# Wayfair: Its Implications and Missed Opportunities

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## INTRODUCTION

This Article has its roots in a lone concurrence by Justice Kennedy in *Direct Marketing Ass'n v. Brohl*,[1] a concurrence having nothing to do with the merits of that case. Nonetheless, that concurrence went viral, leading to the most important sales tax case in over a quarter-century: South Dakota v. Wayfair, Inc.[2] Because of the cataclysmic impact of Kennedy's concurrence and its preview of the issues in this Article, it is worth quoting at length:

> Almost half a century ago, this Court determined that, under its Commerce Clause jurisprudence, States 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 State. Use taxes are still due, but under *Bellas Hess*[3] they must be collected from and paid by the customer, not the out-of-state seller.
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> 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.[4] This was despite the fact that under the more recent and refined test elaborated in *Complete Auto Transit, Inc. v. Brady*,[5] "contemporary Commerce

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1. 135 S. Ct. 1124 (2015). In *Direct Marketing*, the Supreme Court unanimously held that the Tax Injunction Act, 28 U.S.C. § 1341 (2012), did not bar the federal courts from hearing challenges to Colorado's statute requiring out-of-state retailers to notify their customers of their sales and use tax requirement, and to report tax-related information to their customers and to the State. The Court remanded the case, which the State later won, 814 F. 3d 1129 (10th Cir. 2016), and "express[ed] no view on the merits." *Id.* at 1134. Justice Kennedy, however, took the opportunity to write separately to critique *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), discussed at length *infra* Part II.A, and to invite a challenge to that case by the states. The fact that Kennedy's concurrence had nothing to do with the merits of the case may explain why no one joined him. Another explanation is that in addition to Kennedy, only Justices Scalia and Thomas were on the Court when *Quill* was decided, leaving six justices who might have had no familiarity with *Quill* and who might have felt uncomfortable joining the concurrence.
2. 138 S. Ct. 2080 (2018).
3. [Ed. Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967), discussed *infra* Part II.]
4. [Ed. Eight of the nine justices in *Quill* reaffirmed *Bellas Hess* on principles of stare decisis.]
5. [Ed. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), discussed *infra* Part II.]

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 State 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 States.

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. . .

. . .

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 States, 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 State 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

> States 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.
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> The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.[6]

## I. SOUTH DAKOTA V. WAYFAIR, INC.: OVERVIEW

### *A. The Majority*

In 2016, South Dakota accepted Justice Kennedy's invitation to challenge *Quill* and *Bellas Hess*. The State passed S. 106, "to provide for the collection of sales taxes[7] from certain remote sellers . . . and to declare an emergency."[8] It adopted a statute requiring out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the State."[9] The Act covers only sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State.[10] Significantly, the Act does not apply retroactively.[11]

In 2017, Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc. were merchants with no employees or real estate in South Dakota. Wayfair, Inc. had net revenues of over $4.7 billion. Overstock.com, Inc. had net revenues of over $1.7 billion.[12] Each of these companies shipped its goods directly to purchasers throughout the United States, including South Dakota. Each easily met the minimum sales or transactions requirement of the Act, but

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6. *Direct Marketing,* 814 F. 3d at 1134 (Kennedy, J. concurring) (internal citations omitted).
7. For a discussion of why a state should draft its statute to provide for the collection of use taxes rather than sales taxes, see *infra* Part VII.C.5.
8. *Wayfair*, 138 S. Ct. at 2088. "Seldom has a concurring opinion signed by a lone Justice prompted a state to officially declare an emergency." Student Comment, *Article I – Stare Decisis for Constitutional Default Rules – Dormant Commerce Clause* – South Dakota v. Wayfair, Inc., 132 HARV. L. REV. 277, 278 (2018). The emergency declaration was to give the law immediate effect and an expedited review. *Id.*
9. *Wayfair,* 138 S. Ct. at 2089.
10. *Id.* For a discussion of the use of thresholds, see *infra* Part VII.C.
11. *Id.; see infra* note 52.
12. *Id.* For some unexplained reason, the Court does not disclose Newegg's net revenues.

none collected South Dakota sales tax.[13]

Pursuant to the Act's provisions for expeditious judicial review,[14] South Dakota filed a declaratory judgment action in state court, seeking a declaration that the Act was valid and applicable to the three vendors. It also sought an injunction requiring the three internet vendors to register for licenses to collect and remit sales tax. The vendors moved for summary judgment, arguing that the Act was unconstitutional.[15]

South Dakota conceded that the Act could not survive under *Bellas Hess* and *Quill* but asserted the importance, indeed the necessity, of asking the Supreme Court to review those earlier decisions in light of current economic realities. The trial court granted summary judgment to the vendors.[16]

The South Dakota Supreme Court affirmed. "However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled [and] remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes."[17]

In an opinion authored by Justice Kennedy, unsurprisingly given that it was his concurrence in *Direct Marketing* that inspired the South Dakota statute, the Court reversed. Writing for a five person majority, Justice Kennedy overturned *Bellas Hess's*[18] and *Quill's* physical presence rule, finding that it was unsound and incorrect, "flawed on its own terms,"[19] "arbitrary, formalistic,"[20] "anachronistic,"[21] "unfair and unjust"[22] to the states and local retailers.[23] Physical presence was not a "necessary interpretation"[24] of substantial nexus, and was "the sort of arbitrary,

13. *Wayfair*, 138 S. Ct. at 2089.
14. *See* Student Comment, *supra* note 8.
15. *Wayfair*, 138 S. Ct. at 2089. The State successfully opposed the vendors' attempt to move the case to the federal courts. South Dakota v. Wayfair Inc, 229 F. Supp. 3d 1026 (D.S.D. 2017). *Compare supra* note 1.
16. *Id.*
17. State v. Wayfair Inc., 901 N. W. 2d 754, 761 (S.D. 2017).
18. Although *Bellas Hess* does not actually use the phrase "physical presence," it had come to be interpreted as imposing that requirement.
19. *Wayfair*, 138 S. Ct. at 2092.
20. *Id.*
21. *Id.* at 2086.
22. *Id.*
23. The Court noted that *Quill* "treats economically identical actors differently, and for arbitrary reasons." *Id.* at 2094.
24. *Id.* at 2092.

formalistic [rule] that the Court's modern commerce clause precedents disavow in favor of a sensitive, case-by-case analysis of purposes and effects."[25] It was a "poor proxy for the compliance costs faced by companies that do business in multiple States."[26] It creates rather than eliminates market distortions.[27] The rule had long been criticized[28] as providing out-of-state sellers an advantage that in each year becomes further removed from economic reality[29] and results in significant revenue losses to the States. The Court held that the rule was an incorrect interpretation of the Commerce Clause, both as first formulated and as applied today and overruled both *Quill* and *Bellas Hess*.[30]

In addition, the Court viewed the rule as conflicting with principles of state sovereignty. The "physical presence rule . . . is not just a technical legal problem—it is an extraordinary imposition by the judiciary on the States' authority to collect taxes and perform critical public functions."[31] It

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25. *Id.* at 2085 (internal citation omitted). The "'dramatic technological and social changes' of our 'increasingly interconnected economy' mean that buyers are 'closer to most major retailers' than ever before—'regardless of how close or far the nearest storefront. Between targeted advertising and instant access to most consumers via any internet-enabled device, 'a business may be present in a State in a meaningful way without' that presence 'being physical in the traditional sense of the term.' A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the state." *Id.* at 2095 (internal citations omitted).

26. *Id.* at 2093.

27. *Id.* at 2085. Local businesses are at a disadvantage because remote sellers can offer lower prices; while the consumer owes the use tax, which should neutralize the tax costs of shopping on-line and shopping locally, the use tax is typically not paid on internet purchases. *Id.* at 2088.

28. *See* RICHARD D. POMP, STATE AND LOCAL TAXATION 9-82-83 (9th ed., 2019) (collecting articles critical of *Quill*).

29. *Wayfair*, 138 S. Ct. at 2092.

> Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. In a footnote, *Quill* rejected the argument that 'title to "a few floppy diskettes" present in a State' was sufficient to constitute a 'substantial nexus' . . . [b]ut it is not clear why a single employee or a single warehouse should create a substantial nexus while 'physical' aspects of pervasive modern technology should not. For example, a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers. A website may leave cookies saved to the customers' hard drives, or customers may download the company's app onto their phones. Or a company may lease data storage that is permanently, or even occasionally, located in South Dakota.

*Id.* at 2095.

30. *Id.* at 2097.

31. *Id.* at 2095.

"intrudes on State's reasonable choices in enacting their tax systems."[32] "If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error."[33]

The majority refused to apply principles of stare decisis and affirm the physical presence rule on the basis of *Bellas Hess* and *Quill*.[34] True, *Quill* relied on stare decisis principles to protect the reliance interests of the remote vendors on *Bellas Hess*.[35] In *Wayfair*, however, the Court declared that these principles can no longer support the Court's prohibition of a valid exercise of the States' sovereign power. Principles of stare decisis are not immutable.[36] Because *Quill's* physical presence rule was no longer a clear or easily applicable standard, reliance arguments were misplaced.[37] "Attempts to apply the physical presence rule to online retail sales are proving unworkable. States are already confronting the complexities of defining physical presence in the Cyber Age."[38]

"Stare decisis accommodates only 'legitimate reliance interest[s].'"[39] "Quill has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and

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32. *Id.*
33. *Id.* at 2096. Calhoun and Kolarik raise the possibility that the Court may be "reevaluating the role of the judiciary in reviewing state tax laws and that it intends to give substantial deference to state tax regimes. It may also be that the Court is indirectly hinting to Congress that it expects congressional action in the field and intends to limit its forays into SALT." Jaye Calhoun & William J. Kolarik II, *Implications of the Supreme Court's Historic Decision in* Wayfair, 89 STATE TAX NOTES 125 (2018).
34. *Wayfair*, 138 S. Ct. at 2096.
35. Quill Corp. v. North Dakota, 504 U.S. 298, 317 (1992).
36. *Wayfair*, 138 S. Ct. at 2096.
37. *Id.* at 2098.
38. *Id.* at 2097.

> For example, Massachusetts proposed a regulation that would have defined physical presence to include making apps available to be downloaded by in-state residents and placing cookies on in-state residents' web browsers. Ohio recently adopted a similar standard. Some States have enacted so-called 'click through' nexus statutes, which define nexus to include out-of-state sellers that contract with in-state residents who refer customers for compensation. Others still, like Colorado, have imposed notice and reporting requirements on out-of-state retailers that fall just short of actually collecting and remitting the tax.

*Id.* at 2097-98 (internal citations omitted).
39. *Id.* at 2098 (alteration in original). Describing the remote vendors' reliance interests as "illegitimate" seems inconsistent with the Court's endorsement of the South Dakota statute applying only prospectively.

services to a State's consumers—something that has become easier and more prevalent as technology has advanced."[40] "[C]onstitutional right[s]" are not based "on the practical opportunities for tax avoidance."[41]

The majority's discussion of stare decisis responded to the dissent's citing *Quill*, which "emphasized that the decision to hew to the physical-presence rule on stare decisis grounds was 'made easier by the fact that 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.'"[42] Accordingly, the dissent argued that the Court need not overrule *Bella Hess* or *Quill*, even if they were wrongly decided.[43] The majority rejected this reasoning:

> If it becomes apparent that the United States Supreme Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error. While it can be conceded that Congress has the authority to change the physical presence rule, Congress cannot change the constitutional default rule. It is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of the Court's own creation. Courts have acted as the front line of review in this limited sphere; and hence it is important that their principles be accurate and logical, whether or not Congress can or will act in response.[44]

Refusing to leave a remedy to Congress, the Court had to decide what should replace the physical presence requirement. The Court turned to the first prong of the *Complete Auto* test, which simply asks whether the tax applies to an activity with a substantial nexus with the taxing State.[45] The Court held that the three remote vendors satisfied this requirement. "[H]ere, the nexus is clearly sufficient based on both the economic and virtual

40. *Id.* at 2094.
41. *Id.* at 2098.
42. *Id.* at 2102 (internal citations omitted).
43. *Id.* at 2101-05.
44. *Id.* at 2096-97.
45. Complete Auto Transit, Inc. v. Brady, 430 U. S. 274, 279 (1977). For an analysis of "substantial nexus." *See infra* Part II.

contacts respondents have with the State."[46] Because of the thresholds, the Act applies only to sellers who engage in a significant quantity of business in the State, and respondents were "large, national companies that undoubtedly maintain an extensive virtual presence."[47] "This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota."[48]

The holding of the Court is that the physical presence test is no longer required for a finding of nexus under the Commerce Clause. The Court did not hold that if the South Dakota thresholds were not satisfied, a remote vendor could not be required to collect the sales tax. The question will be whether based on the particular facts, the vendor availed itself of the substantial privilege of carrying on business in the state. Facts come in all different sizes and shapes and can be quirky or idiosyncratic. Satisfying a state's thresholds might trigger nexus if there were other safeguards (e.g., no retroactivity and membership in the Streamlined Sales Tax Agreement), but the converse is not automatically true. A pedestrian example would be if a vendor had a store in a state having sales that were less than the thresholds.[49] The South Dakota statute has no effect on the State's existing state law on physical presence, which remains sufficient, but not necessary after *Wayfair*, to establish nexus.

To be sure, the Court was concerned that without the physical presence rule, undue burdens might be imposed on some vendors. "[T]he daunting complexity and business development obstacles of nationwide sales tax collection"[50] "may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States."[51] But software was available that would help, and Congress could deal with the most egregious circumstances.

In addition to software, the Court looked favorably on three features of South Dakota law that would help protect smaller vendors: the thresholds, the lack of retroactivity,[52] and the State's adoption of the Streamlined Sales

46. *Wayfair*, 138 S. Ct. at 2099.
47. *Id.*
48. *Id.*
49. *See infra* notes 186, 198, and accompanying text.
50. *Wayfair*, 138 S. Ct. at 2098.
51. *Id.*
52. The Court cited the Brief for Law Professors et al. as Amici Curiae 7, n.5 for the proposition that

and Use Tax Agreement, which reduces compliance burdens.[53] The Court did not hold that the South Dakota statute was constitutional. Nor did it hold that a statute with similar features to South Dakota's would be constitutional as applied to a particular taxpayer. All it did was eliminate the physical presence requirement.

True, in dicta, the Court strongly suggested that the combination of the thresholds, lack of retroactivity, and membership in the Streamlined Sales Tax Agreement would pass constitutional muster.[54] The Court indicated, however, that any remaining claims regarding the Commerce Clause's application in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand, perhaps under *Pike* balancing.[55]

Nowhere does the Court focus specifically on any unfair competition between a remote vendor with sales below a threshold and a local store also having sales below that same threshold but one that has to collect a sales

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"retroactive liability risks a double tax burden in violation of the Court's apportionment jurisprudence because it would make both the buyer and the seller legally liable for collecting and remitting the tax on a transaction intended to be taxed only once." *Wayfair*, 138 S. Ct. at 2099; *see also infra* note 84; Paige Jones, *New York Could Pursue Retroactivity Post-*Wayfair*, Practitioner Says*, STATE TAX NOTES (Mar. 1, 2019), https://www.taxnotes.com/state-tax-today/nexus/new-york-could-pursue-retroactivity-post-wayfair-practitioner-says/2019/03/01/2963y?highlight=State%20Could%20Pursue%20Retroactivity%20Post-Wayfair. Six on-line retailers are suing Massachusetts over the tax department's enforcement of its remote sales tax regulations pre-*Wayfair*. Paige Jones, *Online Retailers Sue Massachusetts DOR Over Back Tax Payments*, STATE TAX NOTES (Dec. 31, 2018), https://www.taxnotes.com/state-tax-today/litigation-and-appeals/online-retailers-sue-massachusetts-dor-over-back-tax-payments/2018/12/31/28ql3?highlight=Online%20Retailers%20Sue%20DOR%20Over%20Back%20 Tax%20Payments.

53. *See infra* Part VII.B. The Agreement "standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability." *Id.* at 2100.

54. *Wayfair*, 138 S. Ct. at 2098.

55. *Id.* at 2100. *See infra* Part VIII. On remand the lower court would determine "whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act." *Id.* at 2099. Presumably, the Court meant invalidate the *application* of the Act to a particular situation. On Oct. 31, 2018, South Dakota Governor Daugaard announced that the State had entered into a settlement agreement and stipulation of dismissal in *Wayfair*. Press Release, Office of South Dakota, Oct. 31, 2018. "This final settlement agreement brings a conclusion to all remaining issues not addressed by the United States Supreme Court." *Id.* Under the terms of the settlement, Wayfair, Overstock, and Newegg started collecting the South Dakota sales tax beginning Jan. 1, 2019, conveniently after the holiday shopping season. All others started collecting on November 1, 2018. S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016).

tax.[56] Nowhere does the Court acknowledge that the greater the protection for the out-of-state vendors, the more unfair it is to the in-state competitors.

