

## LEAD ARTICLE

# REVISITING *MILLER BROTHERS*, *BELLAS HESS*, AND *QUILL*

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#### INTRODUCTION

The *American University Law Review* was prophetic in choosing “Taxing Remote Sales in the Digital Age” as its symposium issue. The obstacle to any meaningful sales tax reform of the digital economy is the U.S. Supreme Court’s 1992 decision in *Quill Corp. v. North Dakota*.<sup>1</sup> In *Quill*, the Court held that the Commerce Clause requires a vendor to have a physical presence in a state before it can be required to collect that state’s use tax.<sup>2</sup> That requirement has subsequently been roundly criticized. Most notably, in March 2015, Justice Anthony Kennedy wrote a concurring opinion in *Direct Marketing Association v. Brohl*<sup>3</sup> that sent shock waves through the profession,<sup>4</sup> urging the Court to revisit *Quill*’s legal underpinnings.<sup>5</sup>

Part of Justice Kennedy’s concurrence is reprinted below because it serves as a wonderful, short overview of the issues dealt with at the *Law Review*’s Symposium and in some of the articles in this Issue. This Article supports Justice Kennedy by arguing that the *Quill* decision was intellectually dishonest, politically motivated, and based on shaky precedent. If the Supreme Court has the opportunity, it should abandon *Quill*.

#### I. JUSTICE KENNEDY’S CONCURRENCE

In *Direct Marketing Ass’n v. Brohl*, the Supreme Court unanimously held that the Tax Injunction Act<sup>6</sup> did not bar the federal courts from hearing challenges to a Colorado statute requiring out-of-state retailers to notify customers of their sales and use tax requirements and to report tax-related information to customers and to the state. The Court remanded the case and “express[ed] no view on the

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1. 504 U.S. 298 (1992).

2. *Id.* at 309–19. For a discussion of the use tax, see RICHARD D. POMP, STATE AND LOCAL TAXATION 6-39 to 6-43 (8th ed. 2015).

3. 135 S. Ct. 1124 (2015).

4. See, e.g., Ronald Mann, *Opinion Analysis: Online Retailers Win Big in Use-Tax Dispute—For Now*, SCOTUSBLOG (Mar. 4, 2015, 10:16 AM), <http://www.scotusblog.com/2015/03/opinion-analysis-online-retailers-win-big-in-use-tax-dispute-for-now> (writing that Justice Kennedy’s “exciting” concurrence will prompt states to pass new use taxes and will surprise many corporate attorneys).

5. *Direct Mktg. Ass’n*, 135 S. Ct. at 1134–35 (Kennedy, J., concurring).

6. 28 U.S.C. § 1341 (2012).

merits.”<sup>7</sup> Justice Kennedy, however, took the opportunity to write separately to critique the *Quill* decision, highlight the states’ interests in taxing Internet commerce, and invite a future challenge to that case. Part of his concurrence follows:

Almost half a century ago, this Court determined that, under its Commerce Clause jurisprudence, [s]tates cannot require a business to collect use taxes—which are the equivalent of sales taxes for out-of-state purchases—if the business does not have a physical presence in the [s]tate. Use taxes are still due, but under *Bellas Hess* they must be collected from and paid by the customer, not the out-of-state seller.

Twenty-five years later, the Court relied on stare decisis to reaffirm the physical presence requirement and to reject attempts to require a mail-order business to collect and pay use taxes. This was despite the fact that under the more recent and refined test elaborated in *Complete Auto Transit, Inc. v. Brady*, “contemporary Commerce Clause jurisprudence might not dictate the same result” as the Court had reached in *Bellas Hess*. In other words, the *Quill* majority acknowledged the prospect that its conclusion was wrong when the case was decided. Still, the Court determined vendors who had no physical presence in a [s]tate did not have the “substantial nexus with the taxing state” necessary to impose tax-collection duties under the Commerce Clause. Three Justices concurred in the judgment, stating their votes to uphold the rule of *Bellas Hess* were based on stare decisis alone. This further underscores the tenuous nature of that holding—a holding now inflicting extreme harm and unfairness on the [s]tates.

In *Quill*, the Court should have taken the opportunity to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy. There is a powerful case to be made that a retailer doing extensive business within a [s]tate has a sufficiently “substantial nexus” to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet. After all, “interstate commerce may be required to pay its fair share of state taxes.” This argument has grown stronger, and the cause more urgent, with time. When the Court decided *Quill*, mail-order sales in the United States totaled \$180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled \$3.16 trillion per year in the United States.

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7. *Direct Mktg. Ass’n*, 135 S. Ct. at 1134.

Because of *Quill* and *Bellas Hess*, [s]tates have been unable to collect many of the taxes due on these purchases. California, for example, has estimated that it is able to collect only about [four percent] of the use taxes due on sales from out-of-state vendors. The result has been a startling revenue shortfall in many [s]tates, with concomitant unfairness to local retailers and their customers who do pay taxes at the register. The facts of this case exemplify that trend: Colorado's losses in 2012 are estimated to be around \$170 million. States' education systems, healthcare services, and infrastructure are weakened as a result.<sup>[8]</sup>

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8. Due to the dynamic changes taking place among remote vendors, anything but very current revenue estimates are likely to overstate the amount of use taxes that are not being collected. For example, Amazon's relatively new business model of shipping orders either on the day the order is received or the very next day requires having distribution centers close to major metropolitan areas. See Jillian D'Onfro, *Here Are All of Amazon's Warehouses in the US*, BUS. INSIDER (Mar. 24, 2015, 1:48 PM), <http://businessinsider.com/how-many-fulfillment-centers-does-amazon-have-in-the-us-2015-3>. Amazon typically places these centers in separate entities—LLCs, LLPs, or C Corporations. Amy Martinez, *Amazon.com Fights Sales Taxes After Getting Other Breaks*, SEATTLE TIMES (Jan. 24, 2011, 6:59 AM), <http://www.seattletimes.com/business/amazoncom-fights-sales-taxes-after-getting-other-breaks>. Those entities obviously have nexus with the states in which the center is located. At one time, Amazon apparently took the position that it did not have nexus with a state merely because a separate entity that it controlled did have nexus. *Id.* Some of the revenue estimates bandied about reflect that position. Amazon now seems to have abandoned that argument and collects use tax in states where it has distribution centers owned by controlled entities, which means that it collects for nearly three quarters of the population. See POMP, *supra* note 2, at 9-66. Any meaningful revenue estimate has to capture that significant change.

Based on a survey of the websites of the largest hybrids in the country, that is, those enterprises that have both dot.coms and retail stores in related entities, this Author concludes that they are collecting use tax on sales made in any state in which their retail stores are located. Part of the explanation is that some states have passed legislation requiring them to collect use tax. See *id.* at 9-71 to 9-74. The lack of litigation over these statutes suggests that the major hybrids have made the same decision as Amazon, discussed *supra*, and have decided to collect rather than litigate. Their legal position is even weaker than Amazon's because the dot.coms often provide that a purchase from them can be returned to, or picked up from, one of their related retail stores. There may also be a shared proprietary credit card, shared email addresses used for marketing purposes by both the dot.coms and the retail stores, and proprietary gift cards sold at the retail stores that can be used for sales made from the dot.coms. And, of course, the dot.coms and the retail stores will have similar names and trademarks. See *N.M. Taxation & Revenue Dep't v. Barnesandnoble.com LLC*, 303 P.3d 824, 829 (N.M. 2013), *aff'g* 283 P.3d 298 (N.M. Ct. App. 2012) (holding that these common facts, which described the relationship between Barnesandnoble.com and its Barnes and Noble retail stores owned by separate entities, created nexus for the dot.com, requiring it to collect the New

The Internet has caused far-reaching systemic and structural changes in the economy, and, indeed, in many other societal dimensions. Although online businesses may not have a physical presence in some [s]tates, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper's favorite store is a click away—regardless of how close or far the nearest storefront. Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a [s]tate in a meaningful way without that presence being physical in the traditional sense of the term.

Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms [s]tates to a degree far greater than could have been anticipated earlier. It should be left in place only if a powerful showing can be made that its rationale is still correct.

The instant case does not raise this issue in a manner appropriate for the Court to address it. It does provide, however, the means to note the importance of reconsidering doubtful authority. The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.<sup>9</sup>

Few law reviews can cite the endorsement of a Supreme Court Justice in support of their wisdom in selecting a symposium topic.<sup>10</sup> The *Law Review* is also to be complimented for having Senator Heidi Heitkamp—a named party in the *Quill* case when she was the North Dakota Tax Commissioner and today that State's U.S. Senator—

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Mexico gross receipts tax). These seismic changes in the tax landscape have reduced the amount of revenue at stake in overturning *Quill*.

9. *Direct Mktg. Ass'n*, 135 S. Ct. at 1134–35 (Kennedy, J., concurring) (citations omitted). Much has been made of the fact that no other Justice joined Kennedy's concurrence. See Jonathan Randles, *Kennedy's Call to Reconsider Quill Could Spawn Test Case*, LAW360 (Mar. 3, 2015, 6:39 PM), <http://www.law360.com/articles/627210/kennedy-s-call-to-reconsider-quill-could-spawn-test-case>. There are several possible explanations, however, for this fact. The Court's composition has changed dramatically since *Quill* was decided. Only Justices Kennedy and Thomas of the current Court were on the *Quill* Court. Perhaps the six current Justices named to the Court since *Quill* were less familiar with the issue and had no opinion on the merits. It is also possible that some Justices did not join Justice Kennedy's concurrence because they believed it was inappropriate, as it had nothing to do with the merits of the case before them—*DMA*. Others may have disagreed with the concurrence and wish to leave *Quill* undisturbed. This Article leaves it to others to read the tea leaves.

10. And few law reviews are as gracious, supportive, and delightful as the Symposium editors. They are a real credit to the American University Washington College of Law. Special thanks are especially due to Ryan Sims, whom Jones Day is lucky to be getting as an associate starting in the Fall of 2016.

deliver the opening address at the Symposium. She was spellbinding, not only because of her magnetic charm, but also because of the “inside baseball” insights she shared as the architect and mastermind of the case, but who unfortunately did not—but should have—argued it before the Supreme Court.<sup>11</sup>

Many, many articles have discussed *Quill*. A computer search of only law review articles, notes, and comments that have “*Quill*” in their titles indicates there are more than seventy.<sup>12</sup> This number is understated because this simple search ignores treatises, monographs, and other articles that discuss *Quill*, but do not name the case in their titles. Almost all of these articles, (as well as the speakers at the Symposium), agree with the sentiments expressed by Justice Kennedy. It is possible that Justice Kennedy might have been influenced by some of this literature.<sup>13</sup>

*Quill* reaffirmed *Bellas Hess*. And *Bellas Hess* was informed by *Miller Brothers*. Hence, this Article starts by reexamining *Miller Brothers*. That case is best remembered today for one of the most quoted statements in state taxation: “due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”<sup>14</sup> What is forgotten, or perhaps never appreciated, is the pivotal role that case played in the development of the Court’s use tax jurisprudence.

Unfortunately for the states, Justice Robert H. Jackson, one of the most aggressive defenders of Justice Frankfurter’s philosophy that the states could not tax interstate commerce, authored the case.<sup>15</sup>

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11. The case was argued by the North Dakota Attorney General, Nicholas Spaeth, who ran (unsuccessfully) for Governor of North Dakota in 1992. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 300 (1992); *Nicholas Spaeth 1950–2014*, N.D. SUP. CT. NEWS (Mar. 21, 2014), <https://ndcourts.gov/court/news/spaethn.htm>.

12. A Westlaw search for <advanced: TI(Quill)> in Law Reviews & Journals returns seventy-one entries.

13. See, e.g., H. Beau Baez III, *Taxing Internet Sales: Trying to Make a Two-Thousand-Year-Old Jurisdiction Test Work in the Dot-Com Economy*, 64 TAX LAW. 807, 848 (2011) (arguing that either the Supreme Court or Congress should change *Quill*’s substantial nexus requirement); Geoffrey E. Weyl, Comment, *Quibbling with Quill: Are States Powerless in Enforcing Sales and Use Tax-Related Obligations on Out-of-State Retailers?*, 117 PENN ST. L. REV. 253, 281 (2012) (stating that applying *Quill* to “pure” e-retailers is not always fair).

14. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954).

15. Justices Frankfurter and Jackson were close friends and Justice Frankfurter was said to have had a great influence over Jackson’s opinions. See H. N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 187–88 (1981). Justice Frankfurter has also been described as influencing Justices Minton and Burton, who perhaps not surprisingly joined with Jackson in *Miller Brothers*. See KIM EISLER, *A JUSTICE FOR ALL: WILLIAM J.*

In the hands of a different Justice, this Symposium might not have been necessary.

After revisiting *Miller Brothers*, this Article examines the role that case played in *Bellas Hess*. This Article then briefly discusses *Quill*, essentially showing why it was a political decision, intellectually dishonest, and unworthy of great precedential value. Finally, this Article concludes by introducing the pieces that follow in this Issue.

## II. *MILLER BROTHERS V. MARYLAND*

*Figure 1: Miller Brothers' Store*



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BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 88, 100 (1993). Justice Frankfurter's feuds with Justices Warren, Black, and Douglas, who all dissented in *Miller Brothers*, were well known. See EISLER, *supra*, at 105, 128; H. N. HIRSCH, *supra*, at 189–90.

Figure 2: *Welcome to Delaware*



A. *The Facts*

Miller Brothers sold furniture at its Wilmington, Delaware store.<sup>16</sup> It did not take orders by mail or telephone.<sup>17</sup> Delaware has never had a sales tax, a fact that the state happily markets.<sup>18</sup> Residents of neighboring Maryland, which adopted a sales tax in 1947, shopped at Miller Brothers' store.<sup>19</sup> Presumably, many of these purchasers were attracted by the lack of a Delaware sales tax, and although they were liable for the Maryland use tax when they brought the goods home, they probably failed to pay it either through ignorance or the knowledge that the risk of discovery was nearly nonexistent.<sup>20</sup>

Miller Brothers used its own vehicle to transport many purchases to the Maryland customers' homes in Maryland.<sup>21</sup> Some purchases were delivered to Maryland by common carrier. Others were

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16. *Miller Bros.*, 347 U.S. at 341.

