

Direct Marketing Association and the Overture to Overturn Quill

Despite Justice Kennedy's invitation in his concurring opinion in DMA, bringing a direct challenge to Quill will be, in a word, challenging.

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On March 3, 2015, the Supreme Court released its opinion in *Direct Mktg. Ass'n v. Brohl*, 135 S Ct 1124, 83 USLW 4133, 15 CDOS 2168, 2015 Daily Journal DAR 2473, 25 FLW Fed S 105, 2015 WL 867663 (hereafter, *DMA*). Few U.S. Supreme Court cases, let alone those decided unanimously (as *DMA* was), become known for a concurring opinion, written by a single justice, on an issue not presented to the Court.¹ But the *DMA* case may be an exception. While the case presented the Supreme Court with only a procedural question, Justice Kennedy filed a solo concurrence suggesting it was time to overturn a long-standing precedent, critical to the collection of state sales and use taxes, left over from the days of catalogue order forms and wall-mounted telephones. In fact, his concurring opinion went even further, inviting the states to bring a case challenging that precedent.²

Other than reminding us that even the Justices themselves do not hold the Court's precedents to be "sacrosanct,"³ what, if anything, should we make of such an overture?

The Issue That Wasn't

DMA involves an unusual notice and information reporting statute, passed in 2010 by Colorado, which requires any out-of-state seller that doesn't collect sales and use tax on sales made into the state to provide notices to purchasers and report information about those sales to the Colorado Department of Revenue.⁴ Colorado enacted the requirements for a reason: under the Supreme Court's precedent, it could not make these out-of-state sellers actually collect and remit the taxes.

In 1992, the Court in *Quill Corp. v. North Dakota*⁵ upheld its 1967 ruling in *Bellas Hess*,⁶ that a state may not require a seller to collect sales and use tax if the seller lacks physical presence in the state. The facts in the two cases were very similar. But, during the 25 years between *Bellas Hess* and *Quill*, the Court's thinking on due process adjudicatory jurisdiction,⁷ and the ability of states to impose tax on interstate commerce generally,⁸ had shifted. Consequently, by 1990, many state tax experts believed that *Bellas Hess*, though never explicitly overruled, was no longer good law. (Considering that the Court seldom signals when it is ready to depart from past precedent, Justice Kennedy's concurrence in *DMA* notwithstanding, that belief was understandable.)

At the time of the *Quill* litigation, North Dakota's tax imposition statute defined a retailer as, "every person who engages in regular or systematic solicitation of a consumer market in th[e] state."⁹ But for years after *Bellas Hess*, North Dakota (as well as other states with similarly broad statutes) had not enforced a tax collection duty where the seller lacked physical presence. *Quill Corp.*, a mail-order purveyor of office supplies with significant sales into the state, fell into the statutory definition, although its contact with North Dakota was limited to sales into the state by common carrier and advertisements sent by U.S. mail. North Dakota brought suit seeking a declaratory judgment that it could impose a collection duty on *Quill*, which the state's supreme court granted.¹⁰

Not only was the result in *Quill* unexpected by many-but the rationale supporting that result was also a surprise.¹¹ The Court amended *Bellas Hess*, but did not overturn it. To conform the decision to its more modern jurisprudence, the Court held that *Quill*'s systematic and purposeful direction of sales into the state met any minimum contacts nexus requirement under the Due Process Clause.¹² But the Court further held that the Commerce Clause was different, and that its substantial nexus standard required more. The Court therefore upheld the physical presence rule of *Bellas Hess* under the dormant commerce clause doctrine and under *stare decisis*.¹³ Since then, states have not been able to require so-called "remote" sellers to collect sales and use taxes from sales to in-state purchasers.

The impact of this limitation has grown with the increasing popularity of online shopping. States must rely on their residents to report purchases and remit the required use taxes. This has proven less than satisfactory, to put it mildly, for both states and traditional sellers who must compete with online merchants.¹⁴ Like most states, Colorado requires its residents by statute to remit use tax on their purchases from out-of-state sellers. And, like most states, Colorado has had trouble enforcing the requirement. Consequently, remote sellers have a competitive advantage over locally based businesses. By enacting notice and reporting requirements, Colorado intended to improve collection of use tax.