### *B. The Concurrence*

In a concurring opinion, Justice Thomas reprised his usual refrain that the Court's dormant commerce clause is wrong because it is not based on the Constitution and thus should be abandoned. Nonetheless, he conceded that *Bellas Hess* and *Quill* "can no longer be rationally justified."[57]

Justice Gorsuch also wrote a short concurrence,[58] closely watched to see if he would disclose his views on the dormant commerce clause. He did not. While noting that *Bellas Hess* and *Quill* were a mistake,[59] Justice Gorsuch described the dormant commerce clause as raising "questions for another day" regarding whether that doctrine "can be squared with the text of the Commerce Clause, justified by stare decisis, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause."[60]

### *C. The Dissent*

Chief Justice Roberts dissented, joined by Justices Breyer, Sotomayor, and Kagan.[61] Their position was simple. They "agree[d ]that *Bellas Hess* was wrongly decided for many of the reasons given by the Court,"[62] but argued that Congress is better suited for determining what to do.[63] "E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule.[64] Any alteration to those rules with the potential to disrupt the

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56. *See infra* note 198.
57. *Id.* at 2100 (Thomas, J., concurring). Justice Thomas also wished he had joined with Justice White's dissent in *Quill*. *Id.* Justice Gorsuch, who was not on the *Quill* court, also favorably cited White. *Id.* at 2100 (Gorsuch, J., concurring).
58. *Id.* at 2100-01.
59. *Id.*
60. *Id.* at 2100-01.
61. *Id.* at 2101 (Roberts, C.J., dissenting).
62. *Id*.
63. *Id.* at 2104.
64. I have argued elsewhere that the dramatic growth of the mail-order industry might have been

development of such a critical segment of the economy should be undertaken by Congress. The Court should not act on this important question of current economic policy, solely to expiate a mistake it made over 50 years ago."[65]

Unlike the majority, which found reliance on *Bellas Hess* and *Quill* to be "illegitimate,"[66] the dissent emphasized the principle of stare decisis. "Departing from the doctrine of stare decisis is an 'exceptional action' demanding 'special justification.'"[67] "The bar is even higher in fields in which Congress 'exercises primary authority' and can, if it wishes, override this Court's decisions with contrary legislation."[68] The competing interests at stake make the collection of taxes by remote vendors especially suited for Congress to balance and resolve:[69]

> Here, after investigation, Congress could reasonably decide that current trends might sufficiently expand tax revenues, obviating the need for an abrupt policy shift with potentially adverse consequences for e-commerce. Or Congress might decide that the benefits of allowing States to secure additional tax revenue outweigh any foreseeable harm to e-commerce. Or Congress might elect to accommodate these competing interests, by, for example, allowing States to tax Internet sales by remote retailers only if revenue from such sales exceeds some set amount per year. . . In any event, Congress can focus directly on current policy concerns rather than past legal mistakes. Congress can also provide a nuanced answer to the troubling question whether any change will have retroactive effect.[70]

The more liberal of the dissenters (Breyer, Sotomayor, and Kagan) might

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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).

65. *Wayfair*, 138 S. Ct. at 2101.
66. *Id.* at 2098.
67. *Id.* at 2101 (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).
68. *Id.* (quoting Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 2036 (2014)).
69. *Id.* at 2104.
70. *Id.* (internal citations omitted).

have had a political agenda in emphasizing the principle of stare decisis. They might fear that the newly constituted Court will erode its more liberal decisions on gay rights, abortion rights, school prayer, the death penalty, prisoners' rights, same sex marriage, and affirmative action, for which former Justice Kennedy was often the swing vote.[71] The erosion might come less from a frontal attack and outright reversal of these cases, but more from a series of inroads, narrowings, and restrictions.[72] To guard against this, the Court's liberals have to emphasize the principle of stare decisis.[73]

The rest of this Article will focus on the case, its implications, and the Court's missed opportunities. Part II argues that the term "substantial

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71. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016) (University of Texas' use of race as a factor in admissions decisions did not violate the Fourteenth Amendment's Equal Protection Clause); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (various state laws banning same-sex marriage violated the Fourteenth Amendment's Due Process Clause, effectively legalizing gay marriage nationwide); Hall v. Florida, 572 U.S. 701 (2014) (Eighth Amendment prohibits states from executing individuals with intellectual disabilities); United States v. Windsor, 570 U.S. 744 (2013) (Defense of Marriage Act, which defined marriage as a union between one man and one woman, violated the Fifth Amendment's Equal Protection Clause); Brown v. Plata, 563 U.S. 493 (2011) (court-ordered limit on California's prison population did not violate federal law, and was necessary to remedy unconstitutional violations of prisoners' rights); Graham v. Florida, 560 U.S. 48 (2010) (Eighth Amendment forbids a punishment of life imprisonment without an opportunity for parole for a juvenile not convicted of homicide); Kennedy v. Louisiana, 554 U.S. 407 (2008) (Eighth Amendment bars states from executing individuals convicted of child rape); Boumediene v. Bush, 553 U.S. 723 (2008) (holding, inter alia, that the Fifth Amendment's Due Process Clause applies to prisoners detained at Guantanamo Bay); Panetti v. Quarterman, 551 U.S. 930 (2007) (rejecting the Fifth Circuit's holding that a state may execute an individual without violating the Eighth Amendment as long as that individual has some factual awareness of the state's reasoning for the execution); Roper v. Simmons, 543 U.S. 551 (2005) (Eighth Amendment prohibits states from executing juveniles); Lawrence v. Texas, 539 U.S. 558 (2003) (Texas law banning same-sex sexual conduct unconstitutional under the Fourteenth Amendment's Due Process Clause); Romer v. Evans, 517 U.S. 620 (1996) (Colorado constitutional amendment prohibiting the State from enacting laws to protect gay, lesbian, and bisexual individuals from discrimination violated the Fourteenth Amendment's Equal Protection Clause); Lee v. Weisman, 505 U.S. 577 (1992) (prayer at a public school graduation that was not associated with a specific religion violated the First Amendment's Establishment Clause); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion) (reaffirming *Roe v. Wade*'s central holding that the Fourteenth Amendment's Due Process Clause protects a woman's right to obtain an abortion).

72. For a frontal attack on public sector labor unions, overturning a 40-year-old precedent, see *Janus v. American Federation of State, County and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). The liberals on the Court (Ginsburg, Breyer, Kagan, Sotomayor) wrote a blistering dissent, emphasizing the principle of stare decisis. With the exception of Justice Ginsburg, this group also dissented in *Wayfair*. Ginsburg's voting with the majority in *Wayfair* is consistent with her emphasis on state sovereignty in *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1816-18 (2015) (Ginsburg, J., dissenting).

73. *See* Richard D. Pomp, *Inroads, Narrowing, and Restrictions*, 90 STATE TAX NOTES 1029 (2018).

substance," mentioned only once in *Complete Auto*,[74] and which was the first time the Court used it in a tax case, should be given no weight. The term was not used by the taxpayer (Complete Auto), which referred to "sufficient nexus." Indeed, the taxpayer conceded that it had sufficient nexus so that the issue of nexus was not even before the Court. Nonetheless, *Quill* latched onto the term to distinguish Commerce Clause nexus from Due Process Clause nexus.[75]

This unprecedented bifurcation of nexus served the Court's political agenda: removing any due process obstacles to Congress's intervention while protecting the reliance interests of the remote vendors. *Wayfair* should have discarded the term, which *Quill* located in the Commerce Clause and returned the concept of nexus back to its roots in the Due Process Clause.

Part III contends that although *Wayfair* dealt only with the sales tax, its implications extend widely. No longer can a taxpayer make a credible argument in the context of other taxes that a physical presence is required for it to have nexus.

Of course, Congress can always overrule *Wayfair* and perhaps reinstate the physical presence rule. Part IV shows why the politics are more favorable for doing so post-*Wayfair*, where Congress can be viewed as protecting vendors, than they were pre-*Wayfair* where Congress might be viewed (incorrectly) as imposing a new tax on Internet purchases. Bills have already been introduced to cut back on *Wayfair* although as this Article goes to press, none has shown any traction.

Part V cautions states from eliminating their pre-*Wayfair* techniques for dealing with *Quill*, such as click through nexus and Colorado-style reporting. Because the states seem not to be applying *Wayfair* retroactively, there will be open audit years when physical presence will remain the relevant nexus standard. And Congress might impose that standard through federal legislation. Pre-*Wayfair* techniques will still be relevant then and should be held in reserve to draw on when necessary.

Pre-*Wayfair* remote vendors without a physical presence in a state could be assured that they did not have to collect the market state's use tax.[76]

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

75. Throughout this Article, due process refers to the 14th Amendment and not the 5th Amendment.

76. The use tax is a backstop to a sales tax. The use tax applies to goods bought outside a state but "used" in that state. The use tax is imposed at the same rate as the sales tax and a credit is provided

*Wayfair* eliminates that assurance. But what if off-shore vendors continue not to collect the market state's use tax even though they are now obligated to do so, or even worse, collect the tax but not remit it? Part VI allays fears about these possibilities.

Part VII provides a brief summary of state reactions to *Wayfair* and explains why there will not be a rush to adopt the Streamlined Sales Tax Agreement. This Part offers advice about how to draft a post-*Wayfair* statute, suggesting that if the transaction threshold is an alternative to the sales threshold as it is in South Dakota and in those states mimicking South Dakota law, it is not especially useful. These states should consider requiring that *both* the transaction threshold and the sales threshold must be satisfied and not just one or the other. If a state wishes to use only one threshold, it should be sales and not transactions.

Other advice in Part VII is that a state should retain its existing rules on physical presence, which may be needed during open audit years or if Congress overrules *Wayfair*. Nothing is gained, and some revenue may be lost by eliminating these existing rules. In addition, there are situations in which a small in-state retailer collecting the sales tax pre-*Wayfair* should continue to do so even if its sales fall below post-*Wayfair* thresholds.

For reasons that have never been explained, South Dakota drafted its statute in terms of collecting its sales tax rather than its use tax. The state may be inadvertently leaving money on the table. Situations may arise where a sale does not take place in South Dakota, but a use tax could otherwise be collected. In addition, limiting the statute to the collection of the sales tax and not the use tax may raise problems because of a pair of Supreme Court cases in 1944: *McLeod v. J.E. Dilworth Co.*[77] and *General Trading Co. v. State Tax Comm'n.*[78] The risk-adverse way to proceed is not to copy South Dakota on this point but to follow the more conventional approach and draft a post-*Wayfair* statute in terms of collecting the use tax.

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against the use tax for any sales taxes (or use taxes) paid to the other state on the same transaction. *See* POMP, *supra* note 28, at 6-41-44. The use tax was upheld by the Supreme Court in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *cf.* Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934). The use tax is imposed on the purchaser, but with the exception of cars, boats, or planes, which have to be registered in a state, voluntary compliance is notoriously low by individuals. *See Wayfair*, 138 S. Ct. at 2088. Hence the pressure to make sure the vendor collects the use tax.

77. 322 U.S. 327 (1944).

78. 322 U.S. 335 (1944).

Part VIII explores the *Pike* balancing test. This test has played no prominent role in state tax cases but has been elevated by *Wayfair* into a key feature of Commerce Clause jurisprudence.

Part IX shifts the focus to local sales and use taxes and predicts that this area will be the source of future litigation.

## II. SUBSTANTIAL NEXUS: A MEANINGLESS MEANS TO A POLITICAL END

Despite four dissents in *Wayfair*,[79] all nine Justices agreed on one thing—that *Quill* was "wrong on its own terms when it was decided in 1992," and "since then the Internet revolution has made its earlier error all the more egregious and harmful."[80] But the one error in *Quill* that the Court did not address was the most serious jurisprudentially: the deification of *Complete Auto's*[81] empty phrase: substantial nexus.

*Quill* was a political decision.[82] The latching on to *Complete Auto's* throwaway phrase, "substantial nexus," in a case having nothing to do with nexus, allowed the *Quill* Court to further its political agenda. That agenda was to clear the way for Congress to establish rules requiring remote vendors to collect the market state's use tax, while protecting their reliance interests on *Bellas Hess*[83] and avoiding the retroactivity issue.[84]

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79. *Wayfair*, 138 S.Ct. at 2080.

80. *Id.* at 2097. This blatant admission could have been easily finessed had the Court wished by stating that *Quill* was correctly decided in 1992 but was overtaken by subsequent events like the Internet. Instead, the Court made a candid, frontal attack on overruling *Quill* ab initio. The Court's candor in admitting its error in 1992 should have carried over to similarly admitting that "substantial nexus" was also an error. Perhaps one reason for not doing so was that neither party in *Wayfair* was making such a request.

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

82. *See* Richard D. Pomp, *supra* note 64, at 1141–1154.

83. Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753 (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, even though the case never used the term "physical presence." *Quill* attributed the growth of the mail order industry to this protection provided by *Bellas Hess*. Quill Corp. v. North Dakota, 504 U.S. 315, 316 (1992). "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*." *Id.* 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 regardless of whether the remote vendor collected it. *Id.* at 315. *Wayfair* made that point rather graphically. *Wayfair*, 138 S.Ct. at 2098.

84. *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

*Bellas Hess* had immunized remote vendors from a state requiring them to collect its use tax if they had no physical presence there. *Quill* cleverly—but without any jurisprudential support—accomplished its agenda 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.[85] Previously, opponents of Congress's stripping remote vendors of their *Bellas Hess* protection argued that Congress could not legislate on matters of due process.[86] If *Bellas Hess* held, as a matter of due process, that remote vendors without a physical presence could not be forced to collect the market state's use tax, Congress would be powerless to act. Efforts to overturn *Bellas Hess* were often stalled for fear that, after spending scarce political capital on drafting and lobbying for legislation, the Due Process Clause might doom the result. 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, it was feared that Congress was powerless to overturn that decision through legislation.

By holding that Quill, the remote vendor, had due process connections with North Dakota despite lacking 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 under the Commerce Clause, which required

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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? State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d 203 (N.D. 1991), *petition for cert. filed*, 1991 U.S. S. Ct. Briefs LEXIS 681, at *1 (U.S. Aug. 2, 1991) (No. 93-11). The Supreme Court granted certiorari on only the first issue. Quill Corp. v. N. Dakota *ex rel.* Heitkamp, 502 U.S. 808 (1991); *see Quill*, 504 U.S. at 332 (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*.").

*Quill* occurred during a period of intense disagreement and upheaval by the Court on the general issue of retroactivity. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991); *see generally* Adam Thimmesch, Darien Shanske, and David Gamage, Wayfair *and the Retroactivity of Constitutional Holdings*, 88 STATE TAX NOTES 511 (2018).

85. Justice White called out the majority on its bifurcation of nexus. *Quill*, 504 U.S. at 327.

86. 504 U.S. at 305, 318.

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*'s passing reference to substantial nexus.[87] The *Quill* Court described the "different constitutional concerns and policies" animating the Due Process and the Commerce Clauses[88] 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 than its meaning under the Due Process Clause. Unfortunately, the Court cited no cases to support its approach—and for good reason. Only one prior case had used "substantial nexus," and it was not a tax case.[89]

As *Wayfair* nicely catalogs, the physical presence requirement is silly. Rather than addressing the underlying concerns of the Commerce Clause, the requirement undercuts those concerns.[90] Combined with the dishonesty of bifurcating nexus and its reliance on the empty phrase of substantial nexus, I cannot help but wonder if the Court assumed that Congress would quickly embrace its new power and intervene with federal legislation, sparing the country the spectacle of the decision being skewered by commentators for over a quarter of a century.[91]

### *A.* Complete Auto *and the Non-Issue of Nexus*

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87. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 289 (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 when applied to an interstate business. *Id.* The result in *Complete Auto* was hardly unexpected and foreshadowed by numerous cases. These cases are summarized in *Complete Auto*. *Id.* *Complete Auto* overruled *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951), which held that a state tax on the "privilege of doing business" was per se unconstitutional when applied to interstate commerce. *Id.* at 289.

88. *Quill*, 504 U.S. at 312 (stating that the Due Process Clause "concerns the fundamental fairness of governmental activity," whereas the Commerce Clause's "nexus requirement" addresses "structural concerns about the effects of state regulation on the national economy").

89. Buckley v. Valeo, 424 U.S. 1, 82 (1976).

90. *See Wayfair*, 138 S. Ct. at 2095-99.

91. For a sampling of cases eviscerating *Quill* and the physical presence test, see POMP, *supra* note 28, at 9-82-83.

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.[92] Given how the *Quill* Court imbued meaning into substantial nexus, it is astonishing that the issue of nexus was not even before the *Complete Auto* Court.[93] Of course, an argument about nexus would have been a fool's errand. The taxpayer was transporting automobiles within Mississippi[94]—a stark example of physical presence and nexus. The case is clear that the taxpayer assumed it had *sufficient* nexus with Mississippi,[95] 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.

Moreover, 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, unprecedented Commerce Clause interpretation of nexus. For example, only *once* did *Complete Auto* refer to "substantial nexus";[96] more often, it referred to "sufficient nexus"[97] or "sufficiently connected."[98] Additionally, *Complete Auto* cited cases referring to nexus in its more traditional due process context as a "necessary connection,"[99] or as "sufficient nexus."[100] Finally, *Complete Auto* was the first time the Court ever used the term "substantial nexus" in a tax case.[101] This was not a Court that attributed any significance to the one time it used the term "substantial nexus" in a case where nexus was not even being challenged, but was

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92. *Complete Auto*, 430 U.S. at 274 ("The issue in this case is whether Mississippi runs afoul of the Commerce Clause . . . when it applies the tax it imposes on 'the privilege of . . . doing business within the State to appellant's activity in interstate commerce").
93. The court stated that "[a]ppellant, in its complaint in Chancery Court, did not allege that its activity which Mississippi taxes does not have a *sufficient* nexus with the State . . ." *Id.* at 277-78 (emphasis added). Furthermore, the court explained that "[t]he appellant also did not allege in Chancery Court that the tax discriminated against interstate commerce, was unfairly apportioned, or was unrelated to services provided by the State." *Id.* at 278. How what the appellant did *not* allege morphed into the four tests of whether a statute is constitutional is saved for another day.
94. *Id.* at 275. For a picture of the type of vehicle involved in *Complete Auto*, see POMP, *supra* note 28, at 1-21. In general, anything that can kill you, like a truck carrying cars, constitutes nexus.
95. *Complete Auto*, 430 U.S. at 277–278.
96. *Id.* at 279.
97. *Id.* at 285.
98. *Id.* at 287.
99. *Id.* at 281.
100. *Id.* at 278, 285.
101. *Supra* note 89 and accompanying text.

instead conceded; it obviously was not injecting that term with any new jurisprudential meaning. If it were intending otherwise, we might have expected a drum roll as the Court trotted out this new Commerce Clause nexus standard (albeit in dicta) with great fanfare.

As if further evidence is even needed, in *National Geographic*,[102] 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."[103] 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.