17. *Id.*

18. See POMP, *supra* note 2, at 6-39 to 6-40; *supra* Figure 2.

19. *Miller Bros.*, 347 U.S. at 341.

20. See POMP, *supra* note 2, at 6-41; Steven Walters, *Just 1% of Taxpayers Report Unpaid Sales Tax*, GAZETTEXTRA (Feb. 13, 2012), <http://www.gazettextra.com/news/2012/feb/13/just-1-taxpayers-report-unpaid-sales-tax> (reporting that a mere one percent of Wisconsin tax payers complied with that state's law requiring its citizens to report sales tax owed on online and out-of-state purchases); see also Adam B. Thimmesch, *Taxing Honesty*, 118 W. VA. L. REV. 147, 148 (2016) (arguing that "economic, moral, and psychological" factors contribute to states' inability to collect use taxes, and suggesting alternative methods to enforce such taxes).

21. *Miller Bros.*, 347 U.S. at 341, 349 n.4 (stipulation by the parties).

“cash-and-carry,”<sup>22</sup> that is, the customer paid for the purchase and carried it out of the store.

Miller Brothers did not collect the Maryland use tax on any of its sales to Maryland customers. Maryland filed suit in its own courts, claiming that Miller Brothers should have collected the Maryland use tax on its sales to Maryland customers. Maryland obtained jurisdiction over Miller Brothers by seizing its vehicle in the State.<sup>23</sup>

Miller Brothers argued that Maryland was seeking to apply its use tax law to a company outside of its borders, in contravention of the Due Process Clause.<sup>24</sup> Maryland’s highest court held that Miller Brothers was liable for the use tax on the goods delivered to Maryland purchasers, but apparently not on the cash and carry sales.<sup>25</sup>

### 1. *Nature of Miller Brothers’ advertising*

On review, the Supreme Court analyzed whether Miller Brothers “by its acts or course of dealing, ha[d] subjected itself to the taxing power of Maryland,” specifically by advertising to Maryland consumers.<sup>26</sup> On this issue, the parties stipulated how and where Miller Brothers advertised.<sup>27</sup> Since January 1, 1951, Miller Brothers engaged in no radio or television advertising anywhere.<sup>28</sup> Before January 1, 1951, Miller Brothers had purchased limited radio and television advertising in Delaware.<sup>29</sup> No ad “made an appeal for out-of-state business or in any way was designed directly or indirectly to appeal particularly to Maryland residents.”<sup>30</sup> In fact, Miller Brothers’ radio slogan was “Furniture Fashion Makers for Delaware.”<sup>31</sup> The parties also stipulated that Miller Brothers advertised regularly in

22. *Id.* at 342; *id.* at 358 (Douglas, J., dissenting). Although the record is silent, a fair inference is that Miller Brothers used its own vehicle to deliver purchases within a certain radius of its store and employed a common carrier to make deliveries to customers outside that radius.

23. *Id.* at 341 (majority opinion). The lower court referred to the vehicle that was attached by Maryland as a station wagon, 95 A.2d 286, 288 (Md. 1953), *rev’d*, 347 U.S. 340 (1954); Justice Jackson refers to it as a truck. 347 U.S. at 341.

24. *Miller Bros.*, 347 U.S. at 341.

25. *Miller Bros. Co. v. State*, 95 A.2d at 292. “These two appeals test the constitutionality of the Maryland Use Tax Act . . . as applied to furniture sold by appellant, Miller Brothers Company, a Delaware corporation, at its store in Delaware and delivered to purchasers residing in Maryland.” *Id.* at 288 (emphasis added).

26. *Miller Bros.*, 347 U.S. at 344.

27. *Id.* at 341, 349 n.4.

28. *Id.*

29. *Id.* at 349 n.4.

30. *Id.*

31. *Id.*

three Wilmington, Delaware newspapers, which “undoubtedly” had “some” circulation in Maryland.<sup>32</sup> The newspaper advertisements did not, however, specifically mention or target Maryland residents.<sup>33</sup>

The parties also stipulated that four times each year, Miller Brothers mailed advertisements to prior customers whose names and addresses it had on file.<sup>34</sup> No advertising was sent to only Maryland purchasers. To be sure, these advertisements might have attracted additional business from prior customers, some of whom lived in Maryland; however, Miller Brothers never used any mail “for the specific purpose of attracting Maryland buyers.”<sup>35</sup>

### B. *The Majority’s Opinion*

In a very short 5-4 opinion,<sup>36</sup> full of questionable, bordering on outrageous, statements,<sup>37</sup> Justice Jackson held in favor of Miller Brothers.<sup>38</sup> The Court reasoned that, although its past decisions were not always clear about the grounds on which a tax was upheld,<sup>39</sup> they all respected one time-honored concept: “that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”<sup>40</sup> Because the Court recently held that a state like Maryland could not have imposed its sales tax on the sales made by a company like Miller Brothers,<sup>41</sup> it “would be a strange law that would make [an] appellant more vulnerable to liability for another’s tax than to a tax on itself.”<sup>42</sup>

#### 1. *Justice Jackson’s eccentric view of the use tax*

In his majority opinion, Justice Jackson claimed that the Court was “dealing with a relatively new and experimental form of taxation.”<sup>43</sup>

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Justice Jackson was joined by Justices Reed, Frankfurter, Burton, and Minton. *See supra* note 15 and accompanying text.

37. *See infra* notes 43–48, 55–56, 62–63, 74 and accompanying text.

38. *Miller Bros.*, 347 U.S. at 346.

39. *Id.* at 344.

40. *Id.* at 344–45.

41. *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944).

42. *Miller Bros.*, 347 U.S. at 346.

43. *Id.* at 343, 352 n.5 (citing MAURICE CRIZ, *THE USE TAX: ITS HISTORY, ADMINISTRATION, AND ECONOMIC EFFECTS* 1 (1941); ROBERT MURRAY HAIG & CARL SHOUP, *THE SALES TAX IN THE AMERICAN STATES* 83 (1934); JEROME HELLERSTEIN, *STATE AND LOCAL TAXATION* 4-12, 338 (1952)). The first cited source, *The Use Tax*,

This statement may have been acceptable in the 1930s, but certainly not in 1954, when the opinion was issued. States began to adopt general sales and use taxes shortly after the Great Depression began in 1929.<sup>44</sup> By 1937, more than twenty states had adopted them, and thirty states had general sales and use taxes by the time Justice Jackson claimed they were “relatively new” and “experimental.”<sup>45</sup>

But his apparent hostility did not stop there. He proceeded to refer to the effects of the use tax as a “protective tariff.”<sup>46</sup> If that were actually the proper way to view the use tax, it would be unconstitutional. State tariffs are “the quintessential evil targeted by the dormant Commerce Clause.”<sup>47</sup> Unfortunately, the Court had already rejected this characterization of the use tax in 1937.<sup>48</sup>

Justice Jackson had better success in rehabilitating his dissent in *General Trading Co. v. State Tax Commission of the State of Iowa*,<sup>49</sup> a companion case to *McLeod v. J.E. Dilworth Co.*<sup>50</sup> Both cases were authored by Justice Frankfurter<sup>51</sup> and handed down the same day.

*Dilworth* and *General Trading* involved nearly identical transactions: an out-of-state vendor employed sales persons who traveled to the market state, solicited orders for goods, sent the orders back to the home office for acceptance or rejection, and if accepted, shipped the goods to the market state.<sup>52</sup> In *Dilworth*, the Court held that the

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was published in 1941, and the page cited has nothing to do with Justice Jackson’s proposition. The second source, *The Sales Tax in the American States*, was published in 1934 and could not support Jackson’s statement in 1954. In any event, the cited page is irrelevant to his assertion. The third source, *State and Local Taxation* (an early edition of the now standard treatise in the area), although closer in time to 1954, not only does not support Justice Jackson, but also can be read for the opposite conclusion.

44. POMP, *supra* note 2, at 6-5.

45. *Id.*

46. *Miller Bros.*, 347 U.S. at 343.

47. *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1792 (2015) (Maryland personal tax scheme that effectively taxed income earned outside the state at a higher rate than income earned inside the state held to be unconstitutional under the Commerce Clause as having the effects of a tariff).

48. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937) (a use tax is not equivalent to a tariff and does not violate the Commerce Clause).

49. 322 U.S. 335 (1944).

50. 322 U.S. 327 (1944).

51. For more information about the relationship between Justices Frankfurter and Jackson, see *supra* note 15 and accompanying text.

52. *Dilworth*, 322 U.S. at 328 (striking down an Arkansas sales tax on the type of transaction described in the text); *General Trading*, 322 U.S. at 336 (upholding the market state’s (Iowa) right to have its use tax collected by the out-of-state vendor on the type of transaction described in the text).

market state could not levy its sales tax on the transaction because the sale occurred beyond its borders.<sup>53</sup> In *General Trading*, however, the Court held that on the same facts as in *Dilworth*, the vendor would have to collect the market state's use tax.<sup>54</sup> The effect of Justice Frankfurter's holding in these companion cases was exactly the "strangeness" that Justice Jackson railed against in *Miller Brothers*.<sup>55</sup> Had Justice Jackson's views prevailed in *General Trading*, a vendor engaged in the very common fact pattern in the case would not be subject to the market state's sales tax and would not have to collect that state's use tax. Assuming the purchaser did not voluntarily pay the use tax, the transaction would, as a practical matter, be tax free.<sup>56</sup> Indeed, this was the likely result in *Miller Brothers*.

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The common business model described in the text was intended to avoid income taxation by the market state. The prevailing constitutional jurisprudence of the day viewed this type of transaction as constituting non-taxable interstate commerce. See *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 495 (1959) (rejecting this view and subjecting interstate commerce to a net income tax under certain conditions). *Portland Cement Co.* upset many businesses' reliance interests, and multistate corporations immediately pressured Congress for relief. In response, Congress adopted Public Law No. 86-272, intended as a temporary measure pending a Congressional study, immunizing corporations from market state income taxation under certain circumstances. Act of September 14, 1959, Pub. L. No. 86-272, 73 Stat. 555. One of those circumstances involved the *Dilworth* and *General Trading* fact patterns. Accordingly, Public Law No. 86-272 restored the protection that existed prior to *Portland Cement Co.* See POMP, *supra* note 2, at 11-12 to 11-26.

53. *Dilworth*, 322 U.S. at 330.

54. *Gen. Trading*, 322 U.S. at 337-38.

55. In *Dilworth*, Justice Frankfurter stated that "[w]hatever might be the fate of [the market state's use] tax *were it before us*, the not too short answer is that [the market state] has chosen not to impose such a use tax, as its Supreme Court so emphatically found." 322 U.S. at 330 (emphasis added). Of course, the use tax *was before the Court* in the companion case of *General Trading*, decided the very same day by Justice Frankfurter.

56. Unlike Justice Jackson's opinion in *Miller Bros.*, his dissent in *General Trading* does not use the term "strange" but rather explains that the majority held that "a state has power to make a tax collector of one whom it has no power to tax." *Gen. Trading*, 322 U.S. at 339. Jackson described *General Trading* as a case where the out-of-state merchant entered the market state through traveling sales agents to conduct continuous local solicitation followed by delivery of goods to the customer. *Miller Bros. Co. v. Maryland*, 317 U.S. 310, 316 (1951). "But there is a wide gulf between this type of active and aggressive operation within a taxing state and the *occasional* delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." *Id.* at 346-47 (emphasis added). He never defends his use of "occasional," which is contradicted by the large number of sales delivered by Miller Brothers in its own vehicle. See *id.* at 340, 341, 350 n.4.

2. *Did Maryland overreach by including the cash and carry sales?*

The stipulation between the parties made it clear that the cash and carry sales were less than a third of the sales delivered in Miller Brothers' own vehicle.<sup>57</sup> Specifically, from July 1, 1947 through December 31, 1951, Miller Brothers made at least \$2500 in cash and carry sales, compared to at least \$8000 of sales delivered in its own vehicle, and at least \$1500 of sales delivered by a common carrier.<sup>58</sup>

There were three problems with requiring Miller Brothers to collect use tax on the cash and carry sales. First, the cash and carry sales had the weakest connection to Maryland. Even assuming that the store knew which of its purchasers were Maryland residents, which is what the stipulation in the case assumes,<sup>59</sup> the missing link is whether the goods would necessarily be used in that state. For example, a Maryland customer may have used the purchase at a summer home in a Delaware beach community, given it to her child attending school in Delaware, or taken it to another state altogether. The record was apparently devoid of evidence regarding the destination of the cash and carry transactions, which would be unsurprising because this fact would be irrelevant to the store.

Second, while a court might have analyzed the cash and carry sales separately without tainting the analysis of the sales that were delivered in Miller Brothers' own vehicle—Maryland's strongest case—there was always the risk (and one that actually materialized, as Justice Jackson's opinion indicates), that the cash and carry sales would "poison" the other transactions. In other words, the weakness in the cash and carry analysis would fatally distract a court from analyzing Maryland's strongest argument, Miller Brothers delivering goods in its own vehicle. Justice Jackson used the small tail of the "cash-and-carry" to wag the big dog of the deliveries in Miller Brothers' vehicle.

Third, this risk was not worth taking because even winning on the cash and carry issue would probably not have led to much use tax ever being collected. It is hard to imagine that the Court would have required Miller Brothers to collect the Maryland use tax on sales to Maryland residents regardless of where the goods were to be used, or that the Court would have endorsed an irrebuttable presumption that a purchase in Delaware by a Maryland resident would be used in

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57. See *Miller Bros.*, 347 U.S. at 341, 350 n.4.

58. *Id.* at 341, 350–51 n.4.

59. *Id.* at 341, 350 n.4.

Maryland.<sup>60</sup> Realistically, the most that Maryland could have hoped for was a decision that *if* the goods were to be used in Maryland, then Miller Brothers would have to collect the Maryland use tax. But how would Miller Brothers determine place of intended use?

Obviously, a clerk could ask the purchaser, but after the first few articles appeared in the regional papers and on radio and television about the tax consequences of answering that question, dishonest customers would not admit they were going to use the goods in Maryland. One can also imagine a clerk asking the purchaser about intended use with a wink and a nod, even providing advice on how to answer the question. Perhaps taxpayers were more honest in 1954 when the decision was handed down, but given the ease with which today's consumers flaunt their use tax obligation on Internet or catalog purchases,<sup>61</sup> one can be a tad skeptical about how much Maryland use tax would have actually been collected.