Remote sellers objected to Colorado's approach. The Direct Marketing Association (the DMA) filed suit on behalf of its members in the federal district court claiming the notice and information reporting requirements violate the dormant commerce clause-arguing both discrimination and undue burden.¹⁵ The DMA is "a trade association of retailers, many of which sell to Colorado residents but do not collect taxes."¹⁶ Its members have a vested interest in maintaining the status quo. The district court granted summary judgment to the DMA on both grounds of discrimination and undue burden (citing *Quill* for the latter), and permanently enjoined enforcement of the notice and reporting requirements.¹⁷ Colorado appealed to the U.S. Court of Appeals for the Tenth Circuit, and many expected that, whatever the circuit court's ruling, the case would eventually reach the U.S. Supreme Court.

As it did. But when it did, it was not on the merits, but on the question of whether the Tenth Circuit had properly dismissed the case under the federal Tax Injunction Act ("TIA"), which deprives the federal district courts of jurisdiction over certain state tax matters. As to this jurisdictional issue, the Supreme Court reversed the Tenth Circuit's ruling, and held that the TIA's bar on suits seeking to enjoin "assessment, levy or collection" did not apply to the kind of notice and information reporting requirements at issue in the case.¹⁸

It may be that part of the reason why Justice Kennedy's concurring opinion has gotten all the attention, rather than the majority's, is because the holding on the TIA has less import than it might appear. While the TIA is one consideration when determining whether a federal district court can adjudicate at least some state tax matters, it is not the last word. The doctrine of comity is.¹⁹ But comity was not an issue before the Court.²⁰

Of course, the merits of the DMA's challenge were also not before the Court. But that did not stop Justice Kennedy from considering them.

The Opinion That Isn't

Justice Kennedy agreed in full with the majority opinion in *DMA*. But then he made what he called a "separate statement concerning what may well be a serious, continuing injustice faced by Colorado and many other States."²¹ In this statement, he encouraged the states to bring a challenge to *Quill*. Kennedy's concurrence was short but well-researched. He noted how electronic commerce had evolved since *Quill* was decided in 1992, and referred to it as "[a] case questionable even when decided."²²

"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 State 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."²³

Kennedy offered a wealth of statistics further supporting his position, and concluded that "[g]iven these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. . . . The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."²⁴ However, he conceded that the present case was not it: "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."²⁵

Kennedy's opinion did not come from nowhere. Colorado's brief, as well as all of the *amicus* briefs filed in support of Colorado, pointed out the negative aspects of *Bellas Hess* and *Quill*. The Multistate Tax Commission underscored the fundamental unfairness of *Quill*: that retailers who engage in the exact same underlying transaction will have different tax collection burdens, depending on their location.²⁶ A brief from interested states²⁷ emphasized the prevalence of Internet sales and the taxes lost on them, as did the brief of the National Governors' Association.²⁸

A fourth brief looked to the possible ramifications that a decision on the TIA might have on the eventual resolution of the issues on the merits, in whatever court those merits might be resolved. (After the Tenth Circuit dismissed the case, the DMA filed suit in state district court.) That brief, filed by certain interested law professors, expressed concern that if the Supreme Court determined that Colorado's reporting requirement

was "integral to Colorado's 'tax collection' for purposes of the TIA," the lower courts on remand would be encouraged to apply *Quill*'s physical presence test to the question of whether the information reporting requirements could be imposed on remote sellers.²⁹ (An issue this article returns to below.) These briefs no doubt laid the groundwork for Kennedy's concurrence.

The Challenges That Are

Despite Justice Kennedy's overture, bringing a direct challenge to *Quill* will be, in a word, challenging. There are four main obstacles—the law itself, time, the rule of four and the rule of five, and Congress.

Obstacle number 1: The law

Test cases are hard. The challenger must, in some sense, contravene the law, in order to change the law. A strong test case will be structured to encapsulate one targeted issue that can be conclusively resolved. One article on the use of test cases says, "the group or individual spearheading the challenge must—among other things—find the right plaintiff(s), determine the strongest legal arguments, and pick the proper judicial forum to create circumstances in which the issue will be teed up for decision."³⁰

A case often held up as a model test case, *Brown v. Board of Education*, was a standout for both strategy and litigation.³¹ The strategy required not just a single challenge but a series of cases intended to weaken the "separate but equal" rule of *Plessy v. Ferguson*, culminating in a direct attack on the law via carefully selected plaintiffs. The litigators then painstakingly positioned the *Brown* case for a definitive decision.