### *B.* 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. No one could applaud *Quill* for its analytic purity.

Justice White easily saw through *Quill's* chicanery.[104] He concurred with the majority's decision to overrule *Bellas Hess*'s requirement of physical

102. Nat'l Geographic Soc. v. California Bd. of Equalization, 430 U.S. 551 (1977).
103. *Id.* at 554 (emphasis added).
104. In his concurrence in *Wayfair*, Justice Thomas admitted that he should have ruled with Justice White in *Quill*. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring).

presence for nexus under the Due Process Clause.[105] But he viewed the Due Process and Commerce Clauses as having the same nexus requirement, and would have given *Bellas Hess* "the complete burial it justly deserves,"[106] (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."[107] Unprecedented though it might be, this bifurcation of nexus allowed the Court to preserve *Bellas Hess*'s safe haven under the Commerce Clause, while removing any perceived barrier to Congressional intervention under the Due Process Clause.

### *C.* Wayfair *and a Missed Opportunity to Correct* Quill*'s Illegitimate 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,[108] cleaning up the nexus standard would have been a useful step. And a Court that had the courage to overrule *Quill*[109] ab initio should not have shied away from finishing the task. After all, the *Wayfair* Court could have said that the physical presence rule was appropriate in 1992 but not in the digital world. Instead, the Court took the bolder path and overturned the rule as misguided from the time of its original formulation. That boldness might have carried over into overturning the substantial nexus rule sua sponte—but did not.

105. Quill Corp. v. North Dakota, 504 U.S. 298, 321-22 (1992) (White, J., concurring in part and dissenting in part). Interestingly, *Bellas Hess* never uses the term "physical presence." *See supra* note 83.
106. *Id.* at 322.
107. *Id.* at 325.
108. I purposely refer to the "use" tax here and not the "sales" tax for the reasons explained *infra* Part VII.C.5.
109. *See supra* note 80.

Instead, *Wayfair* muddied the nexus standard. Citing dicta from *Polar Tankers*,[110] the Court stated a "substantial nexus" is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction."[111] *Polar Tankers*, a fairly uneventful case interpreting the rarely litigated Tonnage Clause of the Constitution--not the dormant Commerce Clause--has an ironic similarity with *Complete Auto*. Neither case had anything to do with nexus, yet *Wayfair* cited both in that context.

*Polar Tankers* has played no dispositive role in any state or local tax case, has been infrequently cited, and was not 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.* So why did the Court resurrect the case?

Perhaps *Wayfair* raised *Polar Tankers* sua sponte to deal with the assertions made at oral argument by South Dakota that one sale would be enough to constitute nexus.[112] One sale, however, depending on the amount,[113] might be unacceptable to constitute nexus under either the Due Process Clause or the Commerce Clause, regardless of whether the nexus

110. Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1 (2009).

111. *Wayfair*, 138 S. Ct. at 2099. The *Polar Tankers* Court followed the language cited by *Wayfair* with references to *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 437, 443 (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 U.S. 434, 441–445 (1979), holding that California could levy an apportioned property tax on shipping containers located in the State and used in international commerce; and *Quill*. *See Polar Tankers*, 557 U.S. at 10 (2009). The pages *Wayfair* cited in *Mobil* refer to both the Due Process Clause and the Commerce Clause; the pages cited in *Japan Line* focus more on the Commerce Clause. *Mobil Oil*, 445 U.S. at 432; *Japan Line*, 441 U.S. at 435-36. In any event, these citations cannot be read to suggest the Court was jettisoning the substantial nexus requirement under the Commerce Clause and replacing it with the Due Process Clause.

112. In response to Justice Sotomayor's question at oral argument what the minimum number of sales was needed to 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." Transcript of Oral Argument at 6, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494). *Complete Auto*, of course, said nothing about the number of sales that would create nexus. *See generally* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). The government, appearing as amicus curiae, supported the South Dakota Attorney General. Video: *South Dakota v. Wayfair Oral Argument* (C-SPAN broadcast Apr. 17, 2018), https://www.c-span.org/video/?441646-1/south-dakota-v-wayfair-oral-argument&start=0.

113. A one-time sale of a plane, boat, or nuclear reactor would raise different concerns from a sale of say a $5 item.

standard is something less than substantial. As Justice Scalia reminded us, the law cares not for trifles.[114]

The need to litigate 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 cavalier use of substantial nexus. Instead, *Wayfair* has opened the door 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 requirement was satisfied "based on both the economic and virtual contacts" the vendors had with South Dakota and that the defendants', "large, national companies that undoubtedly maintain an extensive virtual presence[,]" satisfy the standard.[115] Under the facts in Wayfair, the Court concluded that:

> the nexus is clearly sufficient[116] based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. S. B. 106, §1. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case.[117]

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114. Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) ("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 federal statute, P.L. 86-272, but the same policies should apply in interpreting nexus.

115. *Wayfair,* 138 S. Ct. at 2099.

116. Presumably Kennedy meant that the contacts were sufficient to satisfy the substantial nexus standard, not that "sufficient nexus" was the new standard. In his concurrence in *Direct Marketing* Justice Kennedy sloppily used the phrase "sufficiently 'substantial nexus.'" Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015).

117. *Wayfair,* 138 S. Ct. at 2099. *See* Calhoun & Kolarik, *supra* note 33, at 130:

> Post-*Wayfair*, the new substantial nexus test turns on whether a taxpayer has availed itself of the substantial privilege of carrying on business in the taxing jurisdiction at issue. In keeping

A disavowment of substantial nexus could have returned the concept of nexus back to its roots in the Due Process Clause.[118] *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."[119] This analytical purity would not be a panacea given the lack of any coherent due process doctrine,[120] but it would at least avoid running two concepts of nexus on parallel tracks, even if the distance between them seems to have narrowed.

## III. IMPLICATIONS OF WAYFAIR FOR OTHER TAXES.

The states had been successful in arguing pre-*Wayfair* that the physical presence standard was limited to the sales and use taxes.[121] These cases have relied on three statements in *Quill*. "*While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today*, *Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases."[122]

> In sum, *although in our cases subsequent to Bellas Hess and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement*, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess*

with tradition, the Court left the minimum threshold of this sufficiency test undefined, for lower courts to determine. Because the substantial nexus analysis is fact-specific, the only existing guidance for determining the sufficiency of the economic and virtual contacts that satisfy this test are the particular South Dakota contacts of the business involved in the *Wayfair* litigation.

118. For an attempt to breathe some meaning into "substantial nexus" if we are forced to live with it despite its lack of foundation, see Hayes Holderness, *Questioning* Quill, 37 VA. TAX. REV. 313, 328 (2018).

119. *Wayfair,* 138 S. Ct. at 2085. 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*.

120. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

121. *See, e.g.*, Geoffrey , Inc. v. South Carolina Tax Comm'n, 313 S.C. 15, *cert. denied*, 510 U.S. 992 (1993); Tax Comm'r v. MBNA Am. Bank, 640 S.E.2d 226 (W. Va. 2006); KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308 (Iowa 2010); Capital One Auto Fin. Inc. v. Dep't of Revenue, 792 N.W.2d 308 (Or. 2018); POMP, *supra* note 28, at 11-206.

122. Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992) (emphasis added).

established in the area of sales and use taxes.[123]

"*Although we have not, in our review of other types of taxes, articulated the same physical-presence requirement that Bellas Hess established for sales and use taxes*, that silence does not imply repudiation of the *Bellas Hess* rule."[124]

By eliminating the physical presence requirement for sales and use taxes, the Court has also eliminated, by inference, the underpinnings of these statements for other taxes as well,[125] such as the corporate income tax, pure gross receipts taxes like Washington's B and O tax, or Ohio's CAT tax.[126] *Wayfair* is also consistent with the MTC factor presence nexus standard[127] for income taxes and is likely to encourage those that have not already done

123. *Id.* at 317 (emphasis added).
124. *Id.* at 314 (emphasis added).
125. *Accord* Calhoun & Kolarik, *supra* note 33.
126. The term "gross receipts" is used in at least two different contexts, which has created confusion in the literature. One meaning is a sales tax that is levied on a vendor's gross receipts. *Quill,* 504 U.S. at 309-10; POMP, *supra* note 28, at 7-2. The other, a "pure" gross receipts tax, is a business turnover tax of the type used by the State of Washington, Ohio, and certain counties, municipalities, and cities. POMP, *supra* note 28, at 9-221.
127. MULTISTATE TAX COMM'N, FACTOR PRESENCE NEXUS STANDARD FOR BUSINESS ACTIVITY TAXES (2002). The MTC's Model Statute states that a "[s]ubstantial nexus is established if any of the following thresholds is exceeded during the tax period: (a) a dollar amount of $50,000 of property; or (b) a dollar amount of $50,000 of payroll; or (c) a dollar amount of $500,000 of sales; or (d) twenty-five percent of total property, total payroll or total sales." *Id.* As of a 2018 survey, 14 states reported that their nexus policy is based on factor presence, with five states indicating their standards wholly or partially conform with the Multistate Tax Commission's model statute. Jennifer McLoughlin, *Bloomberg Tax 18th Annual Survey: States Studying Federal Changes*, Accounting Policy & Practice Rep. BNA No. 103, at 9 (2018). Thirty-two of the states surveyed stated that they apply economic presence standards to define corporate income tax nexus. *Id.* Disagreement exists on whether the test of "undue burden" would be harder to satisfy under an income tax than a sales tax. Andrea Muse, *State Income Tax Not Likely to Cause Undue Burden After* Wayfair, STATE TAX NOTES (Mar. 11, 2019), https://www.taxnotes.com/state-tax-today/corporate-taxation/state-income-tax-not-likely-cause-undue-burden-after-wayfair/2019/03/11/29731?highlight=State%20Income%20Tax%20Not%20Likely%20to%20Cause%20Undue%20Burden%20After%20Wayfair.

so, to move in that direction. And of course, *Tyler Pipe*[128] and *Scripto*[129] sit out there with an open-ended test for nexus with no reference to property, payroll, or sales—just the activities performed on behalf of the taxpayer. *Wayfair* may also have implications for the Court's due process jurisprudence[130] and Public Law 86-272.[131]

Wells Fargo certainly thinks *Wayfair* applies to a state income tax. Following *Wayfair*, Wells Fargo's $5.2 billion second-quarter earnings in 2018 included a $481 million net discrete income tax expense that was mostly related to state income taxes and driven by the *Wayfair* decision.[132] Apparently, some of Wells Fargo's affiliates were taking the position for income tax purposes that because they had no physical presence in a state they had no income tax exposure.[133]

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128. Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 250-51 (1987) ("'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.' The court [below] found this standard was satisfied because Tyler's 'sales representatives perform any local activities necessary for maintenance of Tyler Pipe's market and protection of its interests . . . .' We agree that the activities of Tyler's sales representatives adequately support the State's jurisdiction to impose its wholesale tax on Tyler" (internal citations omitted)). This standard can be satisfied without any sales into a state in a particular year.

129. Scripto, Inc. v. Carson, 362 U.S. 207 (1960) (independent contractors soliciting sales constitute nexus).

130. *See* Alan Erbsen, Wayfair *Undermines* Nicastro*: The Constitutional Connection Between State Tax Authority and Personal Jurisdiction*, 128 YALE L.J.___(forthcoming, 2019). *See generally* Hayes Holderness, *Taking Tax Due Process Seriously: The Give and Take of State Taxation*, 20 FLA. TAX REV. 317 (2017).

131. Public Law 86-272 prevents a state from imposing a corporate income tax on out-of-state corporations whose only activities in a state consist of the solicitation of orders for the sale of tangible personal property, provided such orders are sent out-of-state for acceptance or rejection, and provided that such property is sent into the state from outside the state. 15 U.S.C. §§ 381–84 (2018). If *Wayfair* is interpreted as removing the protection that remote vendors previously claimed under an income tax from not having a physical presence, P.L. 86-272 will offer them an alternative argument. *See* Martin I. Eisenstein & Nathaniel A. Bessey, Wayfair *and P.L. 86-272 in a Services Economy*, 90 STATE TAX NOTES 501 (2018); Stanley R. Kaminski, *Public Law 86-272 and Digital Goods*, 90 STATE TAX NOTES 527 (2018); Richard L. Cram, *No Shade for Cloud Computing Income Under P.L. 86-272*, 89 STATE TAX NOTES 1237 (2018); David Gamage & Darien Shanske, *The Federal Government's Power to Restrict State Taxation*, 81 STATE TAX NOTES 547 (2016); POMP, *supra* note 28, at 11-28-42; Joe Crosby et al., Wayfair's *Potential Implications for Other Taxes*, 89 STATE TAX NOTES 1247 (2018).

132. *See also* Wayne D. Roberts, Wayfair*: The Far-Reaching Effects of Killing* Quill, 89 STATE TAX NOTES 985 (2018).

133. "Following [Wayfair], some of our affiliated entities may be considered to be taxable based on an economic presence in the state, even if they have no physical presence in the state." Andrea Muse, *Wells Fargo Adjusts Income Tax Reserves Following Wayfair*, STATE TAX NOTES (July 16, 2018), https://www.taxnotes.coc/editors-pick/wells-fargo-adjusts-income-tax-reserves-following-wayfair. The

## IV. PROSPECTS FOR CONGRESSIONAL LEGISLATION.

*Wayfair* changed the politics of congressional intervention. Pre-*Wayfair*, federal legislation overturning *Quill* and the physical presence standard would have been viewed by most consumers (incorrectly) as imposing a new tax on the Internet. This view would have been wrong, of course, because the use tax was always owed on the remote transaction, but most purchasers would not view it that way—and nor would the Tea Party.

From Congress's perspective, such legislation would be a lose-lose proposition. Congress would be accused of adopting a new tax without getting to keep any of the new revenue, which would inure to the benefit of the states.[134] (Theoretically, Congress could reduce its aid to the states by the amount of revenue they would now be collecting, and, in that sense, Congress could benefit.)

Post-*Wayfair*, Congress could now be viewed as the savior of the consumer by cutting back on the reach of the decision. About one month after the *Wayfair* decision, the U.S. House Judiciary Committee held a hearing on possible federal legislation. Some of the suggestions for federal legislation at that hearing included more generous thresholds to protect small businesses; mandating one single tax rate for remote sales; uniform definitions of taxable products, services, and exemptions; no caps or thresholds on taxable value of goods or services; uniform definitions of sales price, delivery charges, and the like; uniform rules for refunds, returns, discounts, and coupons; uniform return and electronic remittance forms; uniform rules for rounding and for treatment of bad debts; uniform dates and rules for sales tax holidays; a single exempt purchaser certificate; single audit on behalf of all participating states at the option of the seller; appeals of assessments through state court system without requiring prior payment

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quoted statement was made by the CFO during an earnings call. The situation he described is an example of entity isolation, discussed in POMP, *supra* note 28, at 9-133 *et seq.*

134. Similar concerns have been raised in the context of foreign vendors not collecting a state use tax, where one possible solution is for Congress to get U.S. Customs involved. But would Congress intervene? "You can see why the U.S. might be less than motivated because there's not any revenue for the U.S. government. . . It all would go to the states." William Hoke, *Enforceability of* Wayfair *Decision on Foreign Companies Unclear*, STATE TAX NOTES (June 28, 2018), https://www.hodgsonrush.com/assets/htmldocumhtml/TaxAnalysts6.28.18.pdf. For a more general discussion of foreign vendors, see *infra* Part VI.

of assessed amount; voluntary, non-binding, independent mediation; precise definition of physical presence to avoid disputes over who is a remote seller and what constitutes a remote sale; protection from retroactive taxation; annual certification by an independent federal agency of state compliance with simplification measures; no state or local tax authority may impose sales tax, gross receipts tax, or tax reporting obligation on a seller lacking federal statutorily defined "physical presence" except as provided in the federal legislation; vendor discount reflecting true cost of tax collection and remittance; federal district court exclusive jurisdiction over claims relating to noncompliance with simplification provisions of federal legislation; and vendor protection from consumer error in computing sales tax.[135] Those who opposed any attempts at federal legislation pre-*Wayfair* may now become allies in such efforts.

Rep. Jim Sensenbrenner (R-Wis.) has introduced the Online Sales Simplicity and Small Business Relief Act of 2018 (H.R. 6814). The bill would prohibit states from imposing sales tax collection duties on "remote sellers" for sales occurring prior to the Court's ruling in *Wayfair* on June 21, 2018. It would: allow states to impose sales tax collections duties on remote sellers only for sales occurring after Jan. 1, 2019 and establish a "small business remote seller exemption" prohibiting states from requiring remote sellers with gross annual receipts below $10 million in the U.S. to collect and remit sales tax. As defined by the bill, a "remote seller" is a person without a physical presence in the taxing state. The term "physical presence" means, with respect to a person, that a person's business activities in the State include any of the following during such person's taxable year:

(i) Being an individual physically in the State, or assigning one or more employees to be in the State;

(ii) Using the services of an agent (excluding an employee) to establish or maintain a market in the State, if such agent does not perform business services in the State for any other person during such taxable year;

(iii) The leasing or owning of tangible personal property (other than

135. *Examining the Wayfair Decision and its Ramifications for Consumers and Small Businesses Before the H. Comm. on the Judiciary*, 115th Cong. (2018) (statement of Steve DelBianco, President, NetChoice), *available at* http://netchoice.org/wp-content/uploads/2018-07-24-NetChoice-testimony-House-Judiciary-hearing-on-Wayfair-1.pdf. *See generally* Doug Sheppard et al., *Additional Thoughts on Judiciary's* Wayfair *Hearing*, 89 STATE TAX NOTES 865 (2018).

digital or alphanumeric data) or of real property in the State." The bill also requires the states to join a multistate compact before they can impose collection requirements on remote vendors.

Additional legislation prohibiting any state from collecting or reporting sales tax from businesses without a physical presence was introduced by Senator Jon Tester (D-Mont.), and co-sponsored by senators from Oregon and New Hampshire: The Stop Taxing Our Potential (STOP) Act (S. 3180). All these states, of course, do not have sales taxes.

Rep. Bob Gibbs, R-Ohio, reintroduced a bill entitled "The Protecting Small Business from Burdensome Compliance Costs Act (H.R. 6724)." According to Representative Gibbs, his bill balances the ability of states to collect online sales tax while preventing undue burden on small businesses.

