and should have never been levied in the first place.

D. BATSA Should Be Enacted Because it Establishes a Bright Line Rule for When Foreign Corporations May Be Taxed But Will Not Eliminate State Taxation of Out-of-State Business

By establishing a clear bright line rule for when a foreign corporation can and cannot be taxed,⁸⁵ BATSA is likely to reduce litigation expenses, eliminate uncertainty, and foster interstate commerce and, thus, economic growth.⁸⁶ The rational basis for taxing businesses is that corporate taxes allow state and local governments to recoup the money spent to provide the privileges and benefits enjoyed by businesses. Additionally, local business taxes help governments offset expenses for local police protection, road maintenance, court systems, and public schools that attract and train employees—services that directly benefit local businesses and their workers. Out-of-state companies whose contacts with a state are limited to interstate commerce, on the other hand, do not benefit from the services they are being taxed to support and should thus not be subjected to them. When states impose business activity taxes on out-of-state corporations, such taxes act as subsidies for in-state businesses since the foreign companies are likely not receiving the same privileges and benefits that intrastate businesses receive.⁸⁷

By establishing a clear bright line rule for when a foreign corporation can and cannot be taxed, BATSA is likely to reduce litigation expenses, eliminate uncertainty, and foster interstate commerce and, thus, economic growth.

Conclusion

The 110th Congress should enact BATSA. As current technology makes it easier for small businesses to sell goods and services nationwide, and as states continue to aggressively tax out-of-state corporations, controversies over taxation of interstate commerce are likely to increase. Presently, the variety of business activity taxes levied by a myriad of jurisdictions applying an array of standards creates a regulatory burden that inhibits interstate commerce and economic growth. By passing BATSA, Congress may create clarity for taxation of interstate commerce, and thereby facilitate the national economy's continued growth. Therefore, Congress should follow the Supreme Court's suggestion and act by establishing a bright line rule for interstate taxation that is fair to both states and businesses. With such a rule, the American economy will continue to thrive. **BLB**



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ENDNOTES: Drew Newman

- ¹ *Quill Corp. v. N.D.*, 504 U.S. 298, 313 n.6 (1992).
- ² *Compare Quill*, 504 U.S. at 308 (holding that the North Dakota Office of State Tax Commissioner could require a mail-order house with no outlets or representatives in respondent's state to collect use taxes simply because it intentionally advertised directly to customers within that market), *with Nat'l Bellas Hess v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967) (holding that the state cannot impose use tax collection on a mail order house "whose only connection with customers in the State is by common carrier or the United States mail"), *overruled in part by Quill*, 504 U.S. 298.
- ³ *See Quill*, 504 U.S. at 313 n.6 (explaining the importance of ensuring "that state taxation does not unduly burden interstate commerce" such that it would hurt the national economy"); *Bellas Hess*, 386 U.S. at 759-60 ("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.'").
- ⁴ *See* 19 C.J.S. Corporations § 883 (2006) (defining a "foreign corporation" as "one that derives its existence solely from the laws of another state, government, or country").
- ⁵ H.R. REP NO. 109-575, at 5 (2006).
- ⁶ *See* H.R. 1956, 109th Cong. § 4(2)(A) (2005) (listing other types of taxes that may be levied by states).
- ⁷ *See Bellas Hess*, 386 U.S. at 759-60 (noting that the many variations in tax rates and administrative requirements of taxation could complicate interstate business' tax obligation to local jurisdictions); H.R. REP NO. 109-575, at 4 (2006) (acknowledging the non-uniformity problem and stating that the purpose of BATSA is to promote interstate commerce by creating certainty for both States and businesses to know when a business has a taxable nexus within a State).
- ⁸ *See* H.R. REP NO. 109-575, at 5 (2006) ("The determination of the outer limits of State taxing power over nonresident businesses has given rise to substantial litigation between State taxing authorities and multistate business enterprises.").
- ⁹ *Bellas Hess*, 386 U.S. at 759-60.
- ¹⁰ *Id.*

¹¹ See *Quill*, 504 U.S. at 312 (explaining that the Commerce Clause was originally formed to bar state regulations which unduly burden interstate commerce).

¹² *Id.*

¹³ THE FEDERALIST, Nos. 7, 11 (Alexander Hamilton).

¹⁴ See *J.C. Penny Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. Dec. 17, 1999), *appeal denied*, (Tenn. May 8, 2000).

¹⁵ H.R. REP NO. 109-575, at 6 (2006).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Business Activity Tax Simplification Act of 2003: Hearing on H.R. 3220 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 108th Cong. 8 (2004) (statement of Arthur Rosen).

¹⁹ *Id.* at 28 (statement of Lyndon William).

²⁰ U.S. CONST. art. I, § 8; U.S. CONST. amend. XIV, § 2.

²¹ *Quill*, 504 U.S. at 305.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 306 (stating that the Due Process Clause requires some connection or link to be established between out-of-state individuals and businesses that it seeks to tax).

²⁵ *Id.* (citations omitted).

²⁶ *Id.* at 307.

²⁷ *Id.* at 303.

²⁸ *Id.* at 308.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 312.

³² *Id.*

³³ U.S. CONST. art. I, § 8.

³⁴ See *Quill*, 504 U.S. at 309.

³⁵ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

³⁶ *Bellas Hess*, 386 U.S. at 753-55.

³⁷ *Id.* at 754-55.

³⁸ *Id.* at 760.

