

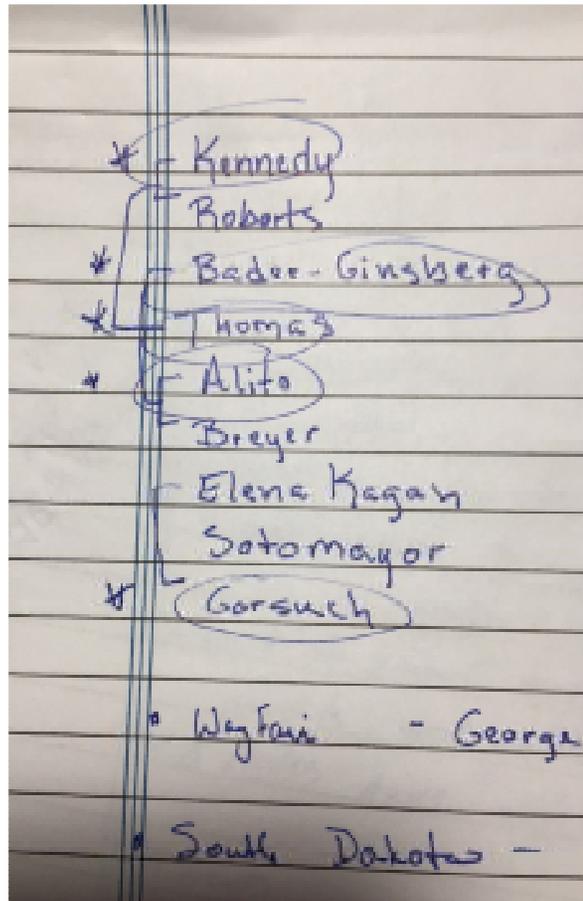
**Impact of  
South Dakota v. Wayfair**

**SEATA 2018**

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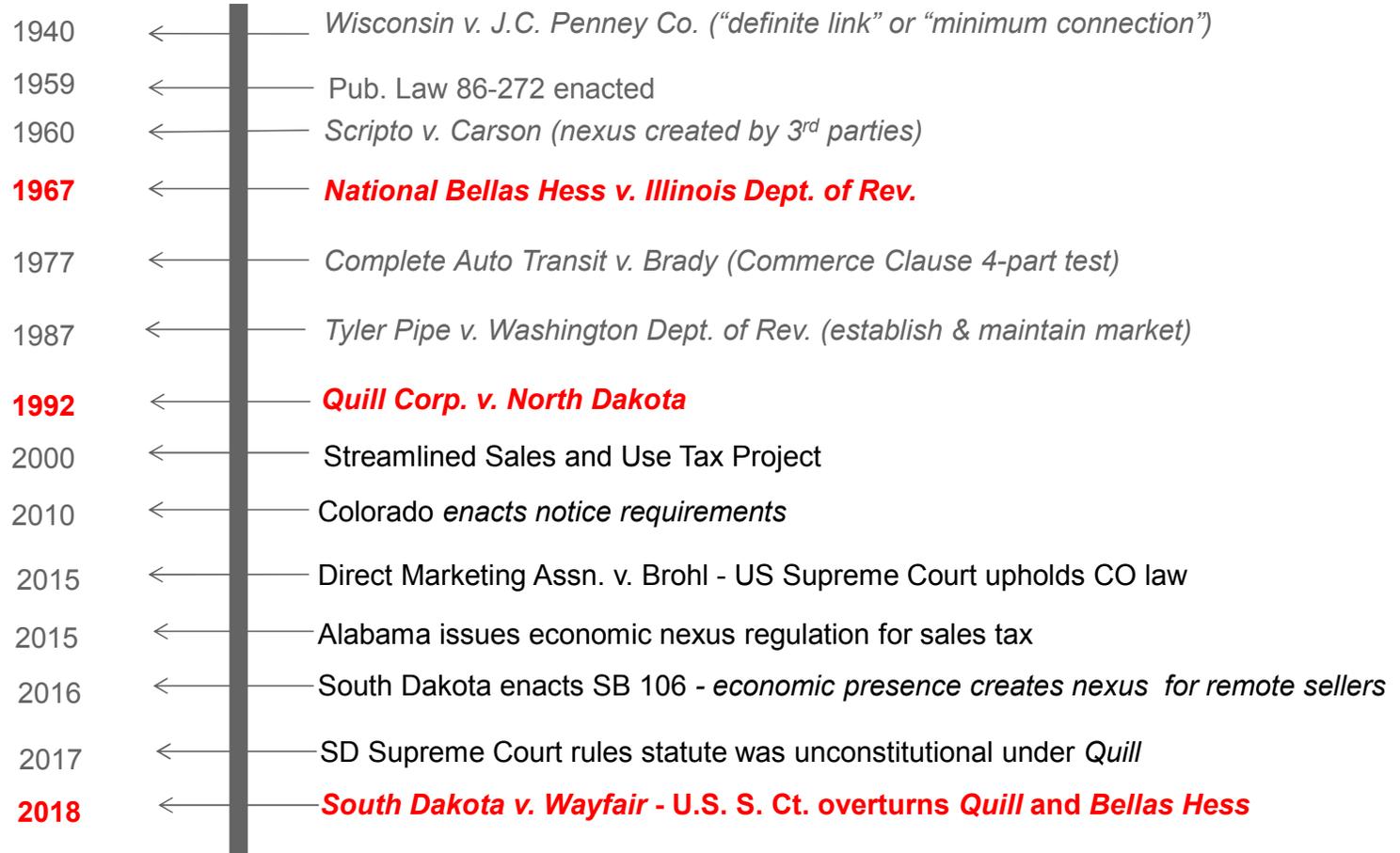
I was there!