Gibbs said the U.S. Supreme Court's ruling in South Dakota v. Wayfair Inc. "opened the door for the possibility of a complex maze of state and local sales taxes that would be nearly impossible for small businesses to navigate without raising compliance costs and, ultimately, raising the costs of goods for consumers."[136] "Under the bill, states could not collect sales tax from out-of-state vendors without physical presence nexus until they enacted legislation that provides a statewide uniform tax rate, permits out-of-state vendors to remit sales tax to one location, and provides a statewide uniform provision that detailed what is taxable. The bill would also ban retroactive collection of sales taxes and prohibit states from requiring sales tax collection and remittance until January 1, 2020."[137]

Unsurprisingly, the Governing Board of the Streamlined Sales Tax Project has shifted its position after *Wayfair*. Previously, the Board supported federal legislation overturning *Quill*. It no longer supports federal intervention.[138]

An irony lurks in the background. Some states have statutes requiring them to use additional tax revenues for reducing their personal income

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136. Paige Jones, *U.S. Lawmaker Reintroduces Online Sales Tax Bill Limiting State Authority*, STATE TAX NOTES (Jan. 10, 2019), https://www.taxnotes.com/state-tax-today/legislation-and-lawmaking/us-lawmaker-reintroduces-online-sales-tax-bill-limiting-state-authority/2019/01/10/291ll?highlight=Reintroduces%20Online%20Sales%20Tax.

137. *Id.*

138. Jad Chamseddine, *Governing Board Not Likely to Back Federal Remote Seller Bill*, STATE TAX NOTES (Oct. 5, 2018), https://www.taxnotes.com/state-tax-today/online-sales-taxation/governing-board-not-likely-back-federal-remote-seller-bill/2018/10/05/28h7t.

taxes.[139] Sales tax increases post-*Wayfair* would reduce personal income taxes. If Congress were to then overrule *Wayfair* causing sales tax revenue to fall, the personal income tax (or other taxes) would increase unless spending were cut. Under either scenario, Congress would be blamed.[140]

## V. CLICK THROUGH NEXUS, COLORADO REPORTING, COOKIE NEXUS ETC. STILL RELEVANT?

Prior to *Wayfair*, states developed different techniques for refining the *Quill* requirement of physical presence. In *Overstock*,[141] for example, the New York Court of Appeals upheld a statute upholding the nexus created by in-state persons soliciting sales, typically through a link on their web sites to a remote vendor in return for a commission.[142] This approach became known as click-through nexus.

Other states have adopted statutes to deal with the problem of entity isolation.[143] In one common use of this approach, a dot.com wishing to have a physical presence in a state, such as a distribution center, without establishing a physical presence would create a subsidiary to own that property. The dot.com would then argue that it did not have nexus, a related party did, and that person's nexus could not be attributed to the dot.com. Some states by statute treat the physical presence of the subsidiary as creating nexus for the dot.com.[144]

Another approach is known as "disclosure" or "reporting" and requires

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139. *See, e.g.*, WIS. STAT. § 73.03(71)(a) (2018). "[C]onservative lawmakers in Indiana are concerned that the projected growth in RST will fuel an unhealthy expansion of public spending, resulting in the dreaded phenomenon known as 'big government.' To counter the possibility, they're proposing that any increases in Indiana's RST revenues be matched, dollar-for-dollar, by reductions in other taxes — including property and income taxes." Robert Goulder, *Parlez-Vous* Wayfair*? Foreign Lessons on Taxing Remote*, 91 TAX NOTES INT'L 317 (2018). *See infra* note 171.

140. Joe Crosby et al., *Sales Taxes in a Post-*Wayfair*, Post-Kennedy World*, 89 STATE TAX NOTES 241 (2018).

141. Overstock.com, Inc. v. New York State Dep't of Taxation & Fin., 987 N.E.2d 621 (N.Y. 2013).

142. For the background on *Overstock* and click-through nexus in New York, see Robert D. Plattner, *After* Wayfair*: Saying Goodbye to Click-Through Nexus*, 90 STATE TAX NOTES 13 (2018). The constitutional footing for the statute was *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

143. *See* POMP, *supra* note 28, at 9-133-34.

144. *See id.* This approach is sometimes known as attributional nexus. The term attributional nexus is misleading because all nexus is "attributional" in some sense. For example, a corporation is a legal construct. It acts through the actions of others; these actions are "attributed" to the corporation.

that a remote vendor send both its customers and the tax departments of the state in which the customers are located a list of goods and services purchased. This approach was upheld by the 10th circuit, which rejected the argument that it violated *Quill*.[145] Massachusetts has recently taken the most aggressive and problematic position that cookies on cell phones or computers constitute nexus.[146]

Superficially, these approaches seem unnecessary for any state mimicking South Dakota's law. But if a state changes its law only prospectively, there will be open years under the prior law for which these approaches would still be relevant. And if Congress were to adopt legislation reinstituting the physical presence rule, these approaches would be back in play. No reason exists for a state to eliminate these approaches just because it adopts a post-*Wayfair* statute similar to South Dakota's.

## VI. FOREIGN REMOTE VENDORS: A NON-PROBLEM?

*Quill* provided remote vendors with a safe harbor, albeit one built around the tax avoidance of their customers. *Quill*'s Commerce Clause nexus requirement of a physical presence "serve[d] as a judicially created tax shelter."[147] Remote vendors had the security of knowing that without a physical presence in the market state, whether they were foreign (i.e., incorporated in a foreign jurisdiction) or domestic, they did not have to collect that state's use tax. After *Wayfair*, both foreign and domestic remote vendors without a physical presence are now obligated to collect the use tax provided they satisfy the market state's constitutionally acceptable rules on nexus, which may be expressed in terms of their gross receipts or number

145. Colorado was the first state to adopt this approach, which was upheld in *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016). *See supra* note 1. Around 12 states have followed Colorado's lead. POMP, *supra* note 28, at 9-158.

146. 830 MASS. CODE REGS. 64H.1.7 (2018). It was recently reported that Ohio would replace its cookie nexus with an economic nexus bill. Jad Chamseddine, *Ohio Looking to Replace Cookie Nexus with Economic Nexus Regime*, STATE TAX NOTES (Oct. 8, 2018), https://www.taxnotes.coc/editors-pick/ohio-looking-replace-cookie-nexus-economic-nexus-regime. Such a change is short-sighted should Congress reinstate the physical presence rule. Ohio's cookie nexus law "was scheduled to take effect on January 1, 2018," but was tied up in the courts in a case brought by the American Catalog Mailers Association. *Id.* The cookie nexus will be eliminated when a new bill based on *Wayfair* is adopted. *See id.* Ohio has adopted the Streamlined Sales and Use Tax Agreement and plans to adopt a statute identical to South Dakota's. *Id.*

147. South Dakota v. Wayfair Inc., 138 S. Ct. 2080, 2094 (2018).

of transactions in such state or both combined.

A major difference between foreign and domestic remote vendors would arise, however, if the former fails to collect. The state would, like in the domestic situation, issue a jeopardy assessment, and reduce that to a judgment. One major difference is that a state judgment can be enforced in another state under the U.S. Constitution's full faith and credit clause,[148] but nothing similar exists in the foreign realm.

Consider, for example, a Chinese-based remote vendor with no physical presence in the market state, but one that met that state's post-*Wayfair* nexus rules. Assume this vendor purposely does not collect the use tax. Now what?

Unless the vendor has assets that can be seized, the state would have to get its judgment enforced in a foreign court, notwithstanding the hoary rule that "no country ever takes notice of the revenue laws of another."[149] And should today's tariff wars still be raging, this hoary rule will be even more respected by foreign countries. To be sure, that rule has been superseded by an extensive network of income tax treaties between the United States and many foreign countries,[150] but these are limited to federal income taxes (with minor exceptions),[151]and generally have no impact on state sales or use taxes.

If a foreign vendor has assets in the United States, such as inventory at a distribution center, the assets can be seized to satisfy a state judgment. But do foreign vendors intent on tax evasion need inventory in the United States to service our market? A foreign vendor wanting no assets in the country

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148. U.S. CONST. art. IV, § 1 (providing that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); *see also* Unif. Enforcement of Foreign Judgments Act (revised 1964), 13 Part I U.L.A. 155 (2002). Nothing equivalent exists among foreign countries.

149. Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775). *See* Brian J. Kirkell & Mo Bell-Jacobs, *E-Flight Risk?* Wayfair *and the Revenue Rule*, 89 STATE TAX NOTES 551 (2018).

150. *See United States Income Tax Treaties A-Z*, INTERNAL REVENUE SERVICE, https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z (last visited Jan. 4, 2019).

151. For one exception, see Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain other Taxes, Ger.-U.S., art. XXIV, Aug. 29, 1989, https://www.irs.gov/pub/irs-trty/germany.pdf. This non-discrimination paragraph would seem to add nothing to the protections already provided by the U.S. Constitution's Foreign Commerce Clause. Nonetheless, a treaty party not familiar with the protection provided by the Foreign Commerce Clause might prefer an explicit treaty provision promising non-discrimination.

might use distribution facilities in Mexico or Canada to service the United States. If necessary, a foreign vendor selling downloadable intangible property might use a server located in either Mexico or Canada, or perhaps lease capacity on a space satellite.

These strategies are not cost-free, and may trigger, for example, Mexican or Canadian taxes, or incur other transaction costs, which would outweigh the perceived competitive advantages of not collecting the use tax. Moreover, running up penalties and interest, plus the taxes owed, might not be in the interests of a remote vendor that will be the subject of some third party's due diligence one day, such as that of a possible creditor or buyer.[152] Buyers want to avoid successor liability provisions that most states have. A buyer will want the vendor to clear up back arrears, which would include not only the amount of use tax not collected, but also any relevant interest and penalties. And if no return has ever been filed, a statute of limitations will not start running.

Foreign vendors that use U.S. banks to process credit card purchases might also be vulnerable to having their accounts seized to satisfy a market state's judgment. Internal Revenue Code Section 6050W(c)(2) requires that banks and merchant services report to the IRS annual gross payments processed by credit cards and/or debit cards, as well as to the merchants that received them. Credit card payments are reported on Form 1099-K.[153] Merchants must provide the payment processor with the full legal name of their businesses, their addresses, and their taxpayer identification numbers (EIN).[154] If no EIN exists, the merchant could become subject to backup

152. *See generally* Kirkell & Bell-Jacobs, *supra* note 149. The problem of arrears is not limited to foreign vendors. U.S. remote vendors having a pre-*Wayfair* physical presence have not always collected sales taxes when they should have. Presumably, these vendors will start collecting going forward. At some point, their earlier sins will be washed out.

153. Form 1099-K is authorized under I.R.C. § 6050W (2018). A 1099 is required when the amount paid exceeds $20,000 and the vendor has engaged in more than 200 transactions. "The IRS routinely shares information with the states, and once the state tax department gets access to the 1099-K, it could assess tax on amounts due to the vendor from the payment processor." Glenn Newman, *Offshore Online Retailers Can't Hide from Sales Tax Collection*, 92 TAX NOTES INT'L 1309, 1310 (2018). The federal reference to 200 transactions might have influenced the South Dakota threshold of 200 transactions. I am indebted to Glen Newman of Greenberg Traurig and Steve Wlodychak of Ernst & Young for their perceptive comments on this part of the Article.

154. According to a well-known practitioner, "credit card companies and other payment processors generally require a federal employer identification number (FEIN) and a depository bank to set up a merchant account to facilitate credit card payments. Collecting a tax delinquency from a bank account

withholding at a rate of 28 percent.[155]

Section 6050W(c)(2) should facilitate collection under a warrant issued by a state to collect on its judgment. Foreign vendors anticipating this problem might attempt evasive action by ceasing all contacts with the United States,[156] which could be difficult because U.S. purchasers will more than likely have credit cards issued by U.S. banks. And whatever such action might be, it would drive up the cost of noncompliance.[157]

Another possible avenue of collection would be for the U.S. Customs Bureau to seize packages at airports and docks sent from vendors having outstanding judgments, but this seems Pollyannaish. Foreign shippers could use aliases or shell companies on shipping documents to thwart these efforts.[158]

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is relatively simple for tax authorities once they identify a taxpayer by FEIN." *Id.*, at 1310.

155. I.R.C. §§ 3406(a)(1), (b)(3)(F) (2018).

156. Because of the physical presence rule, foreign vendors previously did not have to obtain state sales tax permits. Now they do. But

> [o]btaining a state sales tax permit can be tricky for foreign sellers. Many states require a federally assigned taxpayer identification number, which can only be obtained through the IRS. Foreign entities are reluctant to contact the Service for fear of having their identities permanently embedded in IRS computer databases, which might later be shared with tax administrators in their home countries. Most states also require that sales tax payments be made using an Automated Clearing House transfer from a U.S. bank. Foreign entities prefer to avoid the U.S. banking system when possible. Programs like the Foreign Account Tax Compliance Act and common reporting standard have succeeded in making people financially paranoid.

Goulder, *supra* note 139, at 320.

157. If a vendor does not collect the New York sales tax, the state "has a couple of courses." Hoke, *supra* note 134 (quoting a practitioner, Christopher Doyle, who states that "New York could issue a warrant creating a lien and have the warrant domesticated in the state where the business is domiciled." Doyle additionally noted that:

> Frankly, New York is not great at collecting against folks and businesses outside of New York . . .It's more about wrecking your credit rating or having this lien out there unsatisfied. If you want to sell your business, it would likely have to be disclosed. . . if there's property that's held in the U.S. by somebody that has enough of a connection in New York that is subject to New York's long-arm authority, New York can claim that property in satisfaction of the warrant. . . Many foreign banks have facilities in New York City, so New York can levy on any cash in the bank account of the business by levying on that bank.

158. These strategies are commonly used to evade United States sanction. *See, e.g.*, Colum Lynch, *U.N. Report Details How North Korea Evades Sanctions*, FOREIGN POLICY (Sep. 20, 2018), https://foreignpolicy.com/2018/09/20/un-report-details-how-north-korea-evades-sanctions/; *North Korea Evades Sanctions with Ships That Change Names*, SYRACUSE (Feb. 28, 2018), https://www.syracuse.com/us-news/index.ssf/2018/02/north_korea_evades_sanctions_with_ships_that_change_names.html; Krishadev

The problem of recalcitrant foreign vendors would be avoided for sales taking place on major platforms, like Amazon.com, Alibaba, Target.com, Etsy, eBay, or Walmart.com in states requiring the collection of use taxes on all third-party sales.[159] These so-called marketplace facilitator laws, which vary in detail, have been enacted by Alabama, Connecticut, Iowa, Minnesota, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Dakota, and Washington, with many more in the drafting stage.[160] The major marketplace facilitators seem to be complying with these statutes—at least for now.[161] This type of legislation can be expected to be widely

Calamur, *How North Korea Cheats Sanctions*, THE ATLANTIC (Aug. 8, 2017), https://www.theatlantic.com/international/archive/2017/08/north-korea-cheats-sanctions/536169/.

159. Amy Hamilton, *Hamer Identifies Ways to Collect Use Tax Owed by Foreign Sellers*, STATE TAX NOTES, (Nov. 5, 2018), https://www.taxnotes.com/state-tax-today/online-sales-taxation/hamer-identifies-ways-collect-use-tax-owed-foreign-sellers/2018/11/05/28kvj. It was reported that more than half of Amazon.com's annual retail sales are made by third-party sellers over the marketplace platform. Amy Hamilton, *Amazon Marketplace Collection Trial Underway in South Carolina*, STATE TAX NOTES (Feb. 5, 2019), https://www.taxnotes.com/state-tax-today/litigation-and-appeals/amazon-marketplace-collection-trial-underway-south carolina/2019/02/05/293qp?highlight=amazon%20marketplace%20collection%20trial.

160. *See, e.g.*, H.B. 1002, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019); H.B. 276, 2019-2020 Reg. Sess. (Ga. 2019); S.B. 396/S.D. 1, 30th Leg. (Haw. 2019); H.B. 1352, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019); S.B. 322, 121st Gen. Assemb. 1st Reg. Sess. (Ind. 2019); S.B. 22, 2019 Reg. Sess. (Kan. 2019); H.B. 354, 2019 Reg. Sess. (Ky. 2019); S.B. 728, 2019 Reg. Sess. (Md. 2019); H. 1, S. 1637, 191st Gen. Court (Mass. 2019); H.B. 548, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019); L.B. 284, 106th Leg., 1st Reg. Sess. (Neb. 2019); H.B. 6, 2019 Reg. Sess. (N.M. 2019); A. 3347, 2019 Assemb. (N.Y. 2019); S.B. 2338, 66th Leg. Assemb. (N.D. 2019); S.B. 890, 86th Leg., Reg. Sess. S. 214 (Tex. 2019); S.B. 168, 2019 Gen. Sess. (Utah 2019); H. 117, 2019 Leg. Sess. (Vt. 2019); H.B. 1722, 2019 Gen. Assemb. Sess. (Va. 2019); S.B. 1083, 2019 Gen. Assemb. Sess. (Va. 2019); H.B. 2813, 84th Leg., 1st Sess. (W. Va. 2019); S.B. 477, 84th Leg., 1st Sess. (W. Va. 2019); H.B. 69, 65th Leg., 2019 Gen. Sess. (Wyo. 2019); *see also* POMP, *supra* note 28, at 9-137-148. Washington and Rhode Island allow marketplace facilitators the option of either collecting the tax or following notice and reporting obligations. New measures in both states would eliminate the option and require collection. Amy Hamilton, *Marketplace Facilitator Legislation Pending in Almost Half the States*, STATE TAX NOTES (Mar. 11, 2019), https://www.taxnotes.com/state-tax-today/marketplace-facilitators/marketplace-facilitator-bills-pending-almost-half-states/2019/03/11/296x2?highlight=Marketplace%20Facilitator%20Legislation%20Pending%20in%20Almost%20Half%20the%20States. One report indicates that marketplace facilitator legislation is pending in almost half the states. *Id*. South Carolina and Louisiana are attempting to apply existing statutes to reach the same result as platform legislation. *See infra* note 163.