As for *Quill*, one thing can be said—the Supreme Court is apparently in no hurry to expand the physical presence requirement to other taxes. So, we must assume that the target is a narrow one. The issue for any direct challenge to *Quill* is whether, for collection of sales and use tax, the state can require a seller with no physical presence within its borders to collect tax.³² (Technically, the issue is whether a *mail-order* seller, the specific type of seller in both *Quill* and *Bellas Hess*, must have some kind of physical presence in the state, although there would likely be problems drawing the issue this narrowly.³³) Because it is such a narrow target, it is easy to imagine cases where the facts might not provide a direct hit, and instead would simply be held to satisfy *Quill*, or be distinguished in some way.

Take, for example, the question of software belonging to the seller and located in the state. Assuming the software is valuable, its presence is significant, and it contributes to making a market for the seller's

products in the state, then the presence of that software might simply be held to satisfy *Quill's* requirement, at least arguably.³⁴

In short, unequivocal acceptance of Justice Kennedy's invitation would appear to require a state to bring a case, or at least take a position so that others can bring a case, that cannot be decided without overruling (or affirming) *Quill*-a case where the seller has no presence in the state that might be deemed to satisfy the physical presence requirement. Of course, this is another reason why test cases are hard. The challenger might lose. (Or, assuming the challenger has lost in the courts below, the Court might simply decline cert.)

Obstacle number 2: Time

Overturning Supreme Court precedent takes time because no case gets to the Court without at least some amount of lower court litigation.³⁵ Time is not much of an obstacle if nothing changes. But things always change. In the time it takes for a case to get to the Court, lots of things can change including the status of related aspects of law, the positions of the litigants, and the makeup of the Court. It is sufficient, perhaps, to note that Justice Kennedy is 78 years old.

Obstacle number 3: The rule of four and the rule of five

It takes four justices voting to accept a petition for certiorari for a case to come before the Supreme Court. And, of course, it takes five justices to definitively overrule past precedent. When it comes to accepting cert, the four justices don't have to agree as to *why* they might each want to take the case. But unless the Court believes the status quo is entirely untenable, there would need to be a sense that a majority wants to, at least, move in the same general direction, or taking the case would be a waste of time.

As noted above, the Court has had opportunities over the years to expand *Quill's* rule to other taxes, and perhaps a few opportunities to narrow it. But it has declined them all. As for narrowing it, in 2013 the Supreme Court denied certiorari in two cases that posed a potential challenge to *Quill*. These cases involved a New York statutory presumption that certain kinds of affiliates in the state were soliciting sales for online sellers so as to create nexus between those sellers and the state. The challenges were essentially facial or per se challenges which, at least arguably, raised a question as to the scope of *Quill's* rule and whether the affiliates' activity in the state was mere advertising.³⁶

Given the Court's reluctance over the years to say more on the matter, can we assume that there are four votes to accept a challenge to *Quill*, or more importantly, five votes to overturn? The fact that no other

Justices joined Justice Kennedy's concurrence in *DMA* does not give us the answer to this question. The concurrence is clearly unusual in its purpose. It does not express any separate rationale for the judgment, nor for that matter does it relate at all to the issue of law decided by the Court. So if we want some sense of the "leaning" of the Court, we must look elsewhere.

Quill, it was noted, was unusual in that, for the first time, the Court separately addressed the Due Process Clause and Commerce Clause principles underlying tax nexus. Prior to *Quill*, most assumed that tax nexus derived from due process principles—so that tax nexus was closely related, if not identical, to personal jurisdiction.³⁷ What do we know about the Court's current thinking about personal jurisdiction?

While the lower courts grapple with personal jurisdiction questions daily, the Supreme Court has taken up very few cases in recent decades. Before 2011, the last major case was *Asahi* in 1987, where the Court was unable to produce a majority opinion.³⁸ But, as it happens, the Court did hear a personal jurisdiction case recently, and while the Court was still split, it was Justice Kennedy who wrote the plurality opinion.

The case was *J. McIntyre Mach., Ltd. v. Nicastro*,³⁹ which held that a New Jersey court could not exercise jurisdiction over a foreign manufacturer in a product-liability suit where only a single product of the manufacturer was shown to be in the state. Justice Kennedy's opinion posited that the British manufacturer did not intend to "submit to the power of a sovereign."⁴⁰ This view of Justice Kennedy, that the inquiry is whether the defendant's activities "manifest an intention" to submit to the power of the sovereign was joined by the Chief Justice and Justices Scalia and Thomas.⁴¹ This plurality opinion argues that, as an animating theory of personal jurisdiction, fairness alone, or foreseeability, would not provide sufficient due process protections.⁴²

The case was a plurality because Justices Breyer and Alito, while agreeing with the judgment, could not join the other four as to the reasoning. Nor were these two inclined to suggest a different rationale. It was their concurrence which, interestingly, cited the "many recent changes in commerce and communication, many of which are not anticipated by our precedents" foreshadowing Justice Kennedy's concurrence in *DMA*.