The cash and carry sales allowed Justice Jackson to make the technical point that:

at the time of the sale, no one is liable for a Maryland use tax. That liability arises only upon importation of the merchandise to the taxing state, an event which occurs after the sale is complete and one as to which the vendor may have no control or even knowledge, *at least as to merchandise carried away by the buyer.*<sup>62</sup>

That point is valid for the cash and carry sales because at best, the store knew only the address of the buyers, but not where they were taking the merchandise. Clearly Miller Brothers knew where it was delivering the goods in its own vehicle, and it knew where it was shipping goods using common carriers. Nevertheless, the cash and carry sales tainted the analysis in the hands of a hostile justice like Justice Jackson.<sup>63</sup>

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60. *See id.* at 342 (a state's power to tax is limited to transactions occurring within its borders). Conceivably, Maryland could have asked the Court to require Miller Brothers to collect the Maryland use tax on all purchases by Maryland consumers, leaving it up to them to apply for a refund if the good was not ultimately used in Maryland. *See infra* note 64. There was no empirical evidence in the record linking the purchaser's home state with the state of use.

61. *See supra* Part I (reprinting Justice Kennedy's concurrence in *Direct Marketing*).

62. *Miller Bros.*, 347 U.S. at 344 (emphasis added).

63. The cash and carry issue in *Miller Brothers* cast a long shadow. *See, e.g.*, Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551, 558-59 (1977) (emphasizing that Miller Brothers did not know the destination of the cash and carry sales); *Scripto, Inc. v. Carson*, 362 U.S. 207, 212 (1960) (describing the deliveries in *Miller Brothers* as "occasional"). But Justice Blackmun, who concurred in *National Geographic Society*, emphasized that the heart of *Miller Brothers* was the deliveries in the

Today, it is taken for granted that an out-of-state vendor that has nexus with the market state can be required to collect the use tax if it is arranging for shipment into that state even though, as a technical matter, no use tax is owed by the purchaser at the time of sale. Under those circumstances, the use tax is merely being pre-collected on the very strong assumption that it will shortly be owed; if it turns out that no use tax is ultimately owed, a refund would be in order.<sup>64</sup>

With the benefit of hindsight (and maybe even without that benefit), it appears that including the cash and carry sales had a serious downside risk with little upside potential, and probably constituted a litigating blunder.

### C. *The Dissent*

Justice Douglas, authoring a four-person dissent,<sup>65</sup> asserted with no explanation that “[a]ppellant did not sell cash-and-carry without knowledge of the destination of the goods.”<sup>66</sup> At best, Justice Douglas might have meant that the appellant knew whether the purchasers had Maryland addresses. Purchasers paying by check presumably would have to provide some form of supporting identification like a driver’s license, which would show a state-specific address. Moreover, Miller Brothers apparently collected customers’ mailing addresses even in the case of the “cash-and-carry” sales for its subsequent advertising circulars.<sup>67</sup> The stipulation indicates that Miller Brothers sent mail about four times a year to “everyone who has purchased from [the store] and whose name and address is on the [store’s] records.”<sup>68</sup> To compile this list, Miller Brothers no doubt made an effort to gather everyone’s addresses.<sup>69</sup> Because the stipulation identified the amount of purchases by Maryland residents,<sup>70</sup> the store apparently had information on the addresses of the purchasers (at least those willing to provide such information).

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store’s own vehicle, and there was “no uncertainty as to the destination of those goods.” 430 U.S. at 562 (Blackmun, J., concurring). Justice Blackmun would have overruled *Miller Brothers*. *Id.* at 563.

64. See generally 2 JOHN C. HEALY & MICHAEL S. SCHADEWALD, MULTISTATE CORPORATE TAX GUIDE 16123, 16146 (2015).

65. Chief Justice Warren and Justices Black and Clark joined in Douglas’ dissent. *Miller Bros.*, 347 U.S. at 357 (Douglas, J., dissenting).

66. *Id.* at 358.

67. *Id.* at 350 n.4 (majority opinion); see *id.* at 358 (Douglas, J., dissenting) (noting that Miller Brothers was aware of the destination of even cash-and-carry sales).

68. *Id.* at 341, 350 n.4 (majority opinion).

69. The record apparently was silent on how successful these efforts were.

70. *Miller Bros.*, 347 U.S. at 341, 350–51 n.4.

Justice Jackson wrote that Maryland claimed it was entitled to use taxes because Miller Brothers sent circulars to *all* former customers, including those in Maryland.<sup>71</sup> This might explain why Justice Douglas thought that Miller Brothers knew the addresses of all the cash and carry purchasers. Nonetheless, that does not answer the more relevant question about where the goods were used. Perhaps Justice Douglas assumed, quite reasonably, that a Maryland purchaser would use the good in Maryland.

Justice Douglas was on stronger grounds when he stated that “[t]his is not a case of a minimal contact between a vendor and the collecting [s]tate. . . . [I]ts delivery truck was not in Maryland upon a casual, nonrecurring visit. Rather[,] there has been a course of conduct in which the appellant has regularly injected advertising into media reaching Maryland consumers and regularly effected deliveries within Maryland by its own delivery trucks and by common carriers.”<sup>72</sup> He correctly focused on the stipulation. The parties stipulated that for over four-and-a-half years, Miller Brothers had sold “at least \$12,000 worth of merchandise . . . to Maryland purchasers for Maryland use”; and Miller Brothers itself had delivered approximately two-thirds of this merchandise to Maryland.<sup>73</sup> Despite these telling, stipulated statistics, Justice Jackson described the delivery of goods as “occasional.”<sup>74</sup> While the stipulation makes clear that Miller

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71. *Id.* at 341–42. The “all” is inconsistent with the stipulation. A gap must have existed between *all* of the store’s former customers and those whose addresses it had on file.

72. *Id.* at 358 (Douglas, J., dissenting) (emphasis added).

73. *Id.* at 358 n.2.

74. The characterization of the deliveries as “occasional” allowed Justice Jackson to distinguish *Miller Brothers* from *General Trading*. See *id.* at 346–47.

The record was silent on how many deliveries actually occurred. A fair assumption is that the deliveries took place throughout the year. Hypothetically, it is possible, even if highly unlikely, that the vehicle made one big delivery on one day only.

Justice Blackmun, concurring in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 562 (1977), sided with the dissent in *Miller Brothers*.

I am not at all convinced that the Court’s facile distinction of *Miller Bros. Co. v. Maryland*, on the ground that in that case “the seller obviously could not know whether the goods sold over the counter in Delaware were transported to Maryland prior to their use,” and that there was a “lack of certainty that the merchandise sold over the counter to Maryland customers in Delaware was transported to Maryland prior to its use,” is a proper and acceptable distinction. I thought that one of the factual difficulties of *Miller [Brothers]*, in the focus of the present case, was the Delaware seller’s own delivery of goods to Maryland, some by common carrier and some by the seller’s own truck. Indeed, Miller Bro[thers] stipulated that during the taxable period, it delivered or paid a common carrier to deliver \$9500 worth of merchandise to customers in Maryland (\$8000 through use of its truck, \$1500 by common carrier). Miller

Brothers in fact delivered a majority of these sales to Maryland, subsequent cases blindly accept Justice Jackson's characterization.<sup>75</sup>

Of course, given Justice Jackson's apparent hostility to Maryland's position, it would not have been relevant how he characterized the delivery of the goods. In fact, if Maryland were going to lose no matter what, the states were better off going forward in having the deliveries misdescribed as "occasional" because that narrowed the holding of the case and its precedential value. Future cases holding for the state would be able to dismiss *Miller Brothers* as involving a fairly weak connection with Maryland: the *occasional* delivery of goods.<sup>76</sup>

#### D. An Alternative Opinion

In the hands of a less hostile Justice than Justice Jackson, the case might have taken a different turn. One can only imagine how Justice Rutledge, who left the Court a few years before *Miller Brothers*, would have decided it. He would have likely upheld the collection of the Maryland use tax, at least on the goods delivered to Maryland customers, provided some relief would be extended for any sales tax paid on the transaction.<sup>77</sup>

At the time of *Miller Brothers*, the Court and commentators did not think that nexus had a different meaning under the Due Process Clause than under the Commerce Clause—*Quill* would later invent that bifurcation.<sup>78</sup> *Miller Brothers* had a vehicle in Maryland presumably on a recurring basis.<sup>79</sup> It sent advertising circulars to

Bro[thers] exhibited no uncertainty as to the destination of those goods. *Id.* at 562 (Blackmun, J., concurring) (citations omitted) (citing *National Geographic*, 430 U.S. at 559, 561 (majority opinion); *Miller Bros.*, 347 U.S. at 341–42, 350–51 n.5).

75. The only exception is Justice Blackmun's concurrence in *National Geographic*. See *supra* note 74.

76. In *Bellas Hess*, Illinois adopted this strategy (to no avail) of marginalizing the deliveries by endorsing Justice Jackson's description as "occasional." Professor Cox, representing *Bellas Hess*, rejected Justice Jackson's characterization. See *infra* notes 111–14 and accompanying text.

77. For Justice Rutledge's visionary views, see *Int'l Harvester Co. v. Dep't of Treasury*, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part); see also *Quill Corp. v. North Dakota*, 504 U.S. 298, 305–06, 326–27 (1992) (White, J., concurring in part and dissenting in part) (citing Justice Rutledge and deferring to his reasoning in *Memphis Nat. Gas Co. v. Stone*, 335 U.S. 80 (1948) (Rutledge, J., concurring)); *Freeman v. Hewit*, 329 U.S. 249, 259 (1946) (Rutledge, J., concurring). Justice Rutledge would have almost certainly upheld the collection of the Maryland use tax on sales that were delivered in *Miller Brothers*' vehicle into Maryland.

78. See *Int'l Harvester Co.*, 322 U.S. at 360 (Rutledge, J., concurring in part and dissenting in part).

79. *Miller Bros.*, 347 U.S. at 341–42.

former customers with Maryland addresses—not all of them, to be sure, but those for whom it had information<sup>80</sup>—and the Court had previously held that where a sale occurred was irrelevant to determining whether the vendor must collect use tax for the market state.<sup>81</sup> It would not have taken a heroic effort to hold that the minimum contacts requirement of *International Shoe* for due process nexus was satisfied.<sup>82</sup>

Sending advertising into Maryland could have been equated with sending in drummers, which had been previously held to constitute nexus.<sup>83</sup> As the Supreme Court later explained, “In ‘modern commercial life’ it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: [t]he requirements of due process are met irrespective of a corporation’s lack of physical presence in the taxing [s]tate.”<sup>84</sup> Miller Brothers’ vehicle received the same type of benefits—fire and police protection—that the Court later found to satisfy the Due Process Clause in *National Geographic*.<sup>85</sup> In short, in the hands of someone more sympathetic to the states, *Miller Brothers* might have reached in 1954 the same due process holding that was eventually set forth in *Quill*. Had it done so, the Court’s jurisprudence would have taken a different path and *Bellas Hess* could well have been decided in favor of the states.

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80. *Id.* at 350 n.4; *see also supra* notes 68–70 and accompanying text.

81. *Gen. Trading Co. v. State Tax Comm’n*, 322 U.S. 335, 338 (1944); *see also Nat’l Geographic Soc’y v. Cal. Bd. of Equalization*, 430 U.S. 551, 563 (1977) (Blackmun, J., concurring) (“The Court appears to find an additional distinction in the fact that the goods in *Miller Bros.* were ‘sold to residents of Maryland at *Miller’s* Delaware store.’ If the Court intends thereby to rest a distinction on the fact that the sales were made out of State, I am at a loss to follow its reasoning. By definition, a use tax is imposed only on sales made out of [s]tate. In short, *Miller Bros.* is not so easily explained away.”).

82. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (establishing that a forum state may only exercise personal jurisdiction over an out-of-state vendor with which it has “minimum contacts”).

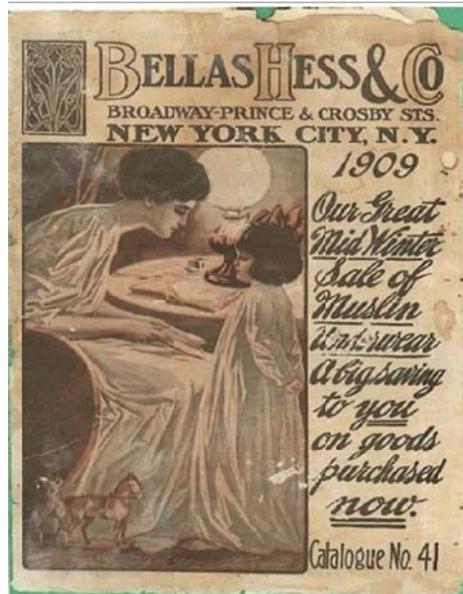
83. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 307–08 (1992).

84. *Id.*

85. *See infra* note 123 and accompanying text.

III. *BELLAS HESS, INC. V. ILLINOIS DEPARTMENT OF REVENUE*

Figure 3: Cover of a Bellas Hess Catalog

A. *The Facts*

Bellas Hess was based in Missouri and conducted a pure mail-order business.<sup>86</sup> It had no sales representatives, personnel, offices, or property of any kind in the State of Illinois.<sup>87</sup> It used the U.S. mail and common carriers to fulfill orders from Illinois residents.<sup>88</sup>

Twice a year, Bellas Hess mailed catalogues to its active or recent customers, including those in Illinois.<sup>89</sup> The company also supplemented this mailing with advertising “flyers” that were occasionally mailed to both past and potential customers.<sup>90</sup>

86. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 753–54 (1967).

87. *Id.* at 754. According to the dissent, Bellas Hess had retail stores in wholly owned subsidiaries but presumably none in Illinois. *Id.* at 760 (Fortas, J., dissenting). Had there been any retail stores in Illinois, the Court would have confronted the issue of entity isolation. *See infra* note 193.

88. *Bellas Hess*, 386 U.S. at 754–55.

89. *Id.* at 754.

90. *Id.* at 754–55.