161. Calhoun & Kolarik, *supra* note 33, at 134 ("Nor is it clear whether a state may compel the marketplace facilitator to collect and remit use tax for its client, the remote seller."). One of the reasons for the lack of litigation may be that those subject to the new statutes welcome them for two reasons. First, the platforms will likely explicitly or implicitly charge for their newly imposed collection obligations, creating a new profit center. Second, the new laws will help level the playing field between the larger platforms, e.g., Amazon, quite capable of collecting on behalf of their third party sellers

adopted.[162] Once a state adopts such legislation, a foreign vendor selling over a platform will have nowhere to hide.[163]

To be sure, some foreign vendors might have their own websites and not sell exclusively over a platform. For these, the other techniques above would be necessary. Possibly public opinion might turn against non-collectors, especially if they are based in countries that are viewed as bete

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because of their experience collecting on their own sales, and their competitors, like eBay, which do not have the same experience. EBay has only recently started to collect use taxes under platform statutes. Ina Steiner, *eBay Starts Collecting Sales Tax with More States to Come*, ECOMMERCE BYTES (Jan. 4, 2019), https://www.ecommercebytes.com/2019/01/04/ebay-starts-collecting-sales-tax-with-more-states-to-come/. EBay is reported as collecting in three states under their platform legislation but will collect in eight states as of July 1, 2019. Amazon is currently collecting in eight states under such legislation. Amazon apparently negotiated an agreement with Mississippi under which it will not be required to collect on behalf of third parties. Amazon has an agreement with Massachusetts under which it turns over data on third-party sellers that have sales and inventory in the state. Aaron Davis, *Online Sellers Crowdsource Sales Tax Compliance*, STATE TAX NOTES (Feb. 19, 2019), https://www.taxnotes.com/state-tax-today/online-sales-taxation/online-sellers-crowdsource-sales-tax-compliance-advice/2019/02/19/294w9?highlight=Online%20Sellers%20Crowdsource%20Sales%20Tax%20Compliance. By the end of 2019, Etsy will be collecting in Washington, Pennsylvania, Oklahoma, Minnesota, Iowa, Connecticut, South Carolina, South Dakota, Alabama, New Jersey, and the District of Columbia. Paul Jones, *Etsy Lists States Where it Collects Tax*, STATE TAX NOTES (Jan. 23, 2019), https://www.taxnotes.com/state-tax-today/ssuta/etsy-releases-list-states-where-it-collects-sales-taxes/2019/01/23/292lj?highlight=etsy.

Many states have an exemption from their sales taxes for “casual sales.” *See* POMP, *supra* note 28, at 6-12; Richard D. Pomp & Oliver Oldman, *A Normative Inquiry into the Base of a Retail Sales Tax*, 43 NAT’L TAX J. 427 (1990), *reprinted in* 1 STATE TAX NOTES 170 (1991). Some sales on eBay, for example, would be exempt as a casual sale. How a marketplace facilitator should take this into account is an issue for the states to resolve through legislation or administrative guidance. *See infra* note 162.

162. The Multistate Tax Commission has provided useful guidance for the states. *See* Wayfair *Implementation and Marketplace Facilitator Work Group*, MULTISTATE TAX COMM’N, http://www.mtc.gov/UniUniUnif/Project-Teams/Wayfair-Implementation-Informational-Project (last visited Feb. 20, 2019); *see generally*, Robert D. Plattner, *MTC Issues White Paper on Drafting ‘Marketplace Legislation’*, 91 STATE TAX NOTES 155 (2019); Tom Yamachika, *The Next* Wayfair *Frontier: Online Marketplaces*, 91 STATE TAX NOTES 165 (2019).

163. A few states not having platform legislation are interpreting their existing statues as requiring the platform to collect on their third-party sales. South Carolina is involved in such litigation with Amazon, and a Louisiana parish is involved in litigation with Walmart. *See* Alex Hartley, *Exclusive: US State Drags Amazon to Court on Platform Sales Tax Liability*, INT’L TAX REV. (Feb. 20, 2019), https://www.internationaltaxreview.com/Article/3859388/Exclusive-US-state-drags-Amazon-to-court-on-platform-sales-tax-liability.html?ArticleId=3859388; Normand v. Wal-Mart.com USA LLC, No. 18-CA-211, 2018 WL 6803175 (La. Ct. App. Dec. 28, 2018); Andrea Muse, *Walmart Faces Procedural Challenges in Louisiana Marketplace Suit*, STATE TAX NOTES (Mar. 6, 2019), https://www.taxnotes.com/state-tax-today/litigation-and-appeals/walmart-faces-procedural-challenge-louisiana-marketplace-suit/2019/03/06/296jz?highlight=Walmart%20Marketplace%20Suit.

noirs, and the fear of a consumer boycott[164] might convince foreign remote vendors that the preferred business model is in fact is to collect the applicable use taxes.

In short, whether foreign vendors really present a meaningful threat of non-compliance calling for federal intervention is an empirical question (complicated politically if a foreign sovereign fund might be involved),[165] but perhaps only a time-limited one as marketplace facilitator legislation becomes more commonplace.[166] Realistically, the fear of noncompliance by remote foreign vendors appears exaggerated, especially because the competitive advantage of not collecting seems outweighed by the downside risks and costs. As this article goes to press in early 2019, there are no reports of non-collection by foreign vendors.

Little attention has been directed at a concomitant problem of a foreign vendor collecting a state's use tax but not remitting the proceeds. Hopefully, this lack of attention means no problem exists. In any event, the widespread adoption of platform statutes[167] will solve this potential problem.

Shortly after *Wayfair* was issued on June 21, 2018, I and other state tax lawyers started receiving inquiries from lawyers acting on behalf of foreign vendors posing the question of what would happen if their clients did not collect the use tax, but such calls do not necessarily mean an actual threat is looming. Lawyers might have raised this issue merely because they were anticipating potential questions from their clients. Or even if a client posed the question, it might have been more in the nature of tax managers wanting an answer to a question they anticipated being asked from an executive, who in turn was merely covering all of his or her bases. Lawyers are used to fielding questions more in the nature of "we have to check this box," and never receive any follow up to their answers, and never see any evidence that their answers made a difference to anyone's behavior.[168]

164. Of course, such a boycott would be against the self-interests of consumers.
165. I leave for another day any possible Foreign Commerce Clause or Import-Export Clause problems.
166. *See* Darien Shanske, David Gamage, & Adam Thimmesch, Wayfair*: Marketplaces and Foreign Vendors*, 90 STATE TAX NOTES 111 (2018). Gamage, Shanske, and Thimmesch also do not view the risk of foreign evasion as serious, although not for all the reasons suggested in the text. *Id.* I hope we are correct.
167. *See supra* note 160 and accompanying text.
168. For example, tax practitioners often are asked to "cost out" the state tax consequences of locating a facility in various competing states. Just because the question was posed does not mean that the

## VII. STATE REACTIONS TO *WAYFAIR*

The Supreme Court did not rule that the South Dakota statute was constitutional; it only eliminated the physical presence standard. Nonetheless, the Court looked favorably on three elements of the law: the use of thresholds; the prohibition against retroactive liability; and the State's adoption of the Streamlined Sales and Use Tax Agreement ("Agreement"). States have rushed to embrace the first two of these elements—politically, the third is trickier.

### *A. State Changes*

The following list, likely to have changed by the time the *Journal* publishes this article, includes post-*Wayfair* changes by the states:

| State | Effective Date | Gross Receipts | # of Trans-actions | Source |
|---|---|---|---|---|
| Alabama | 10/1/18 | $250,000 | N/a | DOR Guidance: https://revenue.alabama.gov/2018/07/03/ador-announces-sales-and-use-tax-guidance-for-online-sellers/. |
| Alaska | N/a | N/a | N/a | AK does not impose a sale or use tax.[169] |
| Arizona | N/a | N/a | N/a | AZ has not made any changes post-*Wayfair* |
| Arkansas | TBD | $100,000 | 200 | Draft bill would set these thresholds. H.B. 1002 (2018). |

answers will actually drive the locational decision, which is an exceedingly complicated one. But the answers are important defensively, that is, if the CEO asks the question, the tax manager better have an answer, even if the answer does not drive the decision. So why did the CEO ask at all if the answer is not going to drive the decision? Because the Board of Directors might ask whether the corporation had determined that there was nothing aberrational about the tax structure of the competing states. Replying that that had not yet been done is unacceptable. In short, all sorts of questions get asked of lawyers by their larger clients that are defensive or anticipatory in nature.

169. The Alaska Municipal League is working with local governments to require sales and use tax compliance by remote vendors through the creation of a centralized system for collecting and distributing the revenue to the local jurisdictions. Paul Jones, *Cities, Boroughs Pursuing Remote Sales Tax Collection*, STATE TAX NOTES (Jan. 28, 2019), https://www.taxnotes.com/state-tax-today/jurisdiction-tax/alaska-localities-pursuing-remote-sales-tax-collection/2019/01/28/292y8.

| State | Effective Date | Gross Receipts | # of Trans-actions | Source |
|---|---|---|---|---|
| California | 4/1/19 | $100,000 | 200 | Department of Tax and Fee Administration Special Notice: https://www.cdtfa.ca.gov/taxes-and-fees/L565.pdf. California A.B. 147 would require $500,000 in annual sales into the State by remote sellers or online marketplace providers, without regard to the number of transactions. The Assembly Appropriations Committee approved the measure on March 6, 2019. |
| Colorado | 12/1/18 | $100,000 | 200 | Grace period provided through May 31, 2019 for retailers to make systems changes. Emergency Regulation Tracking Number: 2018-00692. |
| Connecticut | 12/1/18 | $250,000 | 200 | Both thresholds must be met. Public Act No. 18-152. |
| DC | 1/1/19 | $100,000 | 200 | Internet Sales Tax Emergency Amendment Act of 2018. |
| Delaware | N/A | N/A | N/A | DE does not impose a statewide sales or use tax. |
| Florida | N/A | N/A | N/A | FL has not made any post Wayfair changes. |
| Georgia | 1/1/19 | $250,000 | 200 | If retailer chooses not to collect, then they must comply with the notice and reporting requirements. 2018 Georgia House Bill 61. |
| Hawaii | 7/1/18 | $100,000 | 200 | Department of Taxation Announcement No. 2018-10. |
| Idaho | N/A | N/A | N/A | ID has not made any post Wayfair changes. However, a new law (House Bill 578) requires an out-of-state retailer to collect sales tax on sales to Idaho customers when (1) total sales to Idaho buyers exceeded $10,000 in the previous year, **and** (2) the out-of-state seller has an agreement with an Idaho retailer to refer potential buyers to the out-of-state seller for a commission. This law went into effect on July 1, 2018. |
| Illinois | 10/1/18 | $100,000 | 200 | Bulletin FY 2019-05. Illinois Public Act 100-587. |
| Indiana | 10/1/18 | $100,000 | 200 | House Enrolled Act No. 1129. |
| Iowa | 1/1/19 | $100,000 | 200 | Senate File 2417. |

| State | Effective Date | Gross Receipts | # of Trans-actions | Source |
|---|---|---|---|---|
| Kansas | N/A | N/A | N/A | KS has not made any post Wayfair changes. |
| Kentucky | 10/1/18 | $100,000 | 200 | House Bill 487. |
| Louisiana | 1/1/19 | $100,000 | 200 | Remote Sellers Information Bulletin No. 18-001. LA R.S. 47:301(4)(m). |
| Maine | 7/1/18 | $100,000 | 200 | 36 M.R.S. § 1951-B. |
| Maryland | 10/1/18 | $100,000 | 200 | COMAR § 03.06.01.33[170] |
| Massachu-setts | 10/1/17 | $500,000 | 100 | Both thresholds must be met. 830 CMR 64H.1.7. |
| Michigan | 10/1/18 | $100,000 | 200 | Revenue Administrative Bulletin 2018-16. |
| Minnesota | 10/1/18 | $100,000 | 100 | Gross receipts threshold must be met through at least 10 sales. Minn. Stat. § 297A.66. |
| Mississippi | 9/1/18 | $250,000 | N/A | CMSR 35-004-003[171] |
| Missouri | N/A | N/A | N/A | MO has not made any post Wayfair changes. |
| Montana | N/A | N/A | N/A | MT does not impose a statewide sales or use tax. |
| Nebraska | 1/1/19 | $100,000 | 200 | DOR Guidance: http://www.revenue.nebraska.gov/news_rel/jul_18/wayfair.pdf |
| Nevada | 10/1/18 | $100,000 | 200 | LCB File No. R189-18. |
| New Hampshire | N/A | N/A | N/A | NH does not impose a statewide sales or use tax. |
| New Jersey | 11/1/18 | $100,000 | 200 | N.J. Stat. § 54:32B-3.5. |
| New Mexico | N/A | N/A | N/A | NM has not made any post Wayfair changes. |

170. H.B. 811, the Sales Tax Reform Act of 2019 would codify these existing regulations. Lauren Loricchio, *Bill Would Codify Post-Wayfair Regulations*, STATE TAX NOTES (Feb. 12, 2019), https://www.taxnotes.com/state-tax-today/sales-and-use-taxation/maryland-bill-would-codify-post-wayfair-regs/2019/02/12/2949p.

171. There are six bills dealing with *Wayfair*. All would impose the $100,000/200 transaction thresholds. Aaron Davis, *Six Remote Sales Tax Bills Vie for Success*, STATE TAX NOTES (Feb. 4, 2019), https://www.taxnotes.com/state-tax-today/ssuta/six-remote-sales-tax-bills-vie-success-missouri/2019/02/04/293mg. One of these bills uses the resulting revenue to reduce the state's top income tax rate from 6% to 5.5%, with additional reduction in future years. *Id; see supra* note 139.

| State | Effective Date | Gross Receipts | # of Trans-actions | Source |
|---|---|---|---|---|
| New York | Pre-existing | $300,000 | 100 | The Deputy Counsel of the New York State Department refers to longstanding NY tax law that asserts nexus is established if property delivered into the state exceeds $300,000 and if more than 100 sales of property were delivered in NY. N.Y. Tax Law § 1101(b)(8)(i)(E) and N.Y. Tax Law § 1101(b)(8)(iv).[172] |
| North Carolina | 11/1/18 | $100,000 | 200 | DOR Directive Number SD-18-6. |
| North Dakota | 10/1/18 | $100,000 | 200 | Begin collecting October 1, 2018, or 60 days after meeting the threshold, whichever is later. DOR Guidance: https://www.nd.gov/tax/remoteseller/. |
| Ohio | 1/1/18 | $500,000 | N/A | Seller must use in-state software to sell or lease taxable property or services; or provides or enters into agreement with another person to provide a content distribution network. Ohio Rev. Code Ann. § 5741.01. |
| Oklahoma | 7/1/18 | $10,000 | N/A | Okla. Stat. tit. 68 § 1392. |
| Oregon | N/A | N/A | N/A | OR does not impose a statewide sales or use tax. |
| Pennsylvania | 4/1/18 | $10,000 | N/A | If retailer chooses not to collect, then they must comply with the notice and reporting requirements. 72 PA. Cons. Stat. § 7213.1.[173] |
| Rhode Island | 8/17/17 | $100,000 | 200 | If retailer chooses not to collect, then they must comply with the notice and reporting requirements. 44 R.I. Gen. Laws § 18.2-3. |
| South Carolina | 11/1/18 | $100,000 | N/A | Revenue Ruling #18-14. |
| South Dakota | 11/1/18 | $100,000 | 200 | S.D. Codified Laws § 10-64-2 (2018). |

172. *See* Joseph N. Endres & Timothy P. Noonan, *New York Had Wayfair Guidance All Along!*, 91 STATE TAX NOTES 481 (2019).

173. The Pennsylvania Department of Revenue recently published an alert warning residents that notices from marketplace facilitators to them about the use tax are not a scam. Paige Jones, *Pennsylvania DOR Alerts Taxpayers to Marketplace Sales Tax Obligations*, STATE TAX NOTES (Feb. 11, 2019), https://www.taxnotes.com/state-tax-today/online-sales-taxation/pennsylvania-dor-alerts-taxpayers-marketplace-sales-tax-obligations/2019/02/11/2949g?highlight=DOR%20alerts%20taxpayers.

| State | Effective Date | Gross Receipts | # of Trans-actions | Source |
|---|---|---|---|---|
| Tennessee | TBD | $500,000 | N/A | On hold until further guidance from the DOR. Tenn. Comp. R. & Regs. 1320-05-01-.129; DOR Notice #18-11.[174] |
| Texas | 1/1/2019 | $500,000 | N/A | Texas Comptroller of Public Accounts released proposed amendments to Rule Section 3.286 that would set the gross receipts threshold. |
| Utah | 1/1/19 | $100,000 | 200 | Utah Code Ann. § 59-12-107. |
| Vermont | 7/1/18 | $100,000 | 200 | Vt. Stat. Ann. tit. 32, § 9701. |
| Virginia | N/A | N/A | N/A | Wayfair guidance not expected until 2019. https://www.bna.com/state-wayfair-virginia-n57982093393/ |
| Washington | 10/1/18 | $100,000 | 200 | DOR Guidance: https://dor.wa.gov/find-taxes-rates/retail-sales-tax/marketplace-fairness-leveling-playing-field/registration-thresholds-out-state-businesses-retail-sales. |
| West Virginia | 1/1/2019 | $100,000 | 200 | Administrative Notice 2018-18. |
| Wisconsin | 10/1/18 | $100,000 | 200 | Emergency Rule 1819. A permanent rule is being considered. |
| Wyoming | 2/1/19 | $100,000 | 200 | Wyo. Stat. Ann. § 39-15-501 (2018).[175] |

Gross receipts in the chart above is a placeholder for different definitions the states have adopted. Most of the listed states use gross sales. Alabama, Minnesota, and Washington use retail sales. North Dakota and Pennsylvania use taxable sales.[176]

174. The Department of Revenue adopted Rule 129 in 2016 requiring out-of-state sellers with more than $500,000 in sales into the state during the previous 12-month period to collect sales and use taxes by July 1, 2017. In that year, H.B. 261 was passed prohibiting the Department from collecting sales taxes under Rule 129 until the General Assembly reviews any court ruling authorizing the collection of sales and use taxes from remote sellers and approves the rule. That review has not yet occurred. Andrea Muse, *Bill Would Expand Economic Nexus*, STATE TAX NOTES (Feb. 18, 2019), https://www.taxnotes.com/state-tax-today/legislation-and-lawmaking/tennessee-bill-would-extend-economic-nexus-amusement-tax/2019/02/13/294dy?highlight=would%20expand%20economic%20nexus.

