

# Wayfair and the Myth of Substantial Nexus

By Richard D. Pomp

Richard D. Pomp examines *Wayfair* and *Quill* with an eye toward what he refers to as “the myth of substantial nexus.”

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## Overview

Despite four dissents in *Wayfair*,<sup>1</sup> all nine Justices agreed on one thing—that *Quill*<sup>2</sup> was “wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.”<sup>3</sup> But the one error in *Quill* that the Court did not address was the most serious jurisprudentially: the deification of *Complete Auto*’s<sup>4</sup> empty phrase: substantial nexus.

*Quill* was a political decision.<sup>5</sup> The latching on to *Complete Auto*’s throwaway phrase, “substantial nexus” allowed the *Quill* Court to further its political agenda, which was to clear the way for Congress to establish rules for requiring remote vendors to collect the market state’s use tax, while protecting their reliance interests on *Bellas Hess*.<sup>6</sup> The latter immunized remote vendors from a market state requiring them to collect its use tax if they had no physical presence there. *Quill* cleverly accomplished these two goals by breathing meaning into *Complete Auto*’s cavalier use of “substantial nexus.” That term allowed *Quill* to bifurcate the concept of nexus so that it had a different meaning under the Due Process Clause from its meaning under the Commerce Clause.

This unprecedented bifurcation was critical to carrying out the Court’s agenda.<sup>7</sup> Previously, opponents of Congress’s stripping remote vendors of their *Bellas Hess* protection argued that Congress could not legislate on matters of due process. If *Bellas Hess* held as a matter of due process that remote vendors could not be forced to collect the market state’s use tax without a physical presence, then there was nothing Congress could do about that. The Constitution does not delegate to Congress the power to strip anyone of their due process protections. As long as *Bellas Hess* was good law, Congress was powerless to overturn that decision.

By holding that *Quill* (the remote vendor) had due process connections with North Dakota, despite the lack of a physical presence, the *Quill* Court overturned that part of *Bellas Hess* and cleared the way for Congress to act. Simultaneously, the *Quill* Court held that *Complete Auto* imposed a *substantial* nexus requirement

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under the Commerce Clause, which required the very physical presence the Court had just eliminated as a precondition under the Due Process Clause.

This jurisprudential legerdemain implemented the Court's political agenda. 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>8</sup> The *Quill* Court described the "different constitutional concerns and policies" animating the Due Process and the Commerce Clauses<sup>9</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, supported, according to the Court, a different meaning for nexus from that under the Due Process Clause. Unfortunately, the Court cited no cases to support its approach—for a good reason. Only one prior case had used "substantial nexus," and it was not a tax case.<sup>10</sup>

*But the one error in Quill that the Court did not address was the most serious jurisprudentially: the deification of Complete Auto's empty phrase: substantial nexus.*

When combined with all the other defects in *Quill*, which *Wayfair* nicely catalogs on its way to overturning the case, the impression is that the *Quill* Court expected that Congress would quickly embrace its new power and intervene with federal legislation, sparing the country the need to live with the consequences of a dishonest opinion.

## Complete Auto and the Non-Issue of Nexus

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. Given how the *Quill* Court imbues meaning into substantial nexus, it is astonishing that the issue of nexus was not even before the *Complete Auto* Court. An argument about nexus would have been a fool's errand. The taxpayer was transporting automobiles within Mississippi—a stark example of physical presence and nexus. The case is crystal clear that the taxpayer assumed it had *sufficient* nexus with Mississippi,<sup>11</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 a Commerce Clause issue.

Finally, the 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"; more often, it referred to "sufficient nexus" or "sufficiently connected." Additionally, *Complete Auto* cited cases referring to nexus in its more traditional due process context as a "necessary connection," or as "sufficient nexus." *Complete Auto* was the first time the Court ever used the term "substantial nexus" in a tax case. 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. If it were otherwise, we might have expected a drum roll as the Court trotted out this new Commerce Clause nexus standard.

As if further evidence is even needed, in *National Geographic*,<sup>12</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 State—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>13</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 Process Clause and the Commerce Clause, belying *Quill*'s bifurcation.