I was there!

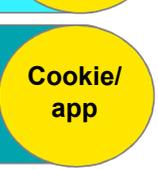
# Nexus milestones

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1940	←	<i>Wisconsin v. J.C. Penney Co. (“definite link” or “minimum connection”)</i>
1959	←	Pub. Law 86-272 enacted
1960	←	<i>Scripto v. Carson (nexus created by 3<sup>rd</sup> parties)</i>
<b>1967</b>	←	<b><i>National Bellas Hess v. Illinois Dept. of Rev.</i></b>
1977	←	<i>Complete Auto Transit v. Brady (Commerce Clause 4-part test)</i>
1987	←	<i>Tyler Pipe v. Washington Dept. of Rev. (establish &amp; maintain market)</i>
<b>1992</b>	←	<b><i>Quill Corp. v. North Dakota</i></b>
2000	←	Streamlined Sales and Use Tax Project
2010	←	<i>Colorado enacts notice requirements</i>
2015	←	<i>Direct Marketing Assn. v. Brohl - US Supreme Court upholds CO law</i>
2015	←	Alabama issues economic nexus regulation for sales tax
2016	←	South Dakota enacts SB 106 - <i>economic presence creates nexus for remote sellers</i>
2017	←	SD Supreme Court rules statute was unconstitutional under <i>Quill</i>
<b>2018</b>	←	<b><i>South Dakota v. Wayfair - U.S. S. Ct. overturns Quill and Bellas Hess</i></b>