175. Paul Jones, *Wyoming Remote Sales Tax Terms Take Effect*, STATE TAX NOTES (Feb. 4, 2019), https://www.taxnotes.com/state-tax-today/online-sales-taxation/wyoming-remote-sales-tax-requirements-take-effect/2019/02/04/293mh?highlight=remote%20sales%20tax%20terms%20take%20effect.

176. Roxanne Bland, South Dakota v. Wayfair: *The Fallout*, 90 STATE TAX NOTES 621 (2018). *See supra* note 195 and accompanying text.

### *B. The Streamlined Sales and Use Tax Agreement ("Agreement"): To Adopt or Not to Adopt?*

Adopting the Agreement will certainly help to withstand post-*Wayfair* litigation. But politically, adopting the Agreement is not as easy as adopting the thresholds. Will the marginal advantages of withstanding post-*Wayfair* litigation be enough to overcome the political opposition?

The purpose of the Agreement is to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance,[177] all laudable goals. The Agreement focuses on improving sales and use tax administration systems for all sellers and for all types of commerce and requires the following:

1. State level administration of sales and use tax collections;
2. Uniformity in the state and local tax bases;
3. Uniformity of major tax base definitions;
4. Central, electronic registration system for all member states;
5. Simplification of state and local tax rates;
6. Uniform sourcing rules for all taxable transactions;[178]
7. Simplified administration of exemptions;
8. Simplified tax returns;
9. Simplification of tax remittances; and
10. Protection of consumer privacy.[179]

*Wayfair* obviously provides a push for states to adopt the Agreement. Two questions arise: why haven't states already adopted the Agreement, even pre-*Wayfair*, and why won't they rush to do so post-*Wayfair*? The short answer is that many states are unwilling--or unable--to make the changes in their sales tax statutes that adopting the Agreement would require.

Especially troublesome are the Agreement's requirements of a single, state-level tax administration in a state with numerous local sales taxes,

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177. *About Us*, STREAMLINED SALES TAX GOVERNING BD., https://www.streamlinedsalestax.org/about-us/ (last visited Feb. 20, 2019).

178. States that have not adopted the Agreement may have different sourcing rules that can be problematic. For a situation where a difference in sourcing rules can lead to double taxation, see Garry G. Fujita, *What Happens Now Without* Quill, 89 STATE TAX NOTES 751 (2018). *See also infra* Part IX.

179. *See* STREAMLINED SALES TAX GOVERNING BD., *supra* note 177.

uniform definitions of products and services in a state with numerous carve outs and exemptions, simplified tax rate structures and other uniform rules, access to sales tax administration software[180] paid for by the state, and immunity from audit liability.

For example, a state that has favorable rules on certain types of purchases might face a severe pushback if those rules were to be changed.[181] The same political forces that were powerful enough to have had such rules enacted in the first place will lobby to protect them. Nonetheless, states could adopt some of the features that impressed the *Wayfair* Court on their own, such as the thresholds and the lack of retroactivity, and selected features of the Agreement, while stopping short of adopting the Agreement in full.

The Agreement has not been adopted by the larger population states. Ohio, the seventh largest state by population, is the most populous state that has adopted it. The six more populous states than Ohio make up around 40% of the population. The 23 states that have adopted the Agreement in full[182] represent only around 30% of the U.S. population. One of the problems is that these larger states have well-organized and substantial groups of lobbyists protecting their constituents from the changes that would be mandated by the Agreement. A state like Texas, for example, has more than

180. Sometimes free software, like a free puppy, can be expensive going forward. In the case of the former, there is the cost of integrating the software with a vendor's existing accounting systems. And the mapping issue can be formidable. *See* Kristin Korpos, *Mapping Your Products in an Automated Tax System*, INTUIT, https://quickbooks.intuit.com/r/sales-tax/mapping-your-products-in-an-automated-tax-system/ (last visited Feb. 28, 2019). One of the issues in designing legislation to require a platform provider like Amazon to collect the market states' use tax for third parties is who should have the responsibility for doing the mapping. *See supra* note 162.

181. I was on a Connecticut Commission to consider adopting the Agreement. While I favored adoption, the majority did not, essentially because it would require changing Connecticut's clothing exemption (since eliminated). Recently, however, the House of Representatives introduced H.B. 6270, requiring Connecticut to change its laws to bring the State into compliance with the Streamlined Sales and Use Tax Agreement. The bill has been referred to the Joint Committee on Finance, Revenue, and Bonding. A hearing was held on February 13, 2019.

182. The 23 full member 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. Tennessee is an associate member. *See* STREAMLINED SALES TAX GOVERNING BD., https://www.streamlinedsalestax.org/ (last visited Feb. 28, 2019). No state has joined since 2014. The most likely states to join in the short-term are Missouri and Tennessee (which is only an associate member at present). *See* Michael J. Bologna, *Large States Remain Cynical About Streamlined Sales Tax Pact*, BLOOMBERG TAX (Jan. 18, 2019), https://news.bloombergtax.com/daily-tax-report-state/large-states-remain-cynical-about-streamlined-sales-tax-pact.

100 sales tax definitions that would have to be changed if it were to adopt the Agreement; South Dakota had far fewer. I do not expect to see a rash of adoptions in order to receive *Wayfair*'s blessing.[183]

### *C. Designing Remote Vendor Collection Statutes*

#### 1. Sales Threshold

A number of considerations should enter into setting a sales threshold. A state might use the threshold to eliminate low-tax returns whose administrative costs cannot be justified by the amount of tax at stake, reflecting a rough "de minimis" philosophy. The threshold might also be set to discourage litigation by culling low-volume vendors whose compliance costs might be many times their profits on their sales.[184] A state might also consider how onerous are its compliance burdens and its inability or refusal to simplify its rules. Finally, the concept of "substantial privilege of carrying on business" in a high population state might require a higher threshold than in a state like South Dakota. The higher the threshold, the more likely a state statute will survive a judicial challenge.[185] But setting the threshold too high would be unfair to in-state merchants in competition with remote vendors.[186] The minimum number of transactions, if that were to be kept as part of the threshold tests,[187] raises similar considerations.

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183. The Streamlined Sales Tax Governing Board admitted it "hasn't had much success persuading other states to join." Jad Chamseddine, *Governing Board to Continue Outreach to Nonmember States*, STATE TAX NOTES (Oct. 4, 2018), https://www.taxnotes.com/state-tax-today/ssuta/governing-board-continue-outreach-ssuta-nonmember-states/2018/10/04/28h3l?highlight=governing%20board%20to%20continue%20outreach.

184. *See infra* notes 198, 267-70, and accompanying text.

185. These arguments lose force in the case of platforms collecting taxes on behalf of those selling on them. *See supra* notes 161-62 and accompanying text.

186. A question for another day is whether states should consider exempting from the sales tax-low volume, in-state, brick and mortar vendors, a practice common in value added taxes. All VATs have a registration threshold. A vendor below the threshold (1) pays a VAT on purchases, (2) does not collect the VAT on re-sale, and (3) does not file a VAT return. Thresholds are based on gross sales; special rules apply to imports. I thank William Lasher of eBay and Richard Ainsworth of Boston University Law School for educating me on this point. Some commentators have called for national uniform threshold post-*Wayfair* but apparently not for in-state vendors. *See, e.g.*, Joel Busch, *The Case for a Uniform Threshold for use Tax Nexus Post*-Wayfair, 91 STATE TAX NOTES 495 (2019).

187. I argue below that a state should consider requiring that both the transaction and the sales thresholds be satisfied before a remote vendor has nexus. *See infra* notes 201-07 and accompanying text.

Anti-avoidance rules need to be considered to deal with vendors that restructure themselves into multiple entities to keep each one's sales below the threshold, a problem that also exists in the case of the transaction threshold.[188] Too high a threshold exacerbates this problem.

This problem is not new. Early in the days of the federal corporate income tax, Congress adopted a statute[189] "to curb the abuse of multiple incorporation"[190] to avoid the tax's marginal rates. Other common law doctrines were also available to supplement the statute.[191] Some of these anti-avoidance approaches might, with some tweaking, be incorporated into state law.

The definition of sales a state adopts should sweep broadly[192] and include transactions that might not be taxable. These transactions could include inter alia exempt sales for resale,[193] goods that would become ingredients and components of tangible personal property, sales to non-profits, and casual sales.[194] Consequently, not every transaction satisfying the threshold will necessarily result in a sales tax. Nonetheless, sweeping broadly by including all sales, whether taxable or not, flushes out all vendors and allows the tax department to make a case-by-case determination regarding the status of a transaction.[195]

The South Dakota statute does not define what constitutes a South Dakota sale, leaving that to the existing statute and regulations. In the case of local brick and mortar stores, the question is trivial. The new question is whether existing definitions and rules will work well when applied to an influx of remote vendors that previously did not have to file any returns. Little constitutional jurisprudence exists on what constitutes a sale within the meaning of a sales tax.[196] Services and intangible property can raise knotty

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188. *See infra* Part VII.C.2.
189. I.R.C. § 1561 (2018).
190. U.S. v. Vogel Fertilizer Co., 455 U.S. 16, 26 (1982).
191. *See generally* Patrick G. Dooher, *Multiple Corporations*, Tax Mgmt. Portfolio (BNA) No. 55-5th (1986).
192. *See supra* note 176 and accompanying text.
193. *See* POMP, *supra* note 28, at 7-33-34.
194. *Id.* at 7-65-66; *supra* note 161.
195. I have defended the virtues of this approach in other contexts. *See, e.g.*, RICHARD D. POMP, REPORT OF THE HEARING OFFICER: MULTISTATE TAX COMPACT ARTICLE IV PROPOSED AMENDMENTS 46 (2013).
196. *See infra* Part VII.C.5.

issues as we have seen in the context of state corporate income taxes and market-based sourcing.[197]

2. Transaction Threshold

The "transactions" threshold (200 transactions) is used by South Dakota as an alternative to the amount of sales threshold ($100,000). One problem is that nexus can be created for a low-profit vendor slightly above the transaction threshold. Consider, for example, a remote vendor making 201 $5 transactions, totaling $1,005. The costs of compliance may totally overwhelm the profit margin on these sales. Why should this vendor have to collect the use tax (even if the software is provided free)?[198] Perhaps this was the type of situation the Court was alluding to when it deferred to the *Pike* balancing test to deal with problems yet to emerge.[199]

Thought has to be given to the definition of "transaction." If I ship an accounting firm pursuant to its order 201 copies of my casebook in a bulk mailing is that one transaction or 201? Is that situation any different from shipping 201 copies to 201 individual purchasers in that same state? And as discussed above, anti-avoidance rules need to be considered to deal with vendors that restructure themselves into multiple entities to keep each one below the threshold.[200]

A transaction threshold could make better sense if it must be satisfied in *addition* to the sales threshold and not as an alternative. Requiring both to be satisfied would deal with the following type of situation.[201]

Suppose a South Dakota resident buys more than $100,000 of art from a gallery in New York while on vacation and has it sent back home. (New

197. *See* POMP, *supra* note 195, at 54-94.
198. *See supra* note 180. The thresholds in general are unfair to small in-state stores in competition with remote vendors, an argument that is more serious as the thresholds increase. *See supra* note 186 and accompanying text. The transaction threshold can also be cumbersome for remote vendors whose software, in my experience, does not track the number of transactions into a state.
199. For a discussion of *Pike* balancing, see *infra* Part VIII. The amounts in the text would hardly justify a vendor litigating the issue by itself rather than as part of a consortium or class action.
200. *See supra* notes 188-91 and accompanying text.
201. The European Union is discussing the use of thresholds to define a virtual permanent establishment. *See* Reuven S. Avi-Yonah, *The International Implications of* Wayfair, 91 TAX NOTES INT'L 161 (2018); Ryan Finley, Wayfair *Decision Echoes Case for Digital PE Standard*, 91 TAX NOTES INT'L 14 (2018).

York does not impose a sales tax because the delivery takes place in South Dakota.)[202] Assume the gallery has no web site, does not advertise nationally, and has no connection with South Dakota. Because the sales exceed the $100,000 threshold, the gallery would have to collect the South Dakota sales tax.[203]

The gallery, however, is not exploiting the South Dakota marketplace,[204] and does not have the minimum contacts with the State to satisfy the Due Process Clause.[205] *Wayfair* does not address this situation because it did not deal with the Due Process Clause.

Nor would the gallery satisfy *Wayfair*'s Commerce Clause requirement of "avail[ing] itself of the substantial privilege of carrying on business"[206] in South Dakota for the straight forward reason that it is not doing anything in that State. Presumably, a refund of the South Dakota sales tax collected by the gallery would be in order. If, however, the transaction threshold had to be satisfied in addition to the sales threshold, the gallery would not initially get caught in the South Dakota tax net and then have to try to extricate itself by seeking a refund, wasting its and the State's resources. The combination of both tests would make it more likely that the Due Process Clause and the Commerce Clause would be satisfied.[207]

### 3. Eliminate Notch Effects

All states should make sure no notch effect exists. That is, if a vendor has made 199 transactions in a state, the 200th one should not trigger a collection obligation on the first 199, especially if there is no practical way to collect the tax from the consumer who may be long gone. This is an easy drafting

202. N.Y. COMP. CODES R. & REGS. tit. 20, § 526.7 (2017).
203. Or maybe not. Even putting aside the constitutional issues identified in the text, under *Dilworth*, there would be no South Dakota sale. *See infra* Part VII.C.5 (discussing the implications of *Dilworth* and *General Trading*).
204. Quill Corp. v. North Dakota, 504 U.S. 298, 305-08 (1992).
205. *Id.*
206. *Wayfair*, 138 S. Ct. at 2099. For a discussion of *Polar Tankers*, *see supra* note 111.
207. Connecticut, Massachusetts, and Minnesota have adopted this approach. *See supra* Part VII.A. Minnesota requires a vendor that meets the gross receipts threshold to have at least 10 sales. Consequently, one sale of $100,000 doesn't trigger a collection obligation. *Id*. California A.B. 147 would require $500,000 in annual sales into the state by remote sellers or online marketplace providers, without regard to the number of transactions. The Assembly Appropriations Committee approved the measure on March 6, 2019.

problem by simply basing the current year's collection obligation on the prior year's results (with sufficient rules on short-year returns), or, albeit administratively more cumbersome for both taxpayers and the tax department, by imposing the collection obligation starting with the 200th transaction. Similar rules with respect to the dollar amount of sales should parallel these approaches.

4. Retain Existing Rules on Physical Presence in Addition to Post-*Wayfair* Thresholds

I would clarify that any existing physical presence rules are in addition to any new post-*Wayfair* thresholds. If the thresholds were the only test, then in-state retailers that were collecting the sales tax pre-*Wayfair*, might inadvertently be stripped of any collection obligation post-*Wayfair*. Similarly, a business with a substantial non-retail physical presence in the state, which had been making modest sales into the state from outside the state and collecting the use tax pre-*Wayfair*, should not stop collecting it post-*Wayfair* just because it fell below the threshold.

Moreover, suppose federal legislation is adopted to overturn *Wayfair* and re-impose the physical presence rule. A state that had kept its pre-*Wayfair* rules in place would not need to call a special legislative session to re-adopt its former rules. And there will be open audit years pre-*Wayfair* that should be subject to the state's rules on physical presence.

It should be emphasized that the South Dakota statute treated remote vendors without a physical presence as if they had one.[208] Consequently, all of the State's existing rules on what constitutes a physical presence remain in place. *Wayfair* holds that a physical presence is not a necessary precondition for nexus, but it remains a sufficient condition if a state wishes.

5. Draft the Statute to Impose an Obligation to Collect the Use Tax and Not the Sales Tax

Post-*Wayfair* legislation should avoid a potential problem by clarifying that it is the use tax that remote vendors are being asked to collect and not

208. *Wayfair*, 138 S. Ct. at 2089.

the sales tax. *Bellas Hess* involved the collection of the Illinois use tax.[209] Similarly, *Quill* involved the collection of the North Dakota use tax.[210] The South Dakota legislation in *Wayfair* deviated from these states and involved the collection of the sales tax and not the use tax. "Notwithstanding any other provision of the law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state. . . shall remit the *sales* tax . . ."[211] There is no public explanation of why South Dakota drafted its statute this way.

Distinguished commentators have suggested that the South Dakota statute was problematic by requiring remote vendors to collect the state's *sales* tax rather than its *use* tax.[212] This aspect of the statute conflicted with both *Quill* and *McLeod v. J.E. Dilworth.*[213] They suggest that the "uncertainty involving this issue leads us to conclude that the better course for states would be to continue to abide by the *Dilworth* formalism and to enact their economic nexus standards through their use tax systems."[214]

Their advice grows out of the companion cases Justice Frankfurter authored in 1944: *Dilworth* and *General Trading Co. v. State Tax Comm'n*.[215] *Dilworth* involved the constitutionality of the *imposition* of the Arkansas *sales* tax. *General Trading* involved the constitutionality of the *collection* of the Iowa *use* tax. Arkansas lost *Dilworth*; Iowa won *General Trading*.

The taxpayers in *Dilworth* were:

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209. *See* Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967). "The statute requires [Bellas Hess] to collect and pay to the appellee Department the tax imposed by Illinois upon consumers who purchase the company's goods for *use* within the State." *Id.* (emphasis added).

210. *Quill*, 504 U.S. at 298. Justice Stevens stated that *Quill*, "like National Bellas Hess, involves a State's attempt to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a *use tax* on goods purchased for use within the State." *Id.* at 301 (emphasis added, internal citations omitted). The opinion in *Quill* did not always respect the distinction between sales taxes and use taxes. *See, e.g.*, *id.* at 314, 316-17, 329.