## Quill's Selective Use of Substantial Nexus

The *Quill* Court reached down into *Complete Auto* and picked up the one and only reference in that case to substantial nexus. That solved the *Quill* Court's dilemma and provided the fig leaf to keep the case from turning into a transparently unprincipled, blatantly political decision. The other references in *Complete Auto*, such as "sufficient nexus," "sufficient connection," or "necessary connection" sounded too much like due process concepts to serve the Court's agenda.

Justice White saw through *Quill's* chicanery. He concurred with the majority's decision to overrule *Bellas Hess's* requirement of physical presence for nexus under the Due Process Clause.<sup>14</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," which nine justices in *Wayfair* happily provided 26 years later. White scolded the *Quill* 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>15</sup> Unprecedented though it might be, this bifurcation of nexus allowed the Court to preserve the *Bellas Hess* safe haven, while removing any perceived barrier to Congressional intervention.

## Wayfair and a Missed Opportunity to Correct Quill's Improper Reliance on Substantial Nexus

The *Wayfair* Court could have added the erroneous reading of *Complete Auto's* substantial nexus to its litany of reasons for overruling *Quill*. Of course, neither party was asking the Court to do so. But if the *Wayfair* Court was going to try to bring order to the problem of remote vendors and the collection of the use tax, cleaning up the nexus standard would have been a useful step.

Instead, *Wayfair* muddies the nexus standard. Citing *Polar Tankers*,<sup>16</sup> the Court described substantial nexus as "such a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction."<sup>17</sup> *Polar Tankers*, a case

interpreting the Tonnage Clause of the Constitution had an ironic similarity with *Complete Auto*. Neither case had anything to do with nexus.

*Polar Tankers* has played no dispositive role in any state or local tax case and is infrequently cited, nor was it cited by any of the parties in *Wayfair*, including the 40 or so amici. Even *Polar Tankers*, a 2009 case, made no mention of *Complete Auto*.

Perhaps *Wayfair* raised it *sua sponte* to deal with the assertions made at oral argument by South Dakota that one sale would be enough to constitute nexus.<sup>18</sup> One sale might be unacceptable regardless of whether the nexus standard is something less than substantial. As Justice Scalia reminded us, the law cares not for trifles.<sup>19</sup> The difference between "substantial" privilege and just plain old privilege suggests that *Wayfair* might have been better off simply disavowing *Quill's* reliance on *Complete Auto's* casual and non-purposeful use of substantial nexus. Instead, it has left the door open to potential litigation over when a privilege might be substantial enough for nexus. About the only thing we now know is that this substantial privilege was satisfied "based on both the economic and virtual contacts" *Wayfair* had with South Dakota and that the defendants'—"large, national companies that undoubtedly maintain an extensive virtual presence" satisfy the standard.<sup>20</sup>

A disavowment of substantial nexus could have returned the concept of nexus back to its roots in the Due Process Clause. *Wayfair* perhaps hinted at this when it stated that the "reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes."<sup>21</sup> This analytical purity would not be a panacea given the lack of any coherent due process doctrine,<sup>22</sup> but it would at least avoid running two concepts of nexus on parallel tracks.

### ENDNOTES

<sup>1</sup> *South Dakota v. Wayfair, Inc. et al.*, 201 L. Ed. 2d 403 (2018).

<sup>2</sup> *Quill Corporation v. North Dakota*, 504 US 298, 112 Sct 1904 (1992).

<sup>3</sup> *Wayfair*, at 412.

<sup>4</sup> *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 97 Sct 1076 (1977).

<sup>5</sup> See Richard D. Pomp, Revisiting *Miller Brothers, Bellas Hess*, and *Quill*, 65 Am. L. Rev. 1115, 1141-1154 (2016) (Symposium Issue).

<sup>6</sup> *National Bellas Hess v. Department of Revenue*, 386 US 753, 87 Sct 1389 (1967). *Bellas Hess* came to be interpreted as holding that a remote

vendor without a physical presence in the market state did not have to collect that state's use tax. *Quill* attributed the growth of the mail order industry to the protection provided by *Bellas Hess*. "Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." *Quill*, at 315. What *Quill* did not explicitly mention, was that that advantage was based on the customer failing to report voluntarily the use tax, which was owed, whether the remote vendor collected it

or not. *Wayfair* made that point rather graphically. *Wayfair*, at 425.