Justice Breyer's concurrence goes on to question the rule posited by Justice Kennedy's opinion: "But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case."⁴³

So what does *J. McIntyre* tell us? One, there are four justices who believe that, as a standard for adjudicatory jurisdiction, the question is whether the seller "manifests an intention" to avail itself of the markets in the state.⁴⁴ Second, this jurisdictional standard, based in sovereignty, is likely higher than a standard based in fairness or foreseeability, but would certainly be lower than one based on physical presence.⁴⁵ Third, three of the justices who joined the plurality opinion are also those who might be expected to have lingering doubts about *Quill's* severing of Due Process and Commerce Clause nexus rationales.⁴⁶ And fourth, one way to reunite the two severed jurisdictional standards in *Quill* would be to raise (slightly) the due process standard, and lower (or eliminate) the Commerce Clause (physical presence) standard.

All that said, it should also be noted that Justice Kennedy recognized in *J. McIntyre* that: "A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts."⁴⁷

Obstacle number 4: Congress

The final "obstacle" is one that the Supreme Court itself foreshadowed in *Quill*, "the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve."⁴⁸ Congress could, therefore, choose to act before any challenge to *Quill* ever reaches the Supreme Court.

Of all proposed legislation to allow states to impose a sales tax collection duty on remote sellers, the Marketplace Fairness Act (hereafter, MFA), introduced in the 113th Congress (S.336, S.743, H.R.684) and reintroduced recently in the 114th Congress in the Senate (S.698), has made the greatest progress. Under the MFA, states might require sellers to collect tax only after they have simplified their sales tax systems-either by adopting the Streamlined Sales and Use Tax Agreement (SSUTA) or by meeting specific simplification mandates listed in the bill. States that choose this second option must:

- notify retailers in advance of any rate changes within the state,
- designate a single state organization to handle sales tax registrations, filings, and audits,
- establish a uniform sales tax base for use throughout the state,
- use destination sourcing to determine sales tax rates for out-of-state purchases,
- provide free software for managing sales tax compliance, and
- hold retailers harmless for any errors that result from relying on state-provided systems and data.

In the prior Congress, on May 6, 2013, the MFA passed 69-27 in the Senate and proceeded to the House for consideration. There, the bill was referred to the House Judiciary Committee. Rep. Robert Goodlatte, (R-Va.), chairman of the committee, later released seven basic principles for Internet sales tax legislation. The House Judiciary Committee also held a hearing on alternatives for the taxation of online sales on May 12, 2014, after which Rep. Goodlatte circulated the draft for an origin-based sourcing bill. Rep. Jason Chaffetz, (R-Utah), a Judiciary Committee member, also circulated draft legislation for a new version of the MFA. Ultimately, the MFA died in the House. Prospects for any further action in this Congress are uncertain.

The Case That Is

Meanwhile, the *DMA* case is back at the Tenth Circuit, before the same panel of judges. On March 31, 2015, the Direct Marketing Association filed a Motion for Limited, Supplemental Briefing on Remand. Colorado countered by requesting a full briefing schedule on the merits of the Commerce Clause claims. The state waived any reliance on the comity doctrine, and requested that the Court address the merits without remanding the case for reinstatement of the original judgment.

The Tenth Circuit issued an order on April 13, 2015, granting the motion to file supplemental briefs and directing the parties to provide full briefing on the Commerce Clause claims and whether the doctrine of comity would apply, as well as any other issues the parties consider relevant. It is unclear whether the Tenth Circuit intends to make a ruling on the merits, however. Its insistence that the parties brief the issue of comity, despite Colorado's waiver, indicates the court may be inclined to allow the state court, where the case is also pending, to resolve it.⁴⁹

Whether the circuit court reaches the merits or leaves it to the Colorado courts, one remaining question at this point is what bearing the Supreme Court's decision in *DMA*, and Justice Kennedy's concurrence, may have on any holding. As previously noted, at least one amicus brief assumed the Court might find that the TIA applied because the case was essentially a "tax case," and therefore asked the Court to make clear that the resolution of the underlying issues should not be controlled by *Quill*. The majority declined to respond to this request. Its reasoning on whether or not the case was barred by the TIA relied entirely on interpretation of the specific statutory language, and not on whether the case was a tax case. Justice Kennedy's concurrence might have some bearing on the resolution of the merits, assuming it signals a shared sentiment that *Quill* need only be applied to situations that fall squarely within its facts.