211. S.D. CODIFIED LAWS § 10-64-2 (2018) (emphasis added).

212. Adam Thimmesch, Darien Shanske, & David Gamage, Wayfair*: Sales Tax Formalism and Income Tax Nexus*, 89 STATE TAX NOTES 975 (2018); *see* Hayes R. Holderness & Matthew C. Boch, *Did South Dakota Neglect Transactional Nexus in its Bill to Kill* Quill*?*, BLOOMBERG BNA TAX MGMNT. WKLY. STATE TAX REPORT (Dec. 6, 2017), https://www.bna.com/south-dakota-neglect-n73014472885/.

213. 322 U.S. 327 (1944); Thimmesch, Shanske, & Gamage, *supra* note 212.

214 Thimmesch, Shanske, & Gamage, *supra* note 212.

215. 322 U.S. 335 (1944).

> Tennessee corporations with home offices and places of business in Memphis where they sell machinery and mill supplies. They are not qualified to do business in Arkansas and have neither sales office, branch plant nor any other place of business in that State. Orders for goods come to Tennessee through solicitation in Arkansas by traveling salesmen domiciled in Tennessee, by mail or telephone. But no matter how an order is placed it requires acceptance by the Memphis office, and on approval the goods are shipped from Tennessee. Title passes upon delivery to the carrier in Memphis, and collection of the sales price is not made in Arkansas. In short, we are here concerned with sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas.[216]
>
> We would have to destroy both business and legal notions to deny that under these circumstances the sale--the transfer of ownership--was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction.[217]

There is, however, another aspect to *Dilworth*. The whole transaction, starting with solicitation in Arkansas and ending with the consumer having possession of the goods in Arkansas, constituted interstate commerce, which, under the jurisprudence of the day, could not be taxed.[218] That part

216. *Dilworth*, 322 U.S. at 328.
217. *Id.* at 329.
218. McLeod v. J.E. Dilworth Co., 322 U.S. 327, 328. Jackson, dissenting in *General Trading*, referred to the sale in *Dilworth* as "being clearly interstate commerce, is not taxable." Gen. Trading Co. v. State Tax Comm'n, 322 U.S. 335, 336 (Jackson, J., dissenting). Jackson believed so strongly in the dormant commerce clause (although that term was not commonly used at that time) that it led him to make some outrageous statements about the use tax in *Miller Brothers*. For example, he stated that the Court was "dealing with a relatively new and experimental form of taxation." This statement may have been acceptable in the 1930s, but certainly not in 1954 when the opinion in *Miller Brothers* was issued. States began to adopt general sales and use taxes shortly after the Great Depression began in 1929. 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." He also referred to the effects of the use tax as a "protective tariff." 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." Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015). Unfortunately for the accuracy of Jackson's pronouncement, the Court had already rejected this characterization of the use tax in 1937. *See* Pomp, *supra* note 64, at 1124-25.

of the opinion was clearly overturned by subsequent cases.[219] But still left open is the constitutional definition of where a sale takes place. This issue might have been expected to have been refined in subsequent litigation. The companion case of *General Trading* made that unnecessary.

*General Trading* involved nearly identical facts to *Dilworth*. The issue, however, was whether the market state (Iowa) could make the remote vendor collect its *use* tax. Iowa was not attempting to make the remote vendor collect its *sales* tax.[220] Frankfurter, writing again for the majority, upheld the obligation to collect the use tax, and amazingly did not cite the companion case of *Dilworth*.

*Dilworth*, by contrast, did allude to *General Trading*, albeit not by name:

> It is suggested, however, that Arkansas could have levied a tax of the same amount on the use of these goods in Arkansas by the Arkansas buyers, and that such a use tax would not exceed the limits upon state power derived from the United States Constitution. Whatever might be the fate of such a tax were it before us,[221] the not too short answer is that Arkansas has chosen not to impose such a use tax, as its Supreme Court so emphatically found. A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of

219. *See supra* note 92 and accompanying text. *See also* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

220. *Compare Gen. Trading Co.* 322 U.S. at 336, *with Dilworth*, 322 U.S. at 327. "The question now presented is, in short, whether Iowa may collect, in the circumstances of this case, such a use tax from General Trading Company, a Minnesota corporation, on the basis of property bought from Trading Company and sent by it from Minnesota to purchasers in Iowa for use and enjoyment there." *Gen. Trading Co.*, 322 U.S. at 336.

221. *Dilworth*, 322 U.S. at 330. This is a bizarre statement because that issue *was before* the Court in the companion case of *General Trading*, which Frankfurter also authored. *See Gen. Trading Co.*, 322 U.S. at 336.

> the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.[222]

Although paying a sales tax and collecting a use tax may appear to be a formal distinction, Frankfurter did not agree.

It may help to understand *Dilworth* by thinking about sales as being arrayed on a continuum. At one end are the sales made by an in-state retailer to a customer at the store who leaves with the purchased good. That this constitutes an in-state sale is beyond constitutional reproach. At the other end of the continuum, consider the earlier example of a South Dakota tourist on vacation buying more than $200,000 of art at a New York City gallery that ships it to South Dakota using a common carrier. *Dilworth* places this situation at the other end of the continuum. Under *Dilworth*, no South Dakota sale exists so how can the gallery owner be asked to pay the South Dakota sales tax as opposed to collecting the South Dakota use tax?[223]

*General Trading* presented the market states with a blueprint for avoiding the constitutional issue of when a remote vendor can be made to collect their sales taxes—and that was to require the collection of their use taxes. To be sure, *Dilworth* did not hold that the Tennessee vendor could not be made to collect the Arkansas sales tax (if there were an Arkansas sale); it involved only the imposition of a sales tax on a transaction that did not constitute a sale in the putative taxing state. It could be viewed as having no relevance to determining the constitutionality of a statute requiring a vendor to collect a *sales* tax rather than a *use* tax. But if *Dilworth* controls on what constitutes a sale, it is hard to imagine how a remote vendor using a common carrier is making an in-state sale.

Frankfurter drew a clear distinction between sales taxes and use taxes. The constitutional power to collect a use tax might not automatically extend

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

223. It is also possible that the gallery owner cannot be made to collect the South Dakota use because of its lack of due process and commerce clause connections.

to collecting a sales tax, assuming a sale exists in the taxing state. And where a sale takes place in the case of downloaded digital services and goods might be problematic. Why invite any challenge at all when the Court has already blessed the collection of the use tax in *General Trading*? That case sent a clear unambiguous message, which the states clearly understood.

In addition to the above discussion, a more compelling reason exists why a state should draft a statute in terms of collecting a use tax and not a sales tax. Recall the earlier example of a South Dakota resident who buys more than $200,000 of art in a gallery in New York City, which the gallery ships to South Dakota. It is unlikely that this constitutes a South Dakota sale under *Dilworth*. Even though the resident owes a use tax when the art arrives home, the gallery would have no obligation under the South Dakota statute to collect the sales tax if under *Dilworth* there were no South Dakota sale.[224] Redrafting the statute to impose an obligation to collect the use tax would bring this situation under *General Trading* and be an easy fix avoiding possible litigation.[225]

I have no idea why South Dakota drafted its statute in terms of collecting the sales tax rather than the use tax. Perhaps there are unique South Dakota reasons for doing so. But South Dakota cannot serve as a model that should be mimicked on this point.[226]

224. To keep the problem in focus, assume (unrealistically) that the gallery otherwise has due process and commerce clause nexus with South Dakota. To be sure, the distinction between a use tax and a sales tax can be described as a "triumph of formalism over substance, " Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 287 (1977), and a relic of an era when the Commerce Clause was interpreted as protecting an area of tax free trade among the states. *Id.* at 278. But the substance of the transaction in the text is not a South Dakota sale.

225. Another approach would be a rule that required a remote vendor to collect either the South Dakota sales tax or use tax, provided the thresholds were satisfied.

226. The majority in *Wayfair* stated that "all concede that taxing the *sales* in question here is lawful." *Wayfair*, 138 S. Ct. at 2087 (emphasis added). I make nothing of this overgeneralization. Neither party, nor any of the amici addressed the issue discussed in the text. I cannot believe that the Court was even aware of *Dilworth*, let alone was implicitly overruling it. *See* Holderness & Boch, *supra* note 212 ("By limiting the scope of the new economic nexus rule to sales taxes, South Dakota has put up an additional hurdle in the way of the victory it deserves. The state may find that even if it wins on the physical presence issue, it will remain unable to tax the proceeds from sales of products delivered into the state by common carrier, and additional legislation will be necessary.") Holderness and Boch dissect possible South Dakota arguments that a remote vendor can be made to pay the sales tax and find all of them defective. *Id. See also* Thimmesch, Shanske, & Gamage, *supra* note 212. ("Justice Anthony M. Kennedy's opinion explicitly noted that the South Dakota statute imposed a sales tax collection obligation, but the reference seems to have been more colloquial than technical.").

Winning on a *Dilworth* argument would only stall the inevitable litigation because of the ease

## VIII. PIKE BALANCING

In many respects, *Wayfair* was not a surprising decision. Commentators had criticized *Quill* and its physical presence rule almost from the outset.[227] But one of the more surprising parts of *Wayfair* was its elevation of *Pike v. Bruce Church, Inc.*,[228] a case that was applied in only one tax case, into one of the:

> two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face 'a virtually per se rule of invalidity' . . . State laws that 'regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' Pike v. Bruce Church, Inc., 397 U. S. 137, 142 (1970); *see* also Southern Pacific [325 U.S., at 779].[229] Although subject to exceptions and variations . . . these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause.[230]

Moreover, *Pike v. Bruce Church, Inc.* did not figure prominently even in

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with which a state could cure the defect by redrafting. Also, because the use tax would be owed by the purchaser regardless of such litigation, even a winning litigant would not necessarily recover any sales taxes that it might have already paid.

227. See the articles set forth in POMP, *supra* note 28, at 9-82-9-83. Some did leave the oral argument, however, surprised at what they perceived to be the hostile questioning of South Dakota and the government.

228. 397 U.S. 137 (1970).

229. Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945) preceded *Pike* by 25 years. That case involved Arizona's limit on the length of trains. The Court applied a balancing test similar to what would subsequently be articulated in *Pike*. The Court acknowledged that its dormant commerce clause approach must consider the "relative weights of the state and national interests involved." *Id.* at 770. The Court had an easy time striking down the Arizona law finding that it imposed a serious burden on interstate commerce and that it had "no reasonable relation to safety," and actually "made train operation more dangerous." *Id.* at 775. The Court had little trouble concluding that the Arizona law achieved "at most a slight and dubious" safety benefit while "preventing the free flow of commerce by delaying it and by substantially increasing its cost and impairing its efficiency." *Id.* at 779.

230. *Wayfair*, 138 S. Ct. at 2091.

the one state tax case in which it was mentioned. For that reason, a detailed review of the case is in order.

Bruce Church engaged in commercial farming in Arizona and California. Pike was an Arizona official charged with enforcing the Arizona Fruit and Vegetable Standardization Act, which was interpreted to require that cantaloupes grown in Arizona for sale had to be packaged in crates within Arizona. Accordingly, Pike prohibited Bruce Church from transporting uncrated cantaloupes from its Arizona ranch to California for packing and processing.[231] Apparently, cantaloupes packed in Arizona were labeled as coming from Arizona and similarly, cantaloupes packed in California were labeled as coming from California.[232]

The company spent more than $3 million preparing its Arizona ranch for growing cantaloupes. Its packing plant in California was 31 miles from its Arizona ranch. It would have cost Bruce Church $200,000 to build a packaging facility in Arizona and while it was being built the company would have lost $700,000 in unsold cantaloupes.[233]

In holding that the Arizona statute imposed an unconstitutional burden on interstate commerce, the Court stated that:

> [a]lthough the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken

231. *Pike*, 397 U.S. at 138.
232. The Court proceeded on this assumption, but it is not clear whether the labeling was required by Arizona law or simply represented the industry practice. *Accord* Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause* 84 MICH. L. REV. 1091, 1209-10 (1986).
233. *Pike*, 397 U.S. at 139.

> a balancing approach in resolving these issues, Southern Pacific Co. v. Arizona, 325 U.S. 761, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.[234]

In applying this test, the Court had the benefit of the State having stipulated that the primary purpose of the law was to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging,[235] which the Court admitted were legitimate, but not strong state interests.

> But the State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the State. The nature of that burden is, constitutionally, more significant than its extent.[236] For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere.[237] Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.[238]

The Arizona "regulatory scheme could perhaps be tolerated if a more compelling state interest were involved" but "the State's interest is minimal at best. . . "[239]

What the Court does not do, contrary to its own formulation of its balancing test, is to ask whether there were alternatives that would have less

234. *Id.* at 142.
235. *Id.* at 143. Apparently, Arizona grew especially good cantaloupes and the purpose of the law was to enhance the competitiveness of the State's cantaloupe growers.
236. Regan, *supra* note 232, at 1215:

> The first sentence, which concludes with a reference to the $200,000 cost to Bruce Church, could be the start of an open-ended private interest balancing. But we are told in the next sentence that the nature of the burden is more significant than its extent. Already then, the balancing is not simply a matter of totting up costs and benefits. Some costs are special. Incidentally, the famous Pike test from earlier in Stewart's opinion says nothing about the nature of the burden being significant. It says the nature of the local interest is significant, but not the nature of the burden.

237. *See infra* note 242 and accompanying text.
238. *Pike*, 397 U.S. at 145.
239. *Id.* at 146.

impact on interstate commerce. The most obvious alternative would be a law requiring cantaloupes grown in Arizona to have a sticker affixed to them indicating their origin; it would be irrelevant where the sticker was applied. Would the cost of affixing that sticker at Church's California plant be so different from the costs of affixing that sticker in Arizona? Without knowing more, it would seem that the mechanics and hence cost of placing a sticker on a cantaloupe would not be a function of where the sticker was applied. The Court is remarkably silent on raising this alternative.

Nor is it clear why the Arizona law should be viewed as "even handed." Church is prohibited from processing his Arizona-grown cantaloupes in California. In the context of the Commerce Clause, why is that "even handed"? According to Professor Coenen, "Pike itself presented an odd case in which to set forth a standard for assessing neutral rules because it involved the application of a state statute that, under present-day analysis, appeared to entail overt discrimination."[240] "From a present-day vantage point, the operation of the Arizona law thus seemed to discriminate against interstate commerce by imposing an in-state processing requirement on the grower."[241] Professor Regan reaches the same result as Professor Coenen by characterizing the Arizona law as "protectionist" and equivalent to an "embargo."[242] After an exhaustive, rigorous disembowelment of the decision, Professor Regan concludes that *Pike* is not a balancing opinion at all despite professing to be one.[243]

Indeed, the Court's reference to the State's burden being "virtually per se illegal" is language normally applied to facially discriminatory statutes and is the opposite of balancing.[244] That is the way *Wayfair* referred to the term.[245] So what to make of *Pike*'s elevation?

Perhaps the way to appreciate *Pike* is to recognize that at least since 1951, the Court had struck down state laws that imposed an "undue burden" on interstate commerce.[246] *Pike* seems to have been a reaction to this earlier

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240. DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 266 (2004).
241. *Id.* at 266 n.41.
242. Regan, *supra* note 232, at 1220.
243. *Id.*
244. *See, e.g.*, Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996).
245. "State laws that discriminate against interstate commerce face 'a virtually per se rule of invalidity.'" *Wayfair*, 138 S. Ct. 2080, 2091 (2018).
246. Dean Milk Co. v. City of Madison, 340 U.S. 349, 353 (1951). The term "undue burden" or some variation thereof has been used by litigants or the Supreme Court starting in the early 20th century. *See*,

line of cases that suggested that a statute that rationally served a legitimate state interest in a non-discriminatory manner was constitutional regardless of its burden on interstate commerce.[247] *Pike* rejects that proposition.

Predictably, terms like "burden" and "undue" are as opaque as they are rootless and flexible. Consistent with *Pike's* low profile in state tax cases, *Quill* referred to "undue burdens" without even citing *Pike*.[248] "Their application thus requires courts to make tough contextual judgments as they work their way through an endless stream of cases involving every imaginable form of state law."[249] If *Pike* was intended to avoid these problems, it simply replaced terms like "undue" and "burden" with an equally opaque balancing test requiring determinations regarding whether a "burden" is "clearly excessive" in relation to "putative local benefits" and whether a statute regulates "evenhandedly" to effectuate a "legitimate" local "public interest". Each of the preceding terms in quotes is hardly self-defining and will take their meaning from the context of a case, requiring a robust record. *Pike* did little to imbue these terms with any meaning that might guide future cases, which the Court lamented in *Davis v. Kentucky*, discussed below.

*Pike* has been applied in only one tax case; its recent application in non-tax cases has resulted in state victories.[250] The only state tax case discussing

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*e.g.*, Union Tank Line v. Wright, 249 U.S. 275, 279 (1919); Stafford v. Wallace, 258 U.S. 495, 521 (1922), Pac. Telephone & Telegraph Co. v. Tax Comm'n, 297 U.S. 403, 413 (1936).

247. *See, e.g.*, South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938). Eleven years before *Pike*, Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959), rejected Barnwell's proposition that "no showing of burden on interstate commerce is sufficient to invalidate local safety regulations in absence of some element of discrimination against interstate commerce." *Id.* at 528-29. In its place, Bibb adopted a balancing test that anticipated *Pike*. Inexplicably, *Pike* does not cite *Bibb*. In *Raymond Motor Transportation v. Rice*, the Court applied *Pike* and stated that "we cannot accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce." Raymond Motor Transp. v. Rice, 434 U.S. 429, 443 (1978).

248. The closest *Quill* came to citing *Pike* was its citing of *Kassel v. Consolidated Freightways Corp.*, which in turn cited *Pike*. Quill v. North Dakota, 504 U.S. 298, 312 (1992). But *Quill* never explicitly referred to *Pike* or engaged in a balancing test. *Wayfair* described the *Quill* majority as "conclud[ing] that the physical presence rule was necessary to prevent undue burdens on interstate commerce." *Wayfair*, 138 S. Ct. at 2092.