[Bellas Hess] was one of the big-five general merchandise catalogs that thrived during the 20th century—the others were Sears, Roebuck, Alden’s,

Under Illinois law, Bellas Hess was considered a retailer maintaining a place of business in the state because it was soliciting orders through catalogues or other advertising.<sup>91</sup> Accordingly, the company was obligated to collect the Illinois use tax, which it did not do.<sup>92</sup>

When Illinois brought suit before the Supreme Court for unpaid use taxes, Bellas Hess retained Professor Archibald Cox.<sup>93</sup> Cox was tall and ramrod straight, regal, bow-tied, and buzz-cut.<sup>94</sup> He was a Harvard Law Professor, a Boston Brahmin, an early supporter of then-Senator John Kennedy, and the head of a Cambridge brain trust in Kennedy's 1960 presidential campaign.<sup>95</sup> When Kennedy became President, he appointed Cox as Solicitor General.<sup>96</sup> From 1961 to 1965, Cox argued numerous landmark cases,<sup>97</sup> including *Baker v.*

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Spiegel[,] and Montgomery Ward. But none deserves its place in history more than Bellas Hess.

The company was founded in the late 1800s as National Cloak & Suit and renamed National Bellas Hess around 1910, as folklore has it. It was located between Washington, Morton[,] and Barrow streets in New York's Greenwich Village. "We have no agents or branch stores," it said in its 1920–21 fall-winter catalog. "We sell only direct from this catalog and anyone claiming to represent us is an imposter." But what a catalog it was. The whole book was illustrated and included many color pages. There was no photography.

Many items seem quaint today—like sleeping caps, union suits, corsets and "knickerbockers" (the short pants that schoolboys couldn't wait to outgrow). Some were expensive. An embroidered crepe blouse went for \$9.98. An "ultra smart style" woman's suit could cost up to \$47.95—no small amount in 1920. Ladies' shoes could be bought for around \$4.98. Except for sweaters and work shirts, there [was not] much for men. By 1928, the firm now known as National Bellas Hess had annual sales of \$40 million, and this number grew by \$17 million when it acquired a competitor: The Charles Williams Stores.

Ray Schultz, *The Ballad of Bellas Hess*, MULTICHANNEL MERCHANT (June 1, 2008, 9:30 PM), <http://multichannelmerchant.com/mcm/the-ballad-of-bellas-hess-01062008>. Despite winning the right not to collect the use tax on sales into states in which it had no physical presence and thus gain a competitive advantage over in-state retailers, Bellas Hess declared bankruptcy in 1974. Clayton Reed, *Bellas Hess Fate in Court*, ST. PETERSBURG TIMES, Nov. 27, 1974, at 5-B.

91. *Bellas Hess*, 386 U.S. at 755.

92. *Id.*

93. *Id.* at 753.

94. See Archibald Cox, *92, Is Dead; Helped Prosecute Watergate*, N.Y. TIMES (May 30, 2004), <http://www.nytimes.com/2004/05/30/nyregion/archibald-cox-92-is-dead-helped-prosecute-watergate.html>.

95. *Id.*

96. *Id.*

97. *Archibald Cox Oral History*, COLUM. U. LIBRS., [http://www.columbia.edu/cu/lweb/digital/collections/oral\\_hist/cox](http://www.columbia.edu/cu/lweb/digital/collections/oral_hist/cox) (last visited May 17, 2016).

*Carr*,<sup>98</sup> *Heart of Atlanta Motel, Inc. v. United States*,<sup>99</sup> *Reynolds v. Sims*,<sup>100</sup> *Peterson v. City of Greenville*,<sup>101</sup> *Massiah v. United States*,<sup>102</sup> *Burton v. Wilmington Parking Authority*,<sup>103</sup> *United States v. Seeger*,<sup>104</sup> and *Zemel v. Rusk*.<sup>105</sup> He was well-known to the Court, with a reputation for fairness and integrity.<sup>106</sup> It is apparent from listening to the oral argument in *Bellas Hess* that the Justices well respected him.<sup>107</sup>

Not surprisingly, *Miller Brothers* played a prominent role in the briefing and oral argument of *Bellas Hess*. Taxpayers had few Supreme Court victories upholding their right not to collect the use tax,<sup>108</sup> so even if *Miller Brothers* was hardly a model of analytical rigor, as well as a 5-4 decision, it was nonetheless a recent—and favorable—precedent.

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98. 369 U.S. 186 (1962).

99. 379 U.S. 241 (1964).

100. 377 U.S. 533 (1964).

101. 373 U.S. 244 (1963).

102. 377 U.S. 201 (1964).

103. 365 U.S. 715 (1961).

104. 380 U.S. 163 (1965).

105. 381 U.S. 1 (1965).

106. Andrew C. Esenstein, *Watergate Prosecutor Cox Dies at 92*, HARV. CRIMSON (June 7, 2004), <http://www.thecrimson.com/article/2004/6/7/watergate-prosecutor-cox-dies-at-92>.

107. Cox received soft-ball questions during oral argument such as the following: Justice Black—“It’s an old company, though? It’s an old company.” Cox—“It’s an old company, yes.” Justice Black—“I remember my mother use[d] that.” Oral Argument at 27:26, *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753 (1967) (No. 241), <https://www.oyez.org/cases/1966/241>. At the time of *Bellas Hess*’ oral argument in 1967, Cox was already highly regarded in legal and political circles. After Attorney General Elliot Richardson appointed him as the special prosecutor in Watergate, Cox became a public and treasured figure. President Nixon later fired Cox in the “Saturday-night Massacre” after he refused to withdraw a subpoena for the infamous White House tapes. *Watergate and the White House: The ‘Third-Rate Burglary’ That Toppled a President*, U.S. NEWS (Aug. 8, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/08/08/watergate-and-the-white-house-the-third-rate-burglary-that-toppled-a-president>. For a detailed study of Cox’s remarkable life, see KEN GORMLEY, *ARCHIBALD COX: CONSCIENCE OF A NATION* (1997). Professor Cox’s irrelevant and insignificant efforts include teaching this Author constitutional law. As far as memory serves, we did not study *Bellas Hess*.

108. Taxpayers were forced to collect the use tax in *Scripto, Inc. v. Carson*, 362 U.S. 207, 211–12 (1960); *Gen. Trading Co. v. State Tax Comm’n*, 322 U.S. 335, 338 (1944); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 366 (1941); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 66–67 (1939). Until *Bellas Hess* in 1967, *Miller Brothers* was the aberration.

In his brief and at oral argument, Professor Cox argued that *Miller Brothers* “should govern the present case”<sup>109</sup> and emphasized that Miller Brothers “made regular deliveries in Maryland in its own truck driven by its own employees.”<sup>110</sup> He rejected Justice Jackson’s characterization of Miller Brothers’ deliveries in Maryland as “occasional.”<sup>111</sup> Instead, Cox recharacterized the deliveries, (more accurately) as “regular.”<sup>112</sup> By underscoring, rather than trivializing, the store’s deliveries (as well as its advertising),<sup>113</sup> Professor Cox was able to state at oral argument: “If continuous regular advertising plus delivery with your own trucks is not enough to make jurisdiction, . . . then surely [there cannot be jurisdiction] where you don’t make deliver[ies] with your own truck[. T]ake away that point of contact[,] and the advertising alone cannot be a sufficient jurisdiction.” He argued that the dissenting Justices in *Miller*, too, would agree with him in *Bellas Hess*: they only would have found Miller Brothers liable because of its deliveries, but in contrast, *Bellas Hess* did not make any such deliveries.<sup>114</sup>

Illinois responded at oral argument by noting *Bellas Hess*’s “tremendous reliance” upon *Miller Brothers* and then rejected Cox’s characterization of the deliveries in *Miller Brothers* as “regular,” citing *Scripto, Inc. v. Carson*,<sup>115</sup> in support of Justice Jackson’s characterization.<sup>116</sup> Illinois had every reason to endorse Justice

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109. Brief for Appellant at 18, *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753 (1967) (No. 241).

110. *Id.*

111. See *supra* note 74 (noting that Justice Jackson stated that Miller Brothers only made “occasional” deliveries).

112. Oral Argument at 13:09, *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753 (1967) (No. 241), <https://www.oyez.org/cases/1966/241>.

113. See *supra* notes 27–35 and accompanying text.

114. Oral Argument at 13:09, 13:54, *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753 (1967) (No. 241), <https://www.oyez.org/cases/1966/241>.

115. *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

116. Oral Argument at 55:51, *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753 (1967) (No. 241), <https://www.oyez.org/cases/1966/241>. In *Scripto*, the Court held that ten part-time manufacturer representatives working on a commission basis soliciting sales for *Scripto* in Florida constituted nexus, requiring *Scripto* to collect the use tax. 362 U.S. at 209, 212–13. Not surprisingly, the taxpayer relied heavily on *Miller Brothers*, which was decided just six years earlier. In rejecting this reliance, the Court stated:

Appellant earnestly contends that [*Miller Brothers*] is to the contrary. We think not. Miller had no solicitors in Maryland; there was no “exploitation of the consumer market”; no regular, systematic displaying of its products by catalogs, samples or the like. But, on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when personally present at Miller’s store in Delaware. True, there was an “occasional” delivery of such purchases by Miller into Maryland, and

Jackson’s description of the deliveries as “occasional.”<sup>117</sup> Further, Illinois attempted to limit the significance of *Miller Brothers* by emphasizing that buyers went from Maryland to Delaware and that Miller Brothers did not know where the goods were to be used.<sup>118</sup>

Illinois’s goal was to minimize the precedential impact of the case to show how different *Bellas Hess* was. Illinois and Justice Jackson were thus odd allies. Cox had the opposite goal, to show how substantial Miller Brothers’ contacts were with Maryland and that if those could not justify collecting the Maryland use tax, then how could *Bellas Hess*’s less substantial contacts do so?

### B. *The Majority Opinion*

Justice Stewart wrote the majority opinion, joined by Chief Justice Warren and Justices Clark, Harlan, Brennan, and White.<sup>119</sup> The opinion is unimaginative and hardly intellectually bold. Justice Stewart summarized the Court’s earlier opinions as involving vendors having either real or personal property in the market state.<sup>120</sup> The common link among these cases was that the “out-of-state seller was plainly accorded the protection and services of the taxing [s]tate.”<sup>121</sup> The Court, however, never explained why Miller Brothers’ delivery in its own vehicle did not benefit from the protection and services provided by Maryland.<sup>122</sup> After all, the vehicle traveled on roads

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it did occasionally mail notices of special sales to former customers; but Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland. This led the Court to conclude that Miller would be made “more vulnerable to liability for another’s tax than to a tax on itself.” In view of these considerations, we conclude that the “minimum connections” not present in Miller are more than sufficient here.

*Id.* at 212 (citations omitted).

117. Oral Argument at 56:08, *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753 (1967) (No. 241), <https://www.oyez.org/cases/1966/241>.

118. *Id.* at 56:48.

119. *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753, 753, 760 (1967).

120. *Id.* at 754.

121. *Id.* at 757.

122. *Id.* at 758; *see Nat’l Geographic Soc’y v. Cal. Bd. of Equalization*, 430 U.S. 551, 561 (1977) (stating that the taxpayer’s offices in the market state benefited from “fire and police protection, and the like”).

supported by state funding and presumably could have received assistance from Maryland's police and firefighters while in Maryland.<sup>123</sup>

But the Court refused to re-examine its precedents:

In order to uphold the power of Illinois to impose use tax burdens on [Bellas Hess] in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a [s]tate, and those who do no more than communicate with customers in the [s]tate by mail or common carrier as part of a general interstate business. . . . [I]t is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved.<sup>124</sup>

The Court also struck a theme that it would later reinforce in *Quill*. “[I]f Illinois [could] impose such [use tax] burdens, so can every other [s]tate, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation.”<sup>125</sup> How this burden would be reduced if there were ten part-time independent solicitors in the state was unaddressed.<sup>126</sup> The majority essentially accepted Cox's framing of the issue. And like *Quill* twenty-five years later, the *Bellas Hess* Court was influenced by considerations of stare decisis.

### C. *The Dissent*

Justice Fortas wrote a stinging dissent, joined by Justices Black and Douglas.<sup>127</sup> The dissent started by noting the size of Bellas Hess's sales nationwide in 1961 of \$60 million and accounts receivable of \$15.5 million.<sup>128</sup> During the fifteen-month audit period (dates unspecified) Bellas Hess's sales in Illinois were over \$2 million.<sup>129</sup> None of these figures was cited by the majority. The dissent

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123. In *National Geographic*, the Court described the taxpayer's offices in California as benefitting from “fire and police protection, and the like.” 430 U.S. at 561. The same could have been said about Miller Brothers' vehicle in Maryland.

124. *Bellas Hess*, 386 U.S. at 758–59.

125. *Id.* at 759.

126. One commentator argues that the reference to burdens on interstate commerce was meant to be “simply atmospheric.” Charles Rothfeld, *Mail-Order Sales and State Jurisdiction to Tax*, 53 TAX NOTES 1405, 1410 (1991).

127. *Bellas Hess*, 386 U.S. at 760 (Fortas, J., dissenting).

128. *Id.* at 760–61. It is unclear whether the \$60 million figure included accounts receivable.

129. *Id.* at 761.

attributed this “substantial volume” to “twice-a-year catalogue mailings” and “intermediate smaller ‘sales books’ or ‘flyers.’”<sup>130</sup>

The dissent underscored another point that the majority ignored: “A substantial part of Bellas Hess’[s] sales [were] on credit.”<sup>131</sup> That fact allowed the dissent to conclude that doubtless “this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient ‘nexus’ to require Bellas Hess to collect from Illinois customers and to remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois.”<sup>132</sup> Bellas Hess was not simply using the facilities of interstate commerce to serve customers in Illinois. Rather, “Bellas Hess enjoy[ed] the benefits of, and profits from the facilities nurtured by, the State of Illinois as fully as if it were a retail store or maintained salesmen therein.”<sup>133</sup> Accordingly, Bellas Hess was obligated to collect the Illinois use tax.<sup>134</sup>

The dissent stressed another point ignored by the majority, and one that has become a rallying cry for overruling *Quill*: the unfairness of exempting remote vendors but taxing their in-state competitors. The dissent argued that excusing Bellas Hess from having to collect the use tax “burden[ed] and penalize[d]” domestic retailers that were obligated to collect the tax<sup>135</sup>:

While this advantage to out-of-state sellers is tolerable and a necessary constitutional consequence where the sales are occasional, minor and sporadic and not the result of a calculated, systematic exploitation of the market, it certainly should not be extended to instances where the out-of-state company is engaged in exploiting the local market on a regular, systematic, large-scale basis.<sup>136</sup>

The dissent underscored yet a final point about how to evaluate the burden on Bellas Hess if made to collect use taxes across the country.<sup>137</sup> The dissent compared the compliance burden on Bellas Hess with that of a local retailer, concluding that the burdens are comparable. By doing this comparison state-by-state, the dissent

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130. *Id.*

131. *Id.*

132. *Id.* at 761–62.