Even if *DMA* returns to the Supreme Court, the Court need not affirm or overturn *Quill* to address the issues presented. So the case might miss the narrow target posed by *Quill* altogether, and end up being decided on other grounds. It would not be the first time such a thing has befallen a would-be test case. The case originally intended to target the laws challenged in *Plessy v. Ferguson*, for example, ended up being decided in state court on grounds of interstate commerce.⁵⁰

And the Case That May Be

Whatever happens, whenever it happens, two things are certain. First, the realities of modern commerce will continue to evolve, so that states will continually need to reassess the applicability of *Quill* to remote sellers whose business models look less and less like traditional mail-order sellers. And second, to quote Justice Kennedy: "There is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently 'substantial nexus' to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet."⁵¹

¹ Dissenting opinions are another matter. Some of those are destined to become more influential than the majority's own opinion. Consider, for example, Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

² *DMA* at 1134 (Kennedy, J., concurring).

³ *Patterson v. McLean Credit Union*, 491 U.S. 164, 105 L. Ed. 2d 132 (1989) (Kennedy, J., writing for the majority on the question of when *stare decisis* may not be controlling).

⁴ Colo. Rev. Stat. § 39-21-112(3.5)(c)(I).

⁵ 504 U.S. 298, 119 L. Ed. 2d 91 (1992).

⁶ *National Bellas Hess v. Dep't of Revenue*, 386 U.S. 753, 18 L. Ed. 2d 505 (1967).

⁷ See *Burger King v. Rudzewicz*, 471 U.S. 462, 85 L. Ed. 2d 528 (1985) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 94 L. Ed. 2d 92 (1987).

⁸ See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L. Ed. 2d 326 (1977) and *National Geographic Soc'y v. Board of Equal.*, 430 U.S. 551, 51 L. Ed. 2d 631 (1977).

⁹ *Quill* at 302-03.

¹⁰ *State By & Through Heitkamp v. Quill Corp.*, 470 N.W.2d 203 (N.D. 1991).

¹¹ See Hellerstein & Hellerstein, *State Taxation* (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through August 2014) (online version accessed on Checkpoint (www.checkpoint.riag.com) (April 11, 2015)) ¶ 19.02: "[T]he 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."

¹² *Quill* at 298.

¹³ *Quill* at 317-318.

¹⁴ See *California's missing online money*, L.A. Times, April 13, 2009, available at <http://articles.latimes.com/2009/apr/13/opinion/ed-tax13>.

¹⁵ *DMA* at 1128.

¹⁶ *DMA* at 1125.

¹⁷ *Direct Mktg. Ass'n v. Huber*, No. 10-CV-01546-REB-CBS, 2012 WL 1079175, at *10 (D. Colo. Mar. 30, 2012). See also Helen Hecht, "Information Reporting for Out-of-State Vendors Just as Unconstitutional as Tax Collection Responsibility," 22 JMT 6 (August 2012).

¹⁸ *DMA* at 1131.

¹⁹ See *Levin v. Commerce Energy*, 560 U.S. 413, 176 L. Ed. 2d 1131 (2010) (the doctrine of comity is more

embrasive than the TIA). However, the doctrine of comity is not really the last word, either. The Eleventh Amendment--or rather--sovereign immunity is. See *Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636 (1999); but see also *Ex parte Young*, 209 U.S. 123 (1908).

²⁰ The Supreme Court noted: "We take no position on whether a suit such as this one might nevertheless be barred under the "comity doctrine," which "counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction." *DMA* at 1133.

²¹ *Id.* at 1134.

²² *Id.* at 1135.

²³ *Id.* at 1134-35 (internal citations omitted).

²⁴ *Id.* at 1135.

²⁵ *Id.* Some may question why, if the Court is really ready to revisit *Quill*, it did not grant certiorari in the *Amazon* and *Overstock* cases out of New York in the last term. This issue is discussed further below. Suffice it to say here that there are reasons, other than not being ready to revisit *Quill*, that might have prevented the Court from doing so. But it does raise the possibility that Kennedy is, in fact, speaking only for himself.

²⁶ *Brief Amicus Curiae of Multistate Tax Commission in Support of Respondent*, 2014 WL 5464088 (U.S.), 12 (U.S., 2014).