249. COENEN, *supra* note 240, at 210.

250. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmnt. Auth., 550 U.S. 330 (2007); Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1989). *But see* Edgar v. MITE Corp., 457 U.S. 624 (1982). Adam Thimmesch, *A Unifying Approach to Nexus Under the Dormant Commerce Clause*, MICH. L. REV. ONLINE (2018), *reprinted in* POMP, *supra* note 28, at 9-117

*Pike* was *Kentucky v. Davis*,[251] which dealt with Kentucky's personal income tax exemption for interest received by residents from Kentucky bonds while taxing residents on interest received from out-of-state bonds. The Davises attacked this provision as discriminating against interstate commerce.

Unfortunately for the Davises, their timing could not have been worse. The case was heard in the middle of the country's financial crisis,[252] and involved a hoary feature found in nearly every state's personal income tax.[253] Presumably, a victory for the taxpayers would have disrupted the bond market, fueled the melt-down of the financial markets, and undercut the reliance interest of those who would not have bought state bonds except for the exemption.[254] Hence, it was not surprising that the Court upheld the exemption and provided stability to the bond market.[255]

Almost from the opening few pages in the decision, it was apparent the exemption would be upheld. The Court's historical review early in its opinion emphasized that for nearly two centuries, states and their political subdivisions have issued bonds to finance projects[256] and that for nearly a century, states have adopted income tax exemptions similar to Kentucky's.

The Supreme Court reversed the Court of Appeals of Kentucky, which

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("The Court has not struck down a state statute applying [Pike] balancing since the 1980's. The Roberts Court has generally been unwilling to even engage in balancing.").

251. 553 U.S. 328 (2007). Professor Coenen argues that "there was a strong reason not to apply Pike balancing in Davis because that case involved a challenged tax law, rather than a challenged regulation, and the Court has historically not subjected state tax laws to *Pike*-balancing analysis. . . The *Davis* Court noted, however, that all parties in *Davis* had seen fit to evaluate the Kentucky tax rule under *Pike*, and for this reason [the Court] proceeded to do so as well." Dan T. Coenen, *The Supreme Court's Municipal Bond Decision and the Market-Participant Exception to the Dormant Commerce Clause*, 70 OHIO ST. L.J. 1179, 1206 n.136 (2009).

252. The case was argued November 5, 2007; the opinion was issued May 19, 2008. The financial crisis started in the summer of 2007, with the collapse of the collateralized debt obligation market. *See, e.g.*, *Global Financial Crisis: Five Key Stages*, THE GUARDIAN, https://www.theguardian.com/business/2011/aug/07/global-financial-crisis-key-stages (last visited Feb. 20, 2019).

253. Forty-nine states filed briefs in support of Kentucky. *Davis*, 553 U.S. at 342. Justice Kennedy in dissent quipped that "[p]rotectionist interests always want the laws they pass . . . " *Id.* at 373 (Kennedy, J., dissenting).

254. The Court focused not on the buyers but on the "settled expectations" of the states.

255. The Court did not rule on the special state tax treatment of private activity bonds, but presumably the holding in the case would be extended to that subset of the bond market. Private activity bonds are municipal bonds issued by a state on behalf of a private entity serving the public good, such as an airport, hospital, or low-income housing. The Davises did not pursue this issue at trial.

256. *Id.* at 331 (majority opinion).

found the tax scheme to be facially unconstitutional.[257] The Court based its reversal on *United Haulers,*[258] which held just a year earlier as described by *Davis* that "a government function is not susceptible to standard dormant Commerce Clause scrutiny [because of] its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors."[259] "[T]he issuance of debt securities to pay for public projects is a quintessentially public function, with [a] venerable history. . ."[260] The Court characterized the State's taxing regime as "parallel[ing] the ordinance[s] upheld in *United Haulers*"[261] and thus beyond dormant commerce clause scrutiny.

Because of the importance that *Wayfair* places on *Pike* balancing, and its prior unimportance in state taxation, it is worth quoting at length from the majority's treatment of *Pike*.

"The Davises' request for Pike balancing assumes an answer to an open question: whether Pike even applies to a case of this sort. . . We need not decide this question today, however, for Kentucky has not argued that Pike is irrelevant, and even on the assumption that a Pike examination might generally be in order in this type of case, the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the Davises to satisfy a Pike burden in this particular case.

The institutional difficulty is manifest in the very train of disadvantages that the Davises' counsel attributes to the current differential tax scheme:

> First, it harms out-of-state issuers (i.e., other States and their subdivisions) by blocking their access to investment dollars in Kentucky. Second, it similarly harms out-of-state private sellers (e.g., underwriters, individuals, and investment funds) who wish to sell their bonds in Kentucky. Third, it harms the national municipal bond market and its participants by distorting and impeding the free flow of capital. Fourth, it harms Kentucky investors by promoting risky,

257. The Kentucky Supreme Court refused to review the Court of Appeals decision. *Id.* at 337.
258. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007).
259. 553 U.S. at 341.
260. *Id.* at 342.
261. *Id.* at 343.

high-cost investment vehicles. Fifth, it harms the States by compelling them to enact competing discriminatory laws that decrease their net revenues.

Even if each of these drawbacks does to some degree eventuate from the system, it must be apparent to anyone that weighing or quantifying them for a cost-benefit analysis would be a very subtle exercise. It is striking, after all, that most of the harms allegedly flowing directly or indirectly to Kentucky's sister States and their citizens have failed to dissuade even a single State from supporting the current system; every one of them, including States with no income tax, have lined up with Kentucky in this case.

The prospect for reliable Pike comparison dims even further when we turn to the benign function of the current system flagged a moment ago. Is any court in a position to evaluate the advantage of the current market for bonds issued by the smaller municipalities, the ones with no ready access to any other bond market than single-state funds? Consider that any attempt to place a definite value on this feature of the existing system would have to confront the what-if questions. If termination of the differential tax scheme jeopardized or eliminated most single-state funds (as the cited authorities predict) would some new source of capital take their place? Would the interstate markets accommodate the small issuers (as no cited authorities predict), or would the financing in question be replaced by current local taxation for long-term projects (unlikely, considering that financially weaker borrowers are involved), or would state governments assume responsibility through their own bonds or by state taxation? Or would capital to some degree simply dry up, eliminating a class of municipal improvements? And if some new source or sources of capital became available for these improvements in a given State, how likely is it that the new scheme would produce measurable net benefits to other States seeking capital, and how perceptibly would it produce a freer flow of funds? Money spent up front on increased local or state taxation is no more available for out-of-state investment than money invested in local bonds; sinking funds would be obviated, but what would the effect be on interstate capital flows?

> What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all. . . .
>
> While it is not our business to suggest that the current system be reconsidered, if it is to be placed in question a congressional forum has two advantages. Congress has some hope of acquiring more complete information than adversary trials may produce, and an elected legislature is the preferable institution for incurring the economic risks of any alteration in the way things have traditionally been done. And risk is the essence of what the Davises are urging here. It would miss the mark to think that the Kentucky courts, and ultimately this Court, are being invited merely to tinker with details of a tax scheme; we are being asked to apply a federal rule to throw out the system of financing municipal improvements throughout most of the United States, and the rule in Pike was never intended to authorize a court to expose the States to the uncertainties of the economic experimentation the Davises request.[262]

Not exactly a glowing endorsement of *Pike*. Justice Scalia did not join the majority's discussion of *Pike* because it did not go far enough. He would abandon *Pike* in its entirety:

> The Court declines to engage in *Pike* balancing here because courts are ill suited to determining whether or not this law imposes burdens on interstate commerce that clearly outweigh the law's local benefits, and the "balancing" should therefore be left to Congress. . . The problem is that courts are less well suited than Congress to perform this kind of balancing in every case. The burdens and the benefits are always incommensurate and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of

262. 553 U.S. at 353-57. Professor Thimmesch identifies the difficulty of measuring a state's interest in levying taxes under a *Pike* balancing. Thimmesch, *supra* note 250.

> deciding whether three apples are better than six tangerines.[263] Here, on one end of the scale (the burden side) there rests a certain degree of suppression of interstate competition in borrowing; and on the other (the benefits side) a certain degree of facilitation of municipal borrowing. Of course, you cannot decide which interest 'outweigh' the other without deciding which interest is more important to you. And that will always be the case. I would abandon the Pike-balancing enterprise altogether and leave these quintessentially legislative judgments with the branch to which the Constitution assigns them.[264]

Justice Kennedy dissented, joined by Justice Alito. Given Kennedy's emphasis on *Pike* in *Wayfair*, his cursory treatment of *Pike* in *Davis* is particularly noteworthy. Kennedy simply agreed that *Pike* did not have to be addressed because the Kentucky tax regime was unconstitutional under a different line of cases.[265] That was it. Not the resounding affirmation of *Pike* that Kennedy expressed in *Wayfair*.

So, what accounted for the Court's exuberance for *Pike* balancing in *Wayfair* given its subdued reception in *Davis*? Presumably, it was attributable to the Government's suggestion in *Wayfair* that *Pike* "can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. For example, the United States argues that tax-

263. 553 U.S. at 360 (Scalia, J., concurring in part). Justice Scalia had earlier indicated his scorn for balancing as "more like judging whether a particular line is longer than a particular rock is heavy." Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 897 (1988)(Scalia, J., concurring in the judgment). *See generally* Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981). Justice Black thought that courts should overrule only discriminatory laws. J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 330 (1938) (Black, J., dissenting). Otherwise, the courts would sit as a "super-legislature." Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 788 (1945). One response to the Black position is that

> [d]iscrimination is a delusively simple term. How overreaching must a state measure be to merit condemnation as discriminatory? It seems apparent that in answering this question the Court must make the same sort of value judgment that it has been making in performing its broader protective function. Discrimination exist or not, depending upon whether there is an economic justification for the difference in treatment which the state accords interstate commerce.

Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, *in* SELECTED ESSAYS ON CONSTITUTIONAL LAW: 1938-1962 280, 290 (1963).

264. *Davis*, 553 U.S. at 360 (Scalia, J., concurring in part).

265. *Id.* at 365 (Kennedy, J., dissenting).

collection requirements should be analyzed under the balancing framework of Pike v. Bruce Church, Inc."[266] Was it just an easy way out of having to deal with tough questions that were not formally before the Court?

What type of situation might raise a *Pike* balancing test? Perhaps one involving the collection of a local sales tax in State X, whose local sales taxes do not conform with X's State sales tax. Suppose State X adopts the same sales and transaction thresholds as in South Dakota's law. Assume the base of X's local sales taxes differs markedly from the base of the State's sales tax. The local base is much broader and has fewer exemptions than the State's.[267] Furthermore, these local taxes are locally administered and differ from each other. In addition, X takes the position that if a remote vendor exceeds the State thresholds it has to collect the local taxes even if its sales into those localities are below the thresholds.[268]

Suppose a remote vendor exceeds the State's thresholds but makes a very modest amount of sales into a locality. Suppose it can prove that its profit margin on those sales is de minimis compared to its costs of complying with the local tax.[269] I leave it to the reader to ponder how *Pike* would resolve this case.[270] Such suits would not result in a refund because the use tax

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266. *Wayfair*, 138 S. Ct. at 2098-99.

267. For example, compare LA. STAT. ANN. § 47:305(D)(1)(j) (state exemption for prescription drugs) with New Orleans Code of Ordinances § 150-887 (prescription drugs taxable); compare LA. STAT. ANN. § 47:305(D)(1)(n) (state exemption for food) with Caddo Parish Code of Ordinances § 50-26 (food taxable); LA. STATE. ANN. § 47:305(D)(1)(m) (state exemption for patient aids) with Caddo Parish Code of Ordinances § 50-26 (patient aids taxable) LA. ADMIN. CODE tit. 61, § 4301 (exemption for custom computer software) with Caddo Parish Code of Ordinances § 50-26 (custom software taxable).

Another candidate for an attack under *Pike* would be Colorado, which has 71 municipalities having their own registration and filing requirements, and tax bases, which not only differ from the state's but also from each other. There are 60 local tax rates and 34 various tax districts. "[A] Colorado retailer can face up to 756 sales tax combinations." Bruce Nelson, *Wayfair—A Cover for Other Mischief?*, 91 STATE TAX NOTES 221, 221 (2019). Another commentator observes that Colorado has over 300 local taxing jurisdictions—counties, cities, and other various special tax districts, in addition to 69 home rule jurisdictions. Bland, *supra* note 176.

268. *See generally* Walter Hellerstein, *Are State and Local Taxes Constitutionally Distinguishable*, 83 STATE TAX NOTES 1091 (2017). South Dakota has no local sales or use taxes, so this issue was not presented by *Wayfair*.

269. U.S. GOV'T ACCOUNTABILITY OFF., GAO 18-114, SALES TAX: STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS 15-27 (2018), lists compliance cost as including the time spent on making sure taxes are correctly paid, the cost of purchasing software and the computing resources needed to incorporate and run tax compliance software, and the time and cost of dealing with audits.

270. For some suggestions on how the analysis might proceed, see Hayes Holderness, *The Workability of Pike Balancing for State and Local Tax Collection Obligations*, THE SURLY SUBGROUP (Apr. 4,

would be owed by the consumer, but it would result in being freed from onerous compliance burdens.

## IX. LOCAL SALES TAXES, DISCRIMINATION, AND THE INTERNET TAX FREEDOM ACT

It is tempting for a state having local sales taxes to require a remote vendor to collect a local use tax based on the delivery address because that is obviously known to the vendor and easily audited. It is also tempting for a state to require local retailers to collect a local sales or use tax at the local rate that applies at the location of the retailer, even if the customer has those goods shipped to an address in another location in the state. This way the local retailer only has to master one set of local rules and regulations. This difference in rules, however, leads to both a constitutional problem and a violation of the Internet Tax Freedom Act.[271]

Arizona provides an example. Arizona provides different sourcing rules for remote vendors and in-state vendors.[272] A sale by an in-state retailer is sourced to the "seller's business location if the seller receives the order at a business location in this state,"[273] regardless of where shipped. By comparison, a sale by a remote vendor is sourced "to the purchaser's

2018), *available at* https://perma.cc/W752-J4AE, *reprinted in* POMP, *supra* note 28, at 9-113; Jeffrey S. Reed, *What Is the New Constitutional Test After Wayfair?*, 89 STATE TAX NOTES 335 (2018), *reprinted in* POMP, *supra* note 28, at 9-114; Thimmesch, *supra* note 250.

271. Pub. L. No. 105-277, Title XI, 112 Stat. 2681, 2719 (1998) (codified as amended at 47 U.S.C. § 151).

272. ARIZ. REV. STAT. ANN. § 42-5040 (2018). Sourcing of certain transactions involving tangible personal property; definitions

A. Except as provided in section 42-5075, retail sales of tangible personal property shall be sourced as follows:

1. To the seller's business location if the seller receives the order at a business location in this state.

2. Except as provided in section 42-5008.01, to the purchaser's location in this state if the seller receives the order at a business location outside this state.

B. For the purposes of this section, an order is received when all of the information necessary to accept the order has been received by or on behalf of the seller, regardless of where the order is accepted or approved. The place of business or residence of the purchaser does not determine where the order is received.

273. *Id.*

location in this state if the seller receives the order at a business location outside this state," regardless of where that person resides.

To illustrate, suppose a resident of local Jurisdiction X shops at a store in local Jurisdiction Y and has the purchase shipped back to X. The local sales tax will be based on rates in Y. If that same person were to order over the Internet, however, the remote vendor would charge tax based on rates in X. This discrimination in rates has been held to be unconstitutional.[274] In addition, this discrimination would violate the Internet Tax Freedom Act.[275]

The difference in compliance burdens alone would raise a Pike balancing issue even if no discrimination were found. The remote vendor has to deal with 91 different municipal tax codes and 15 county rates. Each municipal tax code differs from the State's and from the others.

## SUMMARY AND CONCLUSION

It will be years before we have a feel for *Wayfair*'s implications and its fallout. Short-term predictions are safer. Starting with the safest, the states will continue adopting legislation modeled after South Dakota's. Hopefully, the statutes will refer to the collection of the use tax and not the sales tax. Moreover, rather than treating the sales and transaction tests as alternatives, both might be required to be satisfied as in Connecticut, Massachusetts, Minnesota, and New York. Alternatively, a state might consider dropping the transaction test. Although *Wayfair* endorsed the Streamlined Sales Tax Agreement, the politics will discourage the states from rushing to join.

As time goes on, the states may be forced to adopt anti-avoidance statutes

274. Associated Indus. v. Lohman, 511 U.S. 641 (1994).

275. 47 U.S.C. § 151 (2018). *See* POMP, *supra* note 28, at 8-33-41. Section 1105(2) defines a discriminatory tax as meaning (A) any tax imposed by a State or political subdivision thereof on electronic commerce that–(i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means; (ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services . . ." *see also* Performance Mktg. Ass'n v. Hamer, 998 N.E.2d 54 (Ill. 2013).

aggregating related entities for purposes of satisfying the thresholds. Similarly, refinements in the definition of a "transaction" might be expected. The Court's recent due process cases will become more important in testing particular fact patterns.

There will be renewed interest in *Pike* balancing, which has previously played no significant role in state taxation. I am somewhat skeptical that the doctrine can bear the weight that will now be placed on it or how it will be distinguished from just plain old "undue burdens."

The most likely litigation will take place at the municipal level, dealing with discrimination, undue burdens on interstate commerce, and violations of the Internet Tax Freedom Act.

The good news is that the fear of off-shore vendors ignoring *Wayfair* is probably over blown.

While the Court missed an opportunity to inter "substantial nexus," I look forward to the day when the phrase is recognized as unhinged and politically driven—and buried.

All bets will be off, of course, should Congress overturn *Wayfair* and reinstate the physical presence requirement. The fact that Congress did nothing in the 27 years between *Quill* and *Wayfair* is not predictive because the politics post-*Wayfair* are 180 degrees different from the pre-*Wayfair* era.