133. *Id.* (raising the issue of credit sales sua sponte, as it had not been raised by Illinois or by Bellas Hess; the latter, of course, would have had no reason to have done so).

134. *Id.* at 762.

135. *Id.* at 763.

136. *Id.*

137. *Id.* at 766.

determined that *Bellas Hess*'s burden was no more significant than what local retailers experienced:

It is hardly worth remarking that appellant's expressions of consternation and alarm at the burden which the mechanics of compliance with use tax obligations would place upon it and others similarly situated should not give us pause. The burden is no greater than that placed upon local retailers by comparable sales tax obligations.<sup>138</sup>

Although there is certainly a burden that comes with collecting taxes, the dissent explained, the burden experienced by a mail order house located in another state, such as the appellant, is no greater than the burden imposed "on an enterprise in the same [s]tate which accepts orders by mail; and it is, indeed, hardly more of a burden than it is on any ordinary retail store in the taxing [s]tate."<sup>139</sup>

Finally, anticipating what critics of *Quill* would later assert, the dissent noted that technology has reduced whatever burdens remote vendors complain about.<sup>140</sup> It attacked the majority's concern that "administrative and record keeping requirements could 'entangle' appellant's interstate business in a welter of complicated obligations" as "vastly underestimat[ing] the skill of contemporary man and his machines."<sup>141</sup> The dissent claimed that a "realistic approach to the facts of [*Bellas Hess*'s] business" showed that the state could impose use taxes on the out-of-state vendor without resulting in an undue burden.<sup>142</sup>

The difference between the majority and dissent was stark. The majority opinion was orthodox in its reasoning, unimaginative, and timid. No one could accuse the majority of advancing the Court's jurisprudence. In sharp contrast, the dissent raised themes the majority ignored (and that were not raised by Illinois)—themes that have come to dominate the current debate over *Quill*. Twenty-five years later in *Quill*, the Court had the opportunity to endorse the dissent in *Bellas Hess*.

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 760.

IV. *QUILL V. NORTH DAKOTA*A. *Overview*

Little need exists to review in depth the facts or the decision in *Quill*, which is one of the most written about and discussed cases in state taxation.<sup>143</sup> Certainly everyone at the Symposium seemed familiar with the case, and Justice Kennedy’s concurrence in *Direct Marketing Association* (“*DMA*”) can serve as a review.<sup>144</sup> *Quill* reaffirmed *Bellas Hess* and endorsed two bright-line rules. The first rule, drawn from *National Geographic*,<sup>145</sup> is that a remote seller must collect the market state’s use tax if it has a physical presence there.<sup>146</sup> Under the second bright-line rule, drawn from *Bellas Hess*, a remote seller does not have nexus with a state if it does not have a physical presence in the state and “whose only connection with customers in the [taxing s]tate is by common carrier or the United States mail.”<sup>147</sup>

As Justice Kennedy’s concurrence in *DMA* indicates, the *Quill* Court was reluctant to reaffirm *Bellas Hess*.<sup>148</sup> The *Quill* majority eventually affirmed the decision in deference to the reliance interests of the mail-order industry and principles of stare decisis.<sup>149</sup> The Court perceived an obligation to protect the reliance interests and settled expectations of the direct-marketing industry, which had partially flourished, according to the Court, as a result of *Bellas Hess*.<sup>150</sup> How much the competitive advantage of not collecting the use tax mattered to the growth of the industry is a tricky empirical

143. See *supra* notes 12–13 and accompanying text (noting the volume of legal commentary on the case).

144. See *supra* Part I (providing the concurrence in part).

145. Nat’l Geographic Soc’y v. Cal. Bd. of Equalization, 430 U.S. 551 (1977).

146. *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992) (finding that “a small sales force, plant, or office” may constitute “presence in the taxing [s]tate”).

147. *Id.* (first alteration in original) (quoting *Bellas Hess*, 386 U.S. at 758).

148. *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring). As part of its ambivalence in affirming *Bellas Hess*, the *Quill* Court noted that “contemporary Commerce Clause jurisprudence might not dictate the same result.” *Quill*, 504 U.S. at 311. Justices Kennedy and Thomas joined in Justice Scalia’s concurrence that the Court could have upheld the rule from *Bellas Hess* on the basis of stare decisis alone. *Id.* at 320 (Scalia, J., concurring in part and dissenting in part).

149. *Quill*, 504 U.S. at 316–17 (majority opinion).

150. *Id.* at 303, 316 (stating that the mail-order business had grown “from a relatively inconsequential market niche’ in 1967 to a ‘goliath’ with annual sales . . . ‘of \$183.3 billion in 1989’” (quoting *State v. Quill Corp.*, 470 N.W.2d 203, 208–09 (N.D. 1991), *rev’d*, 504 U.S. 298 (1992))).

question, but the Court implicitly assumed it was significant.<sup>151</sup> The Court realized that the underlying jurisprudence would support a decision in favor of North Dakota, but felt that Congress was better suited for dealing with the problems that would accompany overruling *Bellas Hess*, especially that of retroactivity.

### B. Congressional Response

Reflecting the ambivalence about the wisdom of its decision, the Court extended a clear invitation to Congress to eliminate or modify the *Bellas Hess* rule.<sup>152</sup> The Court stated that the Due Process Clause did not prohibit Congress from “decid[ing] whether, when, and to what extent the [s]tates may . . . collect use taxes.”<sup>153</sup> Many earlier legislative attempts to overrule *Bellas Hess* failed, partially based on the fear that any legislation would violate the Due Process Clause.<sup>154</sup> After *Quill*, the Senate finally passed the Marketplace Fairness Act in 2013,<sup>155</sup> but it languished in the House and was never enacted.<sup>156</sup> The bill has been reintroduced in the Senate and referred to Committee.<sup>157</sup>

The politics for passing the Marketplace Fairness Act are brutal, as most voters (and many politicians) might see the bill as imposing a new tax that takes away their perceived God-given right to shop on the Internet tax-free, rather than viewing the bill as more akin to the withholding that is routinely accepted in the income tax on wages. Legislators may increase the likelihood of passage by pairing the bill

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151. *Id.* at 316. The growth of the industry was certainly facilitated by the advent of national credit cards, such as MasterCard and Visa, innovation of the 800-telephone call, and expansion of the United Parcel Service (UPS) and Federal Express. At the time of writing, this Author knows of no attempt by analysts to separate out the effect of these developments on the industry from the non-collection of the use tax.

152. *Id.* at 318 (“No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.”).

153. *Id.*

154. Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013); *see S. 743 (113th): Marketplace Fairness Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s743> (last visited May 17, 2016) (providing the legislative history of S. 743).

155. *S. 743 (113th): Marketplace Fairness Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s743> (last visited May 17, 2016).

156. *See S. 743-Marketplace Fairness Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/743/related-bills> (last visited May 17, 2016) (providing the status of legislation related to S. 743 pending in Congress).

157. Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015); *see S. 698-Marketplace Fairness Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/698/related-bills> (last visited May 17, 2016) (providing the status of legislation pending in Congress).

with pro-taxpayer bills that can blunt or neutralize opposition. Perhaps Justice Kennedy understood that the *Quill* Court's invitation for Congressional reform<sup>158</sup> was politically unrealistic when he suggested judicial redress as an alternative.<sup>159</sup> That the Senate passed

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158. See *supra* note 152 and accompanying text (quoting the *Quill* court).

159. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (encouraging the legal system to find a case that would allow the "Court to reexamine *Quill* and *Bellas Hess*"). Such a case would involve imposing a use tax collection on remote sellers lacking a physical presence in the market state. Alabama was the first state to accept Justice Kennedy's invitation. It adopted Regulation 810-6-2-.90.03, which applies to transactions occurring on and after January 1, 2016. The regulation requires certain out-of-state retailers to collect Alabama sales tax on sales of tangible personal property into Alabama, even if the retailer lacks a physical presence in the state. Officials in the Alabama tax department have said they welcome a challenge to *Quill*. See ALA. ADMIN. CODE r. 810-6-2-.90.03 (2016); Clark R. Calhoun & Matthew P. Hedstrom, *Ask and Ye Shall Receive, Justice Kennedy: The Alabama DOR Has Proposed a Regulation to Challenge Quill*, IPT INSIDER (Sept. 2015), at 13–14, <http://www.alston.com/Files/Publication/9725da83-be8e-484a-b9ed-e7526a99f215/Presentation/PublicationAttachment/13d3278c-3fc9-4bfc-8628-c241d79ee209/Sales-Use%20Tax%20Article.pdf> (highlighting the key concepts of the Alabama regulation and noting the Alabama Department of Revenue "appears ready to challenge the well-settle rule of *Quill* and provide Justice Kennedy with a test case"). On June 8, 2016, Newegg Inc. filed a Notice of Appeal in the Alabama Tax Tribunal challenging an assessment by the Alabama Department of Revenue. Stephen P. Kranz et al., *Alabama Issues Remote Sellers Use Tax Assessment, Newegg, Inc. Appeals*, INSIDE SALT BLOG (June 15, 2016), <http://www.insidesalt.com/2016/06/alabama-issues-remote-sellers-use-tax-assessments-newegg-inc-appeals>. Apparently, the assessment is based solely on Newegg's significant sales to Alabama customers. *Id.* (reporting that Newegg makes more than \$250,000 in sales to customers in Alabama).

South Dakota adopted a law, effective May 1, 2016, which is also a frontal attack on *Quill*. S.B. 106, 2016 Sess. (S.D. 2016). A statement of legislative purpose provides that there is "an urgent need for the Supreme Court of the United States to reconsider [the *Quill*] doctrine." *Id.* § 8(8). Litigation is already underway with Newegg, Overstock.com, Systemax, Wayfair, American Catalog Mailers, and Netchoice. Sandra Guy, *South Dakota Sues Four Big Online Retailers Over Sales Taxes*, INTERNET RETAILER (Apr. 29, 2016, 1:40 PM), <https://www.internetretailer.com/2016/04/29/south-dakota-sues-four-online-retailers-over-sales-taxes>. These efforts by Alabama and South Dakota are criticized in George S. Isaacson & Matthew P. Schaefer, *The Problems with State Efforts to Kill Quill*, 80 ST. TAX NOTES 623 (2016).

Tennessee is proposing a regulation that will require out-of-state vendors to collect that state's use tax even if they do not satisfy *Quill*. See Stephen P. Kranz et al., *Breaking News: Tennessee Submits Proposed Economic Nexus Regulation for Publication*, INSIDE SALT BLOG (June 16, 2016), <http://www.insidesalt.com/2016/06/breaking-news-tennessee-submits-proposed-economic-nexus-regulation-for-publication>. Other states are considering similar action. Andrew Yates, *States Continue to Challenge Quill's Physical Presence Standard*, ALSTON & BIRD TAX BLOG (Feb. 9, 2016), <http://www.alstontax.com/1314-2> (discussing the National Conference of State Legislatures' "new, provocative attack on *Quill*").

a bill at all, finally accepting the *Quill* Court's invitation, might encourage some on the Court to hold off granting certiorari for now, waiting to evaluate the outcome of the November elections and their effect on the passage of legislation.

### C. *The Bifurcation of Nexus*

*Quill* was a political decision. Its novel approach of bifurcating the concept of nexus so that it had a different meaning under the Due Process Clause from its meaning under the Commerce Clause allowed the Court to accomplish two goals: clearing the way for Congressional intervention while protecting the reliance interests of the mail order industry. By holding that due process nexus was satisfied, it provided Congress with clear authority for overturning *Quill*. Previously, opponents of federal intervention were telling Congress that *Bella Hess* held that the Due Process Clause prevented out-of-state vendors with no physical presence in a state from having to collect that state's use tax. Opponents then argued that Congress could not legislate on matters of due process, even if economic issues were concerned, and thus was powerless to overturn *Bellas Hess*. *Quill* put that fear to rest and simultaneously held that Commerce Clause nexus was not satisfied, which meant that *Bellas Hess* prevented remote vendors with no physical presence from collecting the market state's use tax. Hence, the Court protected the reliance interests of the mail order industry.

The bifurcation of nexus solved the Court's quandary of removing impediments to Congressional legislation without removing the existing protection for the mail order industry. This approach, however, came with a high jurisprudential cost. It had no support in the case law, although the Court tried to tease it from *Complete Auto*.<sup>160</sup> The Court described the "different constitutional concerns and policies" animating the Due Process and the Commerce Clauses<sup>161</sup> and underscored *Complete Auto*'s use of the term "substantial nexus." *Complete Auto* was a Commerce Clause case, and its use of substantial nexus, (a term that had not appeared in any of the Court's Due Process cases), supported, according to the Court, a different

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160. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 274, 289 (1977) (Mississippi's tax "on 'the privilege of . . . doing business' within the [s]tate" did not violate the Commerce Clause).

161. *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (stating that the Due Process Clause "concerns the fundamental fairness of governmental activity," while the Commerce Clause's "nexus requirement" addresses "structural concerns about the effects of state regulation on the national economy").

meaning for nexus from that under the Due Process Clause. Unfortunately, the Court cited no other cases to support its approach. As two leading scholars noted, the Court's failure to cite any other cases was not an oversight: "the Court's discovery that '[d]espite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical' is more accurately viewed as a doctrinal epiphany than as a logical inference to be drawn from the careful reading of its precedents."<sup>162</sup>

Justice White concurred with the majority's decision to overrule *Bellas Hess's* requirement of physical presence for nexus under the Due Process Clause.<sup>163</sup> But he viewed the Due Process and Commerce Clauses to have the same nexus requirement and would have given *Bellas Hess* "the complete burial it justly deserves."<sup>164</sup> He scolded the majority for its unprincipled approach, noting that "[t]he Court freely acknowledges that there is no authority for this novel interpretation of our cases and that we have never before found, as we do in this case, sufficient contacts for due process purposes but an insufficient nexus under the Commerce Clause."<sup>165</sup> Unprecedented though it might be, this bifurcation of nexus allowed the Court to preserve the *Bellas Hess* result, while removing any perceived barrier to congressional intervention.