I have argued elsewhere that the dramatic growth of the mail-order industry might have been attributed to the rise of the national credit cards, the 800-telephone call, and UPS and Federal Express. Richard D. Pomp, Revisiting *Miller Brothers, Bellas Hess*, and *Quill*, 65 Am. L. Rev. 1115, 1142 n. 151 (2016) (Symposium Issue). My treatment of *Bellas Hess* is found at 1133-1141.

<sup>7</sup> Justice White called out the majority on its bifurcation of nexus. See notes 14-15 *infra* and accompanying text.

<sup>8</sup> *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 274, 289, 97 Sct 1076 (1977). The only holding of *Complete Auto* was that Mississippi's tax on the privilege of doing business within the State did not violate the Commerce Clause. The result in *Complete Auto* was hardly unexpected and foreshadowed by numerous cases. These cases are summarized in *Complete Auto*. That case overruled *Spector Motor Service, Inc. v. O'Connor*, 340 US 602 (1951), holding that a state tax on the "privilege of doing business" was per se unconstitutional when it is applied to interstate commerce. Twenty-six years elapsed between *Spector* and *Complete Auto*, around the same elapsed time between *Bellas Hess* and *Quill*.

Because *Complete Auto* removed a major obstacle to state taxation of interstate commerce, it is not surprising that subsequent cases have transformed dicta in *Complete Auto* into the four prongs of Commerce Clause analysis in order to impose some constraints on the states. To satisfy the Commerce Clause, a tax must be applied to an activity with a substantial nexus with the taxing State, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the State.

<sup>9</sup> *Quill Corporation v. North Dakota*, 504 US 298, 312, 112 Sct 1904 (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").

<sup>10</sup> *J.L. Buckley v. F.R. Valeo*, Sct, 76-1 USTC ¶9189, 424 US 1, 96 Sct 612.

<sup>11</sup> *Complete Auto*, at 277-278.

<sup>12</sup> *National Geographic Soc. v. California Bd. of Equalization*, 430 US 551 (1977).

<sup>13</sup> *Id.* at 554 (emphasis added).

<sup>14</sup> *Quill*, 504 US 321-22 (White, J., concurring in part and dissenting in part). Interestingly, *Bellas Hess* never uses the term "physical presence."

<sup>15</sup> *Id.* at 325.

<sup>16</sup> *Polar Tankers, Inc. v. City of Valdez*, 557 US 1 (2009).

<sup>17</sup> *Id.* at 426. The *Polar Tankers* Court followed the language cited by *Wayfair* with references to *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 US 425, 437, 443, 100 Sct 1223 (1992), a case holding that Vermont could tax Mobil, which had gas stations in the State, on dividends it received from foreign subsidiaries; *Japan Line, Ltd. v. County of Los Angeles*, 441 US 434, 441-445, 99 Sct 1813 (1979), holding that California could levy a property tax on shipping containers located in the State and used in international commerce; and *Quill*.

<sup>18</sup> In response to Justice Sotomayor asking what the minimum number of sales would constitute

nexus, the South Dakota Attorney General stated: "The minimum would be one sale because, if you look at *Complete Auto*, that creates the nexus." *Complete Auto*, of course, said nothing about the number of sales that would create nexus.

<sup>19</sup> *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 US 214, 231, 112 Sct 2447 ("the venerable maxim de minimis non curat lex ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.") Justice Scalia was writing in the context of a statute, but the same policies should apply in interpreting nexus.

<sup>20</sup> *Wayfair*, at 426. The Court stated that [h]ere, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. *Id.* (emphasis added). Presumably the Court meant sufficient to satisfy the substantial nexus standard.

<sup>21</sup> *Wayfair*, at 411. The Court also recognized that "[w]hen considering whether a State may levy a tax, Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels." *Id.*

<sup>22</sup> See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 US 873 (2011).

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