# Current state nexus landscape (not including states with anti-*Bellas Hess* laws in place)

	<p>▶ Enacted: Arkansas, California, Connecticut, Georgia, <b>Idaho</b> (2018), Illinois, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Vermont, Washington</p>
	<p>▶ Enacted: Arkansas, California, Colorado, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Nevada, New York, Oklahoma, Puerto Rico, South Dakota, Utah, West Virginia, Wisconsin</p>
	<p>▶ Enacted: Alabama, <b>Connecticut</b>, <b>Georgia</b>, <b>Hawaii</b>, <b>Illinois</b>, Indiana, <b>Louisiana*</b>, Maine, Massachusetts, Mississippi, <b>New Jersey</b>, North Dakota*, Ohio, Rhode Island, South Dakota, Tennessee**, Vermont*, Washington, <b>Wisconsin***</b>, Wyoming</p>
	<p>▶ Enacted: Alabama, Colorado, Connecticut (state asserting), <b>Georgia</b>, Kentucky, Louisiana, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Washington</p>
	<p>▶ Enacted: <b>Alabama</b>, <b>Connecticut</b>, <b>Kentucky*</b>, <b>Iowa</b>, Massachusetts, Minnesota, <b>Oklahoma</b>, Pennsylvania, Rhode Island, Washington</p>
	<p>▶ Enacted: <b>Iowa</b>, Massachusetts, Ohio, Rhode Island</p>

 Enacted in 2018

\*Contingent effective date  
 \*\*Legislative action required  
 \*\*\*Rule will be promulgated

# Holding

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- ▶ *Quill* applies *Complete Auto* and imposes the physical presence requirement to prevent undue burdens on interstate commerce
- ▶ This physical presence rule, “both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause”
- ▶ The physical presence rule of *Quill* and *National Bellas Hess* is “unsound and incorrect” and “should be, and now are, overruled.”

## What is the standard now?

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- ▶ *Complete Auto* requires “substantial nexus” with taxing authority and the opinion concludes that substantial nexus is satisfied in this case
- ▶ While not identical, the nexus standards under the Due Process and Commerce Clauses have significant parallels
- ▶ *Quill* majority drew a sharp distinction between the respective standards, does the ruling in *Wayfair* cause that distinction to become less clear, if not meaningless?
- ▶ Does this raise the possibility that for sales and use tax collection purposes, the standard may now merely be “purposeful availment” or “minimum contacts” (i.e., Due Process standards only)?

## What is the standard now? (cont.)

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- ▶ Court found the protections in South Dakota's law (e.g., sales threshold, limits on retroactivity, Streamlined Sales Tax membership) include several features designed to prevent **discrimination against or undue burdens** on interstate commerce:
  - ▶ Provides a safe harbor or reasonable degree of protection for small business
  - ▶ Does not apply retroactively
  - ▶ South Dakota is a member of Streamlined Sales and Use Tax Agreement
- ▶ Opinion, pages 21 and 23

## Additional considerations

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- ▶ Other potential means of challenging state tax provisions:
  - ▶ *Pike v. Bruce Church, Inc.* 397 U.S. 137
  - ▶ Prohibition of double taxation
  - ▶ Discrimination against interstate commerce

## What will the states do?

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- ▶ States are likely to take immediate legislative and regulatory action adopting nexus standards aimed at remote retailers
- ▶ States with laws on their books can immediately begin requiring remote sellers to register and collect tax on sales to in-state customers
- ▶ Will states repeal or revise other laws focused on remote sellers (i.e., click-thru, reporting & notice)?
- ▶ How do the state nexus rules and marketplace statutes interrelate?
- ▶ Will states offer amnesty/voluntary disclosure programs for remote retailers?

# How will taxpayers keep up with evolving compliance?

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- ▶ Consider the differences in state tax schemes:
  - ▶ Taxable products
  - ▶ Thresholds
  - ▶ Exemptions
  - ▶ Rates
  - ▶ Sourcing
  - ▶ Audits
  
- ▶ Kennedy briefly addresses compliance through software systems and observes that while various state revenue schemes are complicated as to rates and taxable goods, without the physical presence rule, “those systems may well become available in a short period of time, either from private providers or from state taxing agencies themselves.”

## What questions are being asked?

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- ▶ The Wayfair decision may be impactful in addition to sales tax remittance
  - ▶ Application to city/county taxes
  - ▶ Financial reporting
  - ▶ Impact on other taxes

# How will states communicate?

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## ▶ **Transparency**

- ▶ Legislative action
- ▶ Administrative Interpretation
- ▶ Informal guidance

## ▶ **Ease of Administration**

- ▶ Clear audit guidelines
- ▶ Low risk of challenge

# Questions?

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