#### D. Other Flaws in the Opinion

One fundamental problem with *Quill* is that the Court never explained what physical presence in a state has to do with limiting state burdens on interstate commerce, retreating into bromides about the value of bright lines and how they can be rough around the edges.<sup>166</sup> *Quill* states that the Commerce Clause and the substantial nexus requirement are informed by structural concerns about the effects of state regulation on the national economy and limiting state burdens on interstate commerce.<sup>167</sup> Yet, nowhere does the Court

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162. See 2 HELLERSTEIN & HELLERSTEIN, *STATE TAXATION* ¶ 19.02 (3rd ed. 1998).

163. *Quill*, 504 U.S. at 321–22 (White, J., concurring in part and dissenting in part).

164. *Id.* at 322.

165. *Id.* at 325.

166. *Id.* at 314–15 (majority opinion) (affirming the validity of *Bellas Hess's* bright line rule, resulting in "commercial activity that is free from interstate taxation," while conceding the rule "appears artificial at its edges"). Not all state courts, however, have respected *Quill's* emphasis on the physical presence, bright line rule. Some courts have applied a quantitative or qualitative test to a taxpayer's physical presence to determine whether nexus exists. See POMP, *supra* note 2, at 9-157 to 9-158.

167. *Quill*, 504 U.S. at 311–13.

explain why the burden of collecting the use tax is reduced when a mail-order vendor has property in the state,<sup>168</sup> or has engaged the services of ten part-time, independent contractors within the state.<sup>169</sup>

A second analytical flaw in *Quill* is its overstatement concerning the evolution of its due process jurisprudence. The Court asserted that “[o]ur due process jurisprudence has evolved substantially in the [twenty-five] years since *Bellas Hess*, particularly in the area of judicial jurisdiction.”<sup>170</sup> But as Justice Scalia noted in his concurrence, the Court had held forty-two years earlier that a state’s regulation of a company that had used the United States mail to establish contacts within the state satisfied the Due Process Clause.<sup>171</sup> Justice Scalia suggested that there was no difference between “jurisdiction to regulate and jurisdiction to tax.”<sup>172</sup>

A third problem is that *Quill* misleadingly relies on *Complete Auto*’s “substantial nexus” language in support of its position that nexus for Commerce Clause purposes is different from nexus for due process purposes.<sup>173</sup> This dubious proposition was irrelevant in *Complete Auto*.

The issue in *Complete Auto* was whether a tax on the privilege of doing business within a state can be applied to an activity in interstate commerce.<sup>174</sup> The issue of nexus was not before the Court—nor could it have been—because there was no doubt that the taxpayer, which was transporting automobiles within Mississippi on behalf of General Motors, had a physical presence in Mississippi.<sup>175</sup> The case is

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168. *Nat’l Geographic Soc’y v. Cal. Bd. of Equalization*, 430 U.S. 551, 562 (1977) (a company’s office in the market state soliciting advertisements for the company’s magazine “provide[d] a sufficient nexus” between the company and the market state).

169. *Scripto, Inc. v. Carson*, 362 U.S. 207, 211, 213 (1960) (ten part-time independent contractors soliciting sales in the market state establish sufficient nexus).

170. *Quill*, 504 U.S. at 307.

171. *Id.* at 319 (Scalia, J., concurring in part and concurring in the judgment) (citing *Travelers Health Ass’n v. Virginia ex rel. State Corp. Comm’n*, 339 U.S. 643, 646–50 (1950) (Virginia can require a mail-order health insurance business incorporated in Nebraska to obtain a permit before mailing solicitations to Virginia residents)).

172. *Id.*; see *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–24 (1957) (noting that courts have consistently “expand[ed] the permissible scope of state jurisdiction over foreign corporation and nonresidents” based on the “increasing nationalization of commerce”); *People v. United Nat’l Ins. Co.*, 427 P.2d 199, 207–09 (Cal. 1967) (en banc) (opining that a state may regulate a business with which it has sufficient contacts); *Ministers Life & Cas. Union v. Haase*, 141 N.W.2d 287, 289, 291–92 (Wis. 1966) (observing that states were given the power to regulate and tax insurance companies by an act of Congress).

173. *Quill*, 504 U.S. at 311–13.

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

175. *Id.* at 276.

crystal clear that the taxpayer assumed it had *sufficient* nexus with Mississippi,<sup>176</sup> and anything the Court might have said about nexus would have been dicta at best. *Complete Auto* never had to address whether it viewed nexus as a due process issue or Commerce Clause issue.

Finally, the rather cavalier way *Complete Auto* vacillated in its description of the nexus requirement was inconsistent with a Court that thought it was formulating a new Commerce Clause interpretation of nexus. For example, only once did *Complete Auto* refer to “substantial nexus”;<sup>177</sup> more often, it referred to “sufficient nexus” or “sufficiently connected.”<sup>178</sup> Additionally, *Complete Auto* cited cases referring to nexus in its more traditional due process context as a “necessary connection,”<sup>179</sup> or as “sufficient nexus.”<sup>180</sup> Moreover, a computer search shows that this was the first time the Court ever used the term “substantial nexus” in a tax case.<sup>181</sup> This was not a Court that attributed any significance to the one time it used the term “substantial nexus” in its opinion; it obviously was not imbuing that term with any new jurisprudential meaning. As if further evidence is even needed, in *National Geographic*,<sup>182</sup> decided less than a month after *Complete Auto*, the Court stated: “The question presented by this case is whether the Society’s activities at the offices in California provided *sufficient* nexus between the out-of-state seller appellant and the [s]tate—as required by the Due Process Clause of the Fourteenth Amendment *and* the Commerce Clause—to support the imposition upon the Society of a use-tax-collection liability.”<sup>183</sup> If in *Complete Auto* the use of the modifier “substantial” was purposeful rather than casual, then the Court, without any notice, must have changed its mind less than one month later when *National Geographic* was decided. *National Geographic* was also quite telling in that the Court viewed the concept of nexus as identical under both the Due

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176. “Appellant, in its complaint in Chancery Court, did not allege that its activity which Mississippi taxes does not have a *sufficient nexus* with the [s]tate.” *Id.* at 277–78 (emphasis added).

177. *Id.* at 279.

178. *See, e.g., id.* at 278, 287.

179. *Id.* at 280–81 (citing *Freeman v. Hewit*, 329 U.S. 249, 271 (1946) (Rutledge, J., concurring)).

180. *Id.* at 285 (citing *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959)).

181. A Westlaw search for <advanced: (“substantial nexus” & “tax”) > returns only one case decided before *Complete Auto*. That case, *Buckley v. Valeo*, 424 U.S. 1 (1976), uses the term “substantial nexus,” but in a legislative authority context.

182. *Nat’l Geographic Soc’y v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977).

183. *Id.* at 554 (emphasis added).

Process Clause and the Commerce Clause.<sup>184</sup> Nonetheless, the very thin reed of “substantial nexus” provided the fig leaf the Court needed from otherwise turning *Quill* into a transparently unprincipled, blatantly political decision.

Although the *Quill* Court refused to grant certiorari on the question of whether a decision in favor of the State would apply retroactively,<sup>185</sup> Justice White seemed to be signaling that the Court discussed this question at its conference.<sup>186</sup> That would not be surprising because at oral argument the Court was clearly concerned about this issue in particular and suggested that Congress was better suited to deal with it.<sup>187</sup>

The intellectually suspect bifurcation of nexus gave the Court a way to resolve its concern about retroactivity, though it could not candidly admit to this agenda without undermining the legitimacy of the decision. At the same time, this suggests that the case is hardly sacrosanct or beyond reproach, as Justice Kennedy’s concurrence in *DMA* well recognizes and as the 5-4 vote in *Miller Brothers* and the 6-3 vote in *Bellas Hess* also suggest.

#### E. *The Relevance of Pre-Quill Cases on Nexus*

An appreciation of the weak foundation upon which *Quill* is built affects the weight that should be given to the Court’s pre-*Quill* decisions on nexus. Some would read such cases very narrowly, essentially limiting them to their facts.<sup>188</sup> But neither *Quill*’s language nor its holding supports a narrow reading of the pre-*Quill* nexus cases.

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184. *Id.*

185. *Quill*’s petition for a writ of certiorari set forth two questions: (1) Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *Bellas Hess*; and (2) Whether the North Dakota Supreme Court may give retroactive effect to its decision, which is contrary to established constitutional precedent, to make *Quill* liable for uncollected use taxes back to July 1, 1987? The Supreme Court granted certiorari on only the first issue. *State v. Quill Corp.*, 470 N.W.2d 203 (N.D. 1991), *cert. granted*, 502 U.S. 808 (1991); *see Quill Corp. v. North Dakota*, 504 U.S. 298, 332 (1992) (White, J., concurring in part and dissenting in part) (“[W]e specifically limited the question on which certiorari was granted in order *not* to consider the potential retroactive effects of overruling *Bellas Hess*.”).

186. *Quill*, 504 U.S. at 332–33.

187. *See* Oral Argument, *Quill Corp. v. North Dakota*, No. 91-194, 1992 WL 687848 (Jan. 22, 1992). Through conversations with the then-North Dakota Tax Commissioner, Heidi Heitkamp, this Author learned that after the oral argument, the state realized it was vulnerable on the retroactivity issue. It considered getting affidavits from all of the sales tax states stating that they would not apply any decision in their favor retroactively. There simply was not enough time to implement this strategy.

188. *See infra* notes 189, 191, 208.

In addition, some critics would reject pre-*Quill* cases decided under the Due Process Clause as having no relevance in a post-*Quill* world where nexus has been bifurcated.<sup>189</sup> Again, they offer no support for this position from the language or the holding of *Quill*.

Those views are a logically possible, but improbable reading of the Court's intent in *Quill*. As discussed above, *Quill* added no new nexus requirement for use taxes. Nor did *Quill* invigorate the existing physical presence precedents. The majority and concurrence claimed they were preserving the physical presence test of *Bellas Hess* because of their adherence to stare decisis.<sup>190</sup> There is not even a hint in *Quill* that the Court, in doing so, was repudiating all of its many cases that gave content to that test. Indeed, to read *Quill* as some radical decision—a voyage into uncharted waters—is to treat the Court's stated concern for stare decisis as claptrap. A court concerned with preserving existing expectations and providing a bright-line, physical presence test for nexus should not be read as having discarded existing nexus jurisprudence unless it has made an explicit statement to that effect.

Those who would read *Quill* as rejecting its earlier cases on nexus are left with the task of examining all prior decisions to determine which of those were decided under the Commerce or Due Process Clause. This task is hopeless. Prior to *Quill*, the Court never had any reason to specify whether a nexus decision was grounded on one clause or the other.<sup>191</sup> Accordingly, the Court could be somewhat

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189. See, e.g., Kendall L. Houghton & Douglas Lindholm, *COST Opposes MTC Nexus Bulletin 95-1*, 10 ST. TAX NOTES 973, 974 (1996) (rejecting the Bulletin's reliance on *Scripto* and *Tyler Pipe*, arguing that those cases “stand for *due process* nexus principles, *not* Commerce Clause principles, and thus cannot serve as binding precedent” (emphasis added)). The authors acknowledge elsewhere, however, that *Tyler Pipe* “does not designate the Due Process Clause *or* the Commerce Clause as grounds for its nexus holding” but argues that *Tyler Pipe* should be characterized as a due process case. *Id.* at 975 (emphasis added).

As further evidence that nothing about Commerce Clause nexus can be teased from *Complete Auto*, *Tyler Pipe*, decided ten year later, uses the term “sufficient nexus” and never uses the term “substantial nexus.” *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 240, 249–50 (1987).

MTC Nexus Bulletin 95-1 addresses whether warranty services provided by a seller through another party can constitute nexus for the seller with states in which the services are performed. See Houghton & Lindholm, *supra*, at 973.

190. *Quill*, 504 U.S. at 314; *id.* at 320 (Scalia, J., concurring in part and concurring in the judgment).

191. See, e.g., *Standard Pressed Steel Co. v. Dep't of Revenue of Wash.*, 419 U.S. 560, 562, 564 (1975) (referencing both the Due Process Clause and the Commerce Clause); see also *Quill*, 504 U.S. at 305 (“As in a number of other cases involving the

casual about the grounds of its decisions, often suggesting that nexus was required by both the Due Process Clause and the Commerce Clause, without even hinting that the concept did not have the same meaning under both clauses.<sup>192</sup> Nothing in *Quill*—or in any other case, even *Complete Auto*—suggests that physical presence had a different meaning under the Due Process Clause than under the Commerce Clause. *Quill* does not define physical presence, nor does the Court indicate that it is reexamining, let alone overruling, the definition of physical presence that emerges from those due process cases that found nexus because of a physical presence.

F. *The Meaning of Physical Presence*

The term “physical presence” cannot be applied literally to a corporation, which is a legal construct with no physical attributes. Unlike an individual, who can be physically present in a state, a corporation can be physically present only indirectly, through, for example, some person or property with which it has a legal relationship. The ownership or leasing of real property is one way in which a corporation can be present in a state.<sup>193</sup> A corporation can also be physically present in a state through persons acting on its behalf.<sup>194</sup>

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application of state taxing statutes to out-of-state sellers, our holding in *Bellas Hess* relied on both the Due Process Clause and the Commerce Clause.”); Nat’l *Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753, 756 (1967) (the “two claims are closely related”); Houghton & Lindholm, *supra* note 189, at 975 (arguing that *Standard Pressed Steel* was predominantly about the Due Process Clause and that some pre-*Quill* cases “do[] not designate the Due Process Clause or the Commerce Clause as grounds for its nexus holding”). *But see Quill*, 504 U.S. at 314 (suggesting that *Standard Pressed Steel* was a “Commerce Clause decision[]”).