³⁹ *Id.*

⁴⁰ *Id.* at 759.

⁴¹ *Id.* at 760.

⁴² See *Id.* at 759-60 (holding that mere use of the mail may not be used to subject an out-of-state business to the state use tax because it could potentially open the door to countless other tax liabilities as well).

⁴³ *Quill*, 504 U.S. at 313.

⁴⁴ See *id.* at 316 (noting that mail-order industry's recent growth can be attributed to the *Bellas Hess*' bright line exemption from state taxation).

⁴⁵ *Id.* at 315-16.

⁴⁶ *Id.* (quoting *Northwestern States Portland Cement Co. v. Minn.*, 358 U.S. 450, 457-458 (1959)) (quotations omitted).

⁴⁷ *Id.* at 314.

⁴⁸ *Id.* at 318-19 (quoting *Commw. Edison Co. v. Mont.*, 453 U.S. 609, 637-38 (1981) (White, J., concurring)); see also *Quill*, 504 U.S. at 320 (Scalia, J., concurring) ("Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so.").

⁴⁹ *Quill*, 504 U.S. at 318.

⁵⁰ *Id.*

⁵¹ See *Quill*, 504 U.S. at 318 ("Accordingly, 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.").

⁵² Pub. L. No. 86-272, 73 Stat. 555 (1959) (codified, as amended, at 15 U.S.C. §§ 381-84 (2007)).

⁵³ See *Heublein, Inc. v. S.C.*, 409 U.S. 275, 280 (1972) (stating that Congress enacted Public Law 86-272 "to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation"); see also *Northwestern States*, 358 U.S. at 452 (holding that out-of-state businesses may be subject to net income taxes in certain circumstances).

⁵⁴ *Northwestern States*, 358 U.S. at 452.

⁵⁵ See *Heublein*, 409 U.S. at 280 ("*Northwestern States Portland Cement* did not adequately specify what local activities were enough to create a 'sufficient nexus' for the exercise of the State's power to tax.").

⁵⁶ *Id.*

⁵⁷ 15 U.S.C. § 381.

⁵⁸ See *Heublein*, 409 U.S. at 280 n.6 (citing H.R. REP NO. 86-936, at 2, n.4 (1959) and discussing Congress' underlying concerns regarding the numerous costs that would arise for businesses trying to comply with various tax laws of different states).

⁵⁹ *Heublein*, 409 U.S. at 281 (citing H.R. REP Nos. 88-1480 (1964), 89-565 (1965), and 89-952 (1965)).

⁶⁰ *Id.*

⁶¹ H.R. REP NO. 109-575, at 7 (2006).

⁶² *Id.*

⁶³ See 15 U.S.C. § 381(a)(1) (prohibiting the imposition of state net income taxes on "the solicitation of orders by such person, or his representative, in such State for *sales of tangible personal property*, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State") (emphasis added).

⁶⁴ H.R. REP NO. 109-575, at 7 (2006).

⁶⁵ 15 U.S.C. §§ 381- 83.

⁶⁶ H.R. REP NO. 109-575, at 18 (2006).

⁶⁷ *Id.* at 9-10.

⁶⁸ *Id.*

⁶⁹ See H.R. 1956, at § 3(b) (defining the parameters of physical presence).

⁷⁰ See *id.* (enumerating excluded activities).

⁷¹ See 151 CONG. REC. E833 (Apr. 28, 2005) (statement of Rep. Goodlatte).

⁷² See H.R. 1956; H.R. 3220, 108th Cong. (2003); H.R. 2526, 107th Cong. (2001).

⁷³ See 151 CONG. REC. E833.

⁷⁴ S. 2721, 109th Cong. (2006).

⁷⁵ H.R. REP NO. 109-575, at 4 (2006).

⁷⁶ See *id.* at 9-10 ("CBO estimates that enacting H.R. 1956 would result in revenue losses for states and some local governments and that such losses likely would total more than \$1 billion in the first full year after enactment.").

⁷⁷ *Id.* at 9-10 (2006).

⁷⁸ *Id.* at 10 (2006).

⁷⁹ *Id.* at 10 (2006).

⁸⁰ *Id.* at 10-11 (2006).

⁸¹ *Id.* at 11.

⁸² NATIONAL GOVERNORS ASSOCIATION, IMPACT OF H.R. 1956, BUSINESS ACTIVITY TAX SIMPLIFICATION ACT OF 2005, ON STATES 1 (Sept. 26, 2005), available at <http://www.nga.org/Files/pdf/0509BAT.PDF>.

⁸³ FEDERATION OF TAX ADMINISTRATORS AND MULTISTATE TAX COMMISSION, OPPOSITION TO THE BUSINESS ACTIVITY SIMPLIFICATION ACT (Jul. 18, 2005).

⁸⁴ National Education Association, Letter to House Judiciary Committee (Sept. 30, 2005); see National School Boards Association, Letter to the Honorable F. James Sensenbrenner, Jr. (Jun. 27, 2006).

⁸⁵ H.R. 1956, at §§ 2-3.

⁸⁶ See H.R. REP NO. 109-575, at 8 (2006) (stating that BATSA "would provide certainty regarding when a state can tax a business, providing the stability and predictability needed by business, especially small businesses").

⁸⁷ See Business Activity Tax Simplification Act of 2003: Hearing on H.R. 3220 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 108th Cong. 8 (2004) (statement of Arthur Rosen).