²⁷ *Brief for the States of Illinois, Alaska, Arizona, Hawaii, Idaho, Indiana, Iowa, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming and the District of Columbia as Amici Curiae in Support of Respondent*, 2014 WL 5464089 (U.S.), (U.S., 2014).

²⁸ *Brief of the National Governors Association, National Conference of State Legislatures, Council of State Governments, National League of Cities, United States Conference of Mayors, National Association of*

Counties, International City/County Management Association, and Government Finance Officers Association as Amici Curiae in Support of Respondent, 2014 WL 5422180 (U.S.), 7 (U.S., 2014).

²⁹ *Brief of Interested Law Professors as Amici Curiae Supporting Respondent*, 2014 WL 6845685 (U.S.), 5 (U.S., 2014).

³⁰ Stephen Wermiel, *SCOTUS for law students (sponsored by Bloomberg Law): Test cases*, SCOTUSblog (Dec. 20, 2012, 11:48 AM), <http://www.scotusblog.com/2012/12/scotus-for-law-students-sponsored-by-bloomberg-law-test-cases/> (last visited Apr. 6, 2015).

³¹ *Id.*

³² There are, of course, cases which have held that a representative in the state may create nexus. See *Scripto v. Carson*, 362 U.S. 207, 4 L. Ed. 2d 660 (1960) and *Tyler Pipe v. Wash. Dept. of Rev.*, 483 U.S. 232, 97 L. Ed. 2d 199 (1987). For purposes of this discussion, we assume that such representatives are a kind of physical presence.

³³ One important problem is the anti-discrimination provision of the federal Internet Tax Freedom Act, 47 U.S.C. § 151 note, which would prevent sales of a product over the Internet from being taxed while mail-order sales of that same product are not. See *Performance Mktg. Ass'n, Inc. v. Hamer*, 998 N.E.2d 54 (Ill. 2013).

³⁴ For one thing, *Quill* notes that the test in *Bellas Hess* was formulated by the Court as a safe-harbor for taxpayers who do business in a state solely through the U.S. mail and common carrier. *Quill* at 315. If that is how *Quill's* rule were to function, this example and others might not provide a direct challenge.

³⁵ Under 28 U.S.C. § 1251, the Court has original and exclusive jurisdiction only over controversies between two states.

³⁶ *Overstock.com, Inc. v. New York State Dep't of Taxation & Fin.*, 987 N.E.2d 621, cert. denied, 134 S. Ct. 682 (2013) and *Amazon.com, LLC v. New York State Dep't of Taxation & Fin.*, 987 N.E.2d 621, cert. denied

134 S. Ct. 682 (2013).

³⁷ *Quill* at 308. See also Helen Hecht, "Is There a Due Process Cloud on the Sales and Use Tax Horizon?" 24 JMT 5 (August 2014).

³⁸ *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 94 L. Ed. 2d 92 (1987).

³⁹ 131 S. Ct. 2780 (2011).

⁴⁰ *Id.* at 2787.

⁴¹ Interestingly, it was also Justices Scalia, Thomas and Kennedy who concurred in *Quill*'s Commerce Clause judgment only on the grounds of *stare decisis*. Chief Justice Roberts, of course, was not on the Court at that time.

⁴² *J. McIntyre* at 2789.

⁴³ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (Breyer, J., concurring).

⁴⁴ The plurality opinion notes that there may be different considerations when it comes to jurisdiction to regulate.

⁴⁵ As the plurality opinion in *J. McIntyre* makes clear.

⁴⁶ Again, Justices Kennedy, Scalia and Thomas, who joined with the Chief Justice in the plurality in *J. McIntyre*, also concurred in *Quill* only in the judgment upholding *Bellas Hess* on *stare decisis* grounds, rather than under the majority's theory of Commerce Clause nexus.

⁴⁷ *J. McIntyre* at 2790.

⁴⁸ *Quill* at 318.

⁴⁹ *Direct Marketing Assoc. v. Colorado Dep't of Rev.*, Case No. 13CV34855 (Denver Dist. Ct. Feb. 18, 2014).

⁵⁰ Stephen Wermiel, *SCOTUS for law students (sponsored by Bloomberg Law): Test cases*, SCOTUSblog (Dec. 20, 2012, 11:48 AM), <http://www.scotusblog.com/2012/12/scotus-for-law-students-sponsored-by-bloomberg-law-test-cases/> (*last visited* Apr. 6, 2015).

⁵¹ *DMA* at 1135.