192. *E.g.*, Nat’l Geographic Soc’y v. Cal. Bd. of Equalization, 430 U.S. 551, 554 (1977) (stating that: “The question presented by this case is whether the Society’s activities at the offices in California provided sufficient nexus . . . as required by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause”); *see also Quill*, 504 U.S. at 304 (describing *Bellas Hess* as relying on both the Due Process Clause and the Commerce Clause; presumably both clauses required physical presence until the *Quill* Court bifurcated the meaning of nexus). The Court recognized that its recent Commerce Clause “cases involved taxpayers who had a physical presence in the taxing [s]tate.” *Quill*, 504 U.S. at 314.

193. No one doubts that the ownership of real or tangible property constitutes physical presence. The Court, however, has never had an opportunity to address whether nexus can be avoided by transferring such ownership to a controlled entity. For a discussion of this technique, known as entity isolation, see POMP, *supra* note 2, at 9-71 to 9-74.

194. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945) (“Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its ‘presence’ without, as well as within, the state of its origin can be manifested only by activities carried on in

Under the case law, a corporation would have physical presence in a state through the actions of an individual soliciting or selling in a state on its behalf. For example, traveling salespersons who are employees of an out-of-state vendor provide nexus for the employer.<sup>195</sup>

The employer-employee relationship is one polar point on a continuum of possible personal relationships. At the other end of that continuum are the employees of common carriers or of the U.S. Postal Service, whose actions would not be attributed to the corporation. As *Quill* held, mail-order sellers “who do no more than communicate with customers in the [s]tate by mail or common carrier” will not have nexus.<sup>196</sup>

Of course, employees are only one category of individuals who can be physically present within the state. The in-state actions of agents and independent contractors can also confer nexus. While the case law does not establish all of the relevant boundary lines, it is clear that an independent contractor does not have to work exclusively for the out-of-state corporation to confer nexus. In *Scripto*, for example, the Court held that nexus was created by ten part-time, independent contractors making commissions on the orders they solicited.<sup>197</sup>

The *Quill* Court described *Scripto* as “[t]he furthest extension” of the Due Process Clause’s requirement that there be a minimum

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its behalf by those who are authorized to act for it. To say that the corporation is so far ‘present’ there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms ‘present’ or ‘presence’ are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process.” (citations omitted)).

195. Query whether it makes a difference what the employee is doing. The easiest case for nexus is where the employee is selling or soliciting sales, that is, taking money out of a state, on behalf of an out-of-state vendor. A state tax commissioner would clearly seek to make the vendor collect use taxes and no case has held that such an employee would not constitute nexus. But suppose the employee is buying inventory from manufacturers in the state, and is thus injecting money into the local economy. A state tax commissioner will be hesitant about treating this situation as creating nexus, for fear of driving purchasers to more nexus-friendly states. A tax commissioner may be similarly lenient with respect to an out-of-state company engaging independent contractors, such as lawyers and accountants. A tax commissioner taking the position that the use of a local law firm constitutes nexus is unlikely to remain commissioner for very long. Consequently, there are few cases—and no Supreme Court cases—on point. On the other hand, the holding in *National Geographic* suggests that real property constitutes nexus regardless of what it is used for. *Nat’l Geographic Soc’y*, 430 U.S. at 554. The parallel treatment of employees would mean that employees would constitute nexus regardless of what they are used for.

196. *Quill*, 504 U.S. at 307.

197. *Scripto, Inc. v. Carson*, 362 U.S. 207, 209, 212–13 (1960).

connection.<sup>198</sup> Critics have latched onto this language to conclude that solicitation is a necessary condition for nexus.<sup>199</sup> Nothing in *Scripto*, however, held that the activities at issue were the *only* activities that could establish nexus. The statement in *Scripto* regarding solicitation is nothing more than an illustration of a sufficient condition for nexus, not a necessary one.<sup>200</sup> Further, in subsequent cases, the Court held that individuals did not necessarily need to engage in solicitation, but could engage in other activities to establish physical presence within the taxing state, thereby rejecting a crabbed reading of *Scripto*.<sup>201</sup>

*Quill's* description of *Scripto* as “[t]he furthest extension”<sup>202</sup> of the law was a neutral descriptive statement. It means what it says—that *Scripto* extended what constituted sufficient nexus, beyond where it stood in previous cases before the Court. No basis exists for the position some commentators have taken that the Court, in making that statement, was “intimating that courts in the intervening [thirty-six] years have moved the other way.”<sup>203</sup>

That interpretation is inconsistent with *Quill's* eliminating the physical presence requirement under the Due Process Clause. That is, *Quill* extends the law substantially further than *Scripto* by holding that *no* physical presence is needed to provide nexus under the Due Process Clause. In other words, if *Scripto* is a due process case, as these commentators maintain, how could *Quill* be read as intimating that courts in the intervening years have moved away from *Scripto*, when *Quill* itself reversed this so-called “trend” by totally eliminating the physical presence requirement as a precondition to satisfying due process? Nor is the Court seriously suggesting that nine independent contractors would not be enough to constitute nexus, but that ten would be.

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198. *Quill*, 504 U.S. at 306.

199. See, e.g., George S. Isaacson & Martin I. Eisenstein, *MTC Nexus Bulletin 95-1 Goes Beyond Existing Law*, 10 ST. TAX NOTES 1168, 1169 (1996); see also Houghton & Lindholm, *supra* note 189, at 975.

200. *Scripto*, 362 U.S. at 211–12.

201. See, e.g., *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 233 (1987); *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560, 562–64 (1975); *Gen. Motors Corp. v. Washington*, 377 U.S. 436, 447 (1964).

202. *Quill*, 504 U.S. at 306.

203. Houghton & Lindholm, *supra* note 189, at 975. In fairness, they made that statement twenty years ago and may no longer subscribe to it. (It is unclear what thirty-six years refers to because only thirty-two years elapsed between *Scripto*, decided in 1960, and *Quill*, decided in 1992.)

Other categories, all resulting in a finding of nexus, include a general agent,<sup>204</sup> a sales representative,<sup>205</sup> or a jobber, broker, or independent contractor,<sup>206</sup> at least in circumstances where the in-state person would be understood as acting on behalf of the vendor. No reason exists to believe the Court will interpret these categories narrowly. The Court has never suggested that it was using terms such as “agent” or “representative” in a narrow, technical sense, or that such terms were to be defined under state law. If anything, the Court has indicated that labels and “fine distinction[s]” of nomenclature will have no “constitutional significance.”<sup>207</sup>

In addition, the Court has described quite broadly the activities of in-state persons who will constitute a physical presence for out-of-state vendors. For example, the Court has held that a corporation has a physical presence if the person acting on its behalf has performed activities significantly associated with the corporation’s ability to establish and maintain the in-state market,<sup>208</sup> or made it possible for the company to realize and continue “valuable contractual relations” with its customers.<sup>209</sup>

The Court’s broad view is consistent with its emphasis on substance rather than form in its Commerce Clause cases and on pragmatism

204. *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 64, 67–68 (1939). Besides the presence of two general agents in *Felt & Tarrant*, the company paid the rent of an office for each of them.

205. *Tyler Pipe*, 483 U.S. at 249–50.

206. *Scripto, Inc. v. Carson*, 362 U.S. 207, 209 (1960).

207. *Id.* at 211.

208. *Tyler Pipe*, 483 U.S. at 250 (finding that nexus existed through sales representatives who provided Tyler Pipe with virtually all their information regarding the Washington market, including: product performance; competing products; pricing, market conditions and trends; existing and upcoming construction products; customer financial liability; and other critical information of a local nature); see Isaacson & Eisenstein, *supra* note 199, at 1169 (dismissing *Tyler Pipe*’s “ability to maintain a market” language as “the applicable test. As the Supreme Court made clear in *Quill*, what is required to create nexus is a ‘physical presence’ and that requires a ‘small sales force, plant, or office’”). Isaacson and Eisenstein convert a *sufficient* condition of nexus into a *necessary* one. The language they quote out of context simply provides a brief summary of some of the relevant precedent. It cannot be fairly read as the Court’s rejection ahead of time of all the possible fact patterns that might constitute nexus. If the reading suggested by Isaacson and Eisenstein were correct—that what is required for nexus is limited to a small sales force, plant, or office—then a mine, a television tower, a server farm, and who knows what else—would not constitute nexus, an absurd view. Perhaps Isaacson and Eisenstein have changed their views since 1996 when they wrote their article.

209. *Standard Pressed Steel Co. v. Dep’t of Revenue*, 419 U.S. 560, 561–62 (1975).

rather than formalism, as clearly expressed in *Complete Auto*.<sup>210</sup> The Court's willingness to treat employees, agents, independent contractors, and representatives as constituting physical presence under appropriate conditions is an example of its pragmatic philosophy of focusing on economic reality and practical effects and not on labels.

The Court's emphasis on substance over form was the key to its holding in *Complete Auto*, but predates that case. In 1960, for example, the *Scripto* Court expressly recognized that the artificial distinction between "regular employees of [Scripto] devoting full time to its service" and independent contractors is "a fine distinction . . . without constitutional significance."<sup>211</sup> The Court was also sensitive to the tax avoidance opportunities that would arise if it were to draw such a distinction, noting that "[t]o permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance."<sup>212</sup> This suggests that the Court will not interpret its prior cases on physical presence in a narrow or wooden manner, but rather that it will acknowledge that legal relationships often will not fall into traditional employer-employee categories, especially true in a world where outsourcing is becoming increasingly common.

Furthermore, the Court has demonstrated an appreciation of, and sensitivity to, the tax avoidance opportunities that can arise from drawing fine distinctions in contractual arrangements. For example, the *Scripto* Court would be unlikely to tolerate a different nexus result if a corporation eliminates an in-house department and then outsources that previous function to independent contractors, some of whom may have been its former employees.<sup>213</sup> In other words, firing employees and rehiring them as independent contractors is unlikely to break the nexus connection.

#### V. REVISITING *QUILL*: THOUGHTS FROM THE SYMPOSIUM

How different the history of the Court's jurisprudence might have been had *Miller Brothers* held for Maryland, at least with respect to the deliveries made to its residents. The "cash-and-carry sales" proved to be a small tail that wagged a big dog in the hands of a hostile Justice like Justice Jackson. Even without those sales, Justice Jackson's hostility to Maryland's arguments, as illustrated by his hyperbolic and

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210. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281–89 (1977)

211. *Scripto*, 362 U.S. at 211.

212. *Id.*

213. *Id.*

erroneous statements about the nature of the use tax, and his mischaracterization of the deliveries by Miller Brothers, doomed Maryland's case. Professor Cox was able to use *Miller Brothers* to influence the *Bellas Hess* majority over a stinging dissent that reads as if it could have been written today. And what a shaky precedent *Bellas Hess* was for the *Quill* Court, which not only was concerned with the issue of retroactivity on which certiorari was specifically not granted, but also had to invent a new theory of nexus to implement its political agenda. The Court candidly admits its ambivalence about its decision and essentially punts the issue to Congress, which has yet to act. Meanwhile, the digital age makes the opinion seem quaint and atavistic. No wonder Justice Kennedy's frustration spilled over into his concurrence in *DMA*.

#### A. *The Main Show*

The authors of the remaining articles in this issue would overrule *Quill* but they also offer strategies that would accommodate the case.<sup>214</sup> The next article, *Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach* by Lila Disque and Helen Hecht,<sup>215</sup> is a gem. It is historical and descriptive, as well as prescriptive with a tad of whimsy;<sup>216</sup> and best of all, it proposes a strategy that might be a real game changer. Building on Colorado's success in *Direct Marketing Ass'n v. Brohl*,<sup>217</sup> the authors propose that states adopt statutes that would allow them to obtain information on *taxable sales* from remote sellers and send notices to instate consumers allowing them to pay, contest, or have the tax withheld by their employer.

A variation of this would be for the employers to make an estimated withholding through payroll deductions based on the preceding year's data that would be sent to instate purchasers; the current data, when available, would then be used by the purchasers to "true up" the withholding and either claim refunds or pay additional tax at the end of the year when they file their returns.

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214. Portions of this section stem from the Author's previous work. POMP, *supra* note 2, at 6-6 to 6-7.

215. Lila Disque & Helen Hecht, *Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163 (2016).

216. Who knew (or remembered), for example, that the first on-line purchase occurred in 1994 and was for a pepperoni pizza with mushrooms and extra cheese from Pizza Hut. See Kate Taylor, *Pizza Hut Offers Big Discount to Celebrate 20th Anniversary of the World's First Online Purchase*, ENTREPRENEUR (Jan. 3, 2014), <https://www.entrepreneur.com/article/230620>.

217. 814 F.3d 1129 (10th Cir. 2016).

The authors' proposal would require the vendor to determine the taxable status of the purchases. The statute challenged in *Direct Marketing Ass'n* requires only determining the amount of purchases by dollar amounts, without regard to their taxable status.<sup>218</sup> Requiring the remote vendor to educate itself about a state's sales tax sufficient to make a decision about taxability could lay the foundation for subsequent litigation.<sup>219</sup>

The authors also describe the kind of table used by California, Maine, and other states, which estimates by adjusted gross income the amount of use tax owed on out-of-state purchases.<sup>220</sup> These states allow taxpayers to report use tax based either on their actual purchases and records or by using these tables.<sup>221</sup> According to the authors, compliance rates under this system are uneven. Lookup tables are worthy of further refinement<sup>222</sup> and may be an alternative to the authors' proposed Colorado approach.

The *American University Law Review* also had panels at its Symposium dealing with the value added tax (VAT). When the *Law Review* put the Symposium together, it could not have anticipated that

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218. See COLO. REV. STAT. §§ 39-21-112(3.5)(c)(I), 39-21-112(3.5)(d)(I)–(II) (West 2016) (requiring retailers that fail to collect sales tax to (1) inform purchasers “that sales or use tax is due on certain purchases”; (2) send the purchasers an annual reminder to pay sales or use tax accompanied by the “dates of purchases, the amounts of each purchase, and the category of the purchase”; and (3) send the Colorado Department of Revenue an “annual statement for each purchaser . . . showing the total amount paid for Colorado purchases”); *Direct Mktg. Ass'n*, 814 F.3d at 1134.

219. Disque and Hecht's proposal might be easiest to implement in states that are members of the Streamlined Sales Tax Project. These states are Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *State Info*, STREAMLINE SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=state-info> (last visited May 17, 2016). Notably, Colorado is not a member. *Id.*

220. Disque & Hecht, *supra* note 215, at 1179–180; see *Use Tax Collection on Income Tax Returns—Reporting and Collections*, JUX LAW FIRM, <http://thompsonhall.com/use-tax-collection-on-income-tax-returns-reporting-and-collections> (last visited May 17, 2016); see also POMP, *supra* note 2, at 6-42 n.183 (noting that Maine uses the same table for calculating sales taxes). None of the states using this approach adjust the estimated use tax by the age of the taxpayer, which would seem to be a relevant factor because the elderly are less likely to buy over the Internet compared with younger groups. See *Use Tax Collection on Income Tax Returns—Reporting and Collections*, *supra* (indicating that the lookup table method for establishing use tax liability relies solely on adjusted gross income).

221. *Make Online Purchases? You May Owe Use Tax*, CAL. STATE BD. OF EQUALIZATION, [https://www.boe.ca.gov/info/use\\_tax\\_table.html](https://www.boe.ca.gov/info/use_tax_table.html) (last visited May 17, 2016).

222. See *supra* note 220 and accompanying text.

Senator Ted Cruz would actually propose a VAT as part of his plan to reform the federal tax system.<sup>223</sup> Once again, subsequent events vindicated the *Law Review's* good judgment.

The VAT, or what is essentially its equivalent—a national sales or consumption tax collected in stages—is “the most studied tax system that has never been seriously considered by Congress.”<sup>224</sup> Taxes on consumption have played an important role in the fiscal history of the United States. Before the Civil War, customs duties were a major source of federal revenue.<sup>225</sup> The first movement for a general federal sales tax in the United States arose during the Civil War and reflected dissatisfaction with the new wartime income tax and the wide range of excise taxes (national sales taxes limited to specific commodities) that had also been imposed.<sup>226</sup> Congress rejected a proposed one percent sales tax in 1862.<sup>227</sup>

From the Civil War through World War I, customs duties and excise taxes were equally important.<sup>228</sup> A second movement for a national sales tax occurred immediately after World War I, motivated again by opposition to high wartime income taxes.<sup>229</sup> A bill providing for a federal sales tax was defeated in 1918.<sup>230</sup> In 1921, a proposal for a personal consumption tax was rejected, as were proposals for various forms of sales taxes.<sup>231</sup> Proposals for a federal sales tax were renewed, again unsuccessfully, during the Great Depression, with

223. Len Burman, *Ted Cruz's Business Flat Tax Is a VAT*, FORBES (Jan. 15, 2016, 5:13 PM), <http://www.forbes.com/sites/beltway/2016/01/15/ted-cruzs-business-flat-tax-is-a-vat/#6eee4cd9580f> (explaining the characteristics that categorize Ted Cruz's tax proposal as a VAT).

224. Alan Schenk, *Prior U.S. Flirtations with VAT*, in THE VAT READER 52, 52 (2011), [http://www.taxanalysts.com/www/freefiles.nsf/Files/SCHENK-4.pdf/\\$file/SCHENK-4.pdf](http://www.taxanalysts.com/www/freefiles.nsf/Files/SCHENK-4.pdf/$file/SCHENK-4.pdf).

225. See *The Civil War*, TAXANALYSTS, <http://www.taxhistory.org/www/website.nsf/web/THM1861?OpenDocument> (last visited May 17, 2016) (explaining that “[c]ustoms duties amounted to about \$75 million annually”); see also POMP, *supra* note 2, at 6-6.

226. POMP, *supra* note 2, at 6-6; Schenk, *supra* note 224, at 53.

227. POMP, *supra* note 2, at 6-6.

228. *History of the US Tax System*, ALMANAC OF POL'Y ISSUES, [http://www.policyalmanac.org/economic/archive/tax\\_history.shtml](http://www.policyalmanac.org/economic/archive/tax_history.shtml) (last visited May 17, 2016) (indicating that “[f]rom 1868 to 1913, almost [ninety] percent of all revenue was collected from the remaining excises”); see also POMP, *supra* note 2, at 6-6.

229. See *History of Federal General Sales Tax Proposals*, TAXANALYSTS, [http://www.taxhistory.org/civilization/Documents/Sales/HST29005/hst29005\(a\).htm](http://www.taxhistory.org/civilization/Documents/Sales/HST29005/hst29005(a).htm) (last visited May 17, 2016).

230. See *id.* (noting that Senator Borah presented the bill “before the Senate Finance Committee on the Revenue Act of 1918”).

231. See *id.* (recounting that Senator Reed Smoot proposed several sales tax schemes to the Senate Finance Committee, all of which were rejected).

famed newspaper publisher William Randolph Hearst as the most outspoken proponent.<sup>232</sup> From 1933 to 1936, excise taxes again became a major source of federal revenue, but their relative importance later declined with increasing reliance upon the income tax.<sup>233</sup>

To finance World War II, the government considered, but ultimately rejected, a sales tax and personal expenditure tax; instead, the war was financed by income, excess-profits, and excise taxes.<sup>234</sup> Excise taxes were similarly used to finance the Korean War.<sup>235</sup> The last vestiges of these wartime excises were generally eliminated in 1965, although the United States still imposes a wide variety of excise taxes on certain goods and services, such as alcoholic beverages, tobacco products, motor fuels, heavy tires and trucks, coal, pistols and revolvers, sports and fishing equipment, domestic air transportation, and breweries.<sup>236</sup>

President Nixon considered a VAT in part to help finance education.<sup>237</sup> Mayors and governors, who realized that a VAT was just a different means of administering a retail sales tax—which they coveted as their own, unshared revenue source—vehemently opposed President Nixon’s proposal.<sup>238</sup>

In 1971, the American Bar Association charged a special group to study the VAT, as did the American Institute of Certified Public Accountants.<sup>239</sup> Proposals for a federal VAT were considered by the

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232. See BEN PROCTER, WILLIAM RANDOLPH HEARST: THE LATER YEARS, 1911–1951, at 96 (2007) (noting that, to “spur Congress to action,” Hearst offered members of Congress an all-expenses-paid trip to Canada to witness its national sales tax in action); see also POMP, *supra* note 2, at 6-6.

233. See Joseph J. Thorndike, *Four Things that Everyone Should Know About New Deal Taxation*, TAXANALYSTS (Nov. 20, 2008), <http://www.taxhistory.org/thp/readings.nsf/ArtWeb/1AEBAA68B74ABB918525750C0046BCAF?OpenDocument> (stating that excise taxes constituted “anywhere from a third to half of federal revenue throughout the 1930s”); see also *History of the US Tax System*, *supra* note 228 (recounting that the personal income tax drastically increased prior and during World War II).

234. See THE TAX FOUNDATION, FEDERAL EXCISE TAXES 17–18 (1956), <http://taxfoundation.org/sites/taxfoundation.org/files/docs/pn40-1.pdf> (providing specific examples of excise taxes implemented to fund World War II).

235. *Id.* at 18; see also POMP, *supra* note 2, at 6-6.

236. See *Excise Tax*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/excise-tax> (last visited May 17, 2016) (defining excise tax); *Tax and Fee Rates*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, [https://www.ttb.gov/tax\\_audit/atftaxes.shtml](https://www.ttb.gov/tax_audit/atftaxes.shtml) (last visited May 17, 2016) (publishing tax rates for various forms of alcohol, tobacco products, and firearms); see also POMP, *supra* note 2, at 6-6.

237. Schenk, *supra* note 224, at 53.

238. See *id.* (noting the prevailing opposition to President Nixon’s VAT proposal).

239. *Id.* at 54.

Treasury in the early 1970's and formed a major part of the Treasury's famous 1984 tax reform study.<sup>240</sup> But the Advisory Commission on Intergovernmental Relations essentially killed interest in a VAT when it concluded that "a massive new [f]ederal program designed specifically to bring about property tax relief is neither necessary nor desirable."<sup>241</sup>

In 1995 and 1996, proposals for variations of a consumption tax, sales tax, or VAT figured prominently in the inevitable political jockeying preceding the presidential election, but none was ever adopted.<sup>242</sup> None of these earlier sweeping proposals generated any depth of support in the 2000, 2004, or 2008 presidential campaigns. In his first term beginning in 2008, President Obama indicated interest in a VAT to deal with the country's large deficits, but he never made it a priority.<sup>243</sup>

One of the lessons that politicians seem to have drawn from the lukewarm reception the VAT has received is to avoid calling it that, which brings us back to Senator Cruz. He has proposed a "Business Flat Tax," but the cognoscenti recognize it as tax-inclusive subtraction-method VAT.<sup>244</sup>

To understand what that means, we are all in good hands. The iconic Professor Walter Hellerstein has contributed *Taxing Remote Sales in the Digital Age: A Global Perspective* to this Issue.<sup>245</sup> Anything by Professor Hellerstein is worth reading, and this Article is no exception. This is as good a primer on the VAT as anyone can read: perceptive, subtle, and insightful.

240. KATHRYN JAMES, *THE RISE OF THE VALUE-ADDED TAX* 345 (2015) (indicating that, although President Nixon tasked the Treasury with evaluating the VAT proposal, the Treasury conducted its own separate and private study); 3 OFFICE OF THE SEC'Y, DEP'T OF THE TREASURY, *TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH* (1984) (dedicating the entire volume to addressing a VAT).

241. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *THE VALUE-ADDED TAX AND ALTERNATIVE SOURCES OF FEDERAL REVENUE* iii (1973), <http://www.library.unt.edu/gpo/acir/Reports/information/m-78.pdf>.

242. POMP, *supra* note 2, at 6-7; John K. McNulty, *Flat Tax, Consumption Tax, Consumption-Type Income Tax Proposals in the United States: A Tax Policy Discussion of Fundamental Tax Reform*, 88 CALIF. L. REV. 2095, 2111 & n.52, 2117-18 (2000).

243. POMP, *supra* note 2, at 6-7; *Obama Leaves Value-Added Tax on Table*, CBS NEWS (Apr. 22, 2010, 2:06 AM), <http://www.cbsnews.com/news/obama-leaves-value-added-tax-on-table>.

244. Alan Cole, *Ted Cruz's "Business Flat Tax": A Primer*, TAX FOUND. (Oct. 29, 2015), <http://taxfoundation.org/blog/ted-cruz-s-business-flat-tax-primer>; see *Burman*, *supra* note 223.

245. Walter Hellerstein, *Taxing Remote Sales in the Digital Age: A Global Perspective*, 65 AM. U. L. REV. 1195 (2016).

Applying a global perspective based on his long experience with the VAT, Professor Hellerstein draws three fundamental lessons: (1) remote sales should be taxed under a consumption tax like the states' retail sales taxes or a VAT, (2) remote sales should be taxed using a destination principle under a retail sales tax or a VAT, and (3) remote sales can be taxed by adopting simplified registration and compliance regimes for nonresident vendors and by adopting a feature familiar to VATs but uncommon in a retail sales tax: the reverse charge mechanism.

Turning to the theme of this Symposium, Professor Hellerstein calls for, with his quintessential wordsmithing, "jettison[ing] the archaic rule of *Quill*, . . . a self-inflicted wound that can be easily repaired with congressional surgery."<sup>246</sup>

A VAT may have advantages over a retail sales tax, but as Professor Richard Ainsworth makes clear, preventing fraud is not one of them. He has consistently been ahead of the curve in raising warnings about how technology can be (and is) manipulated to commit fraud, in both the VAT and the retail sales tax.

Professor Ainsworth was the first American scholar to raise the rallying cry against the use of zappers or suppressors, long before the public, including most state tax administrators, had ever heard of them. These are computer programs, installed using a thumb drive on point of sale electronic cash registers, which erase and permanently delete a percentage of gross receipts.<sup>247</sup> The program can be customized to the particular needs of a user.<sup>248</sup> Professor Ainsworth has been a one-person bandwagon, cajoling and coaxing the states to take defensive measures, and some, but not enough, have heard his warning.

His Symposium Article, *Sales Suppression—The International Dimension*,<sup>249</sup> provides chilling accounts of criminal prosecutions in Canada, where zappers have been used before they apparently spread to the United States, especially to the West Coast. Similar prosecutions are now following in the United States and are colorfully detailed by Professor Ainsworth, who could easily have

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246. *Id.* at 1237.

247. Richard Ainsworth, *California Zappers: A Proposal for California's Commission on the 21st Century Economy*, (B.U. Sch. of Law, Working Paper No. 09-01, 2009).

248. *R v. InfoSpec Sys., Inc.*, 2013 B.C.C.A. 333, paras. 6–7 (British Columbia Ct. App. 2013) (explaining that the Profitek Zapper manufactured by InfoSpec can be easily customized).

249. Richard Ainsworth, *Sales Suppression: The International Dimension*, 65 AM. U. L. REV. 1241 (2016).

another career writing crime thrillers. Professor Ainsworth criticizes the FBI's focus on the end user of the zappers and contrasts that approach with the Washington Attorney General, who focused on the salesmen, installers, and service providers of zipper technology in Washington State.

After regaling the reader with prosecutions in Canada and the United States, Professor Ainsworth distills the lessons that should be learned. Taxing jurisdictions need to have technology that reconstructs the digital transaction records that have been suppressed, or need to have technology that encrypts and saves digital records at the time of their creation. Professor Ainsworth's preference is for "real-time secure transmission of encrypted transactional data to a central location where artificial intelligence (AI) conducts a high quality risk analysis."<sup>250</sup> Technology exists that would accomplish this and could be mandated by statute.

Through his writings and speeches, Professor Ainsworth has prompted states to adopt legislation to deal with zappers, but attacks some of these statutes as allowing for warrantless searches and seizures. He also criticizes statutes that make the salesmen and manufacturers of suppression devices liable for the lost taxes as estimated by a tax department. Because the zappers erase transactional data, reconstructing tax losses is difficult. He is concerned that salesmen and manufacturers cannot challenge a tax department's estimates because that process is cloaked in taxpayer confidentiality.

This Issue of the *Law Review* provides a treasure trove of analysis and support for overturning *Quill*. Even if that were not to happen, the authors propose strategies for: coping with *Quill*, minimizing its precedential value, and narrowing its holding; improving the administration of the sales tax; using *DMA* as a springboard for collecting the use tax; and perhaps even adopting a VAT. The *Law Review* is to be complimented for assembling a broad and comprehensive resource for judges, lawyers, and policymakers.

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250. *Id.* at 1266–267(citations omitted).