The History of Internet Sales Taxes from 1789 to the Present Day: *South Dakota v. Wayfair*

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On June 21, 2018, the U.S. Supreme Court ruled that South Dakota can require collection of its sales tax on sales to its residents by out-of-state internet retailers.[1] The 5-4 decision overruled two earlier precedents, *National Bellas Hess, Inc. v. Illinois Department of Revenue* (1967) and *Quill Corp. v. North Dakota* (1992), which had both held that only businesses with a physical presence in a state can be required to collect that state's sales tax.[2] The new rule, articulated in *Wayfair*, is that a state sales tax can be constitutionally collected so long as it does not discriminate against or place excessive burdens on those engaging in interstate commerce. South Dakota's law, with built-in protections for taxpayers and limitations on its authority, passed constitutional muster.

In one sense, the *Wayfair* case is unremarkable. Most observers had predicted the outcome as inevitable. The four dissenting justices did not bother to defend the old physical presence rule, writing that "*Bellas Hess* was wrongly decided, for many of the reasons given by the Court," disagreeing only that Congress should fix the problem

* Executive vice president and general counsel at the Tax Foundation. The Tax Foundation brief in support of neither party that Bishop-Henchman authored in *Wayfair* was cited twice by the Court. He has also testified to Congress seven times and to states dozens of times on these issues since 2010.

1 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018). Technically, the tax being collected is the state's use tax, a tax imposed at an identical rate as the sales tax on any purchase by a resident where sales tax has not otherwise been collected. Every state with a sales tax has a use tax, and their nondiscriminatory imposition was upheld in Henneford v. Silas Mason Co., Inc., 300 U.S. 577 (1937). To avoid pedantry I refer to them simply as sales taxes.

2 See National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 (1967); Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

rather than the Court.[3] News coverage was an almost whimsical oh-well-it-was-good-while-it-lasted-but-now-we-have-to-pay-tax-on-the-stuff-we-buy-online.[4] The largest online retailer, Amazon.com, had collected sales taxes nationwide since 2014, and shortly after the decision, rival Overstock.com said it would do so as well.[5] In the weeks after the decision, states began preparing laws identical to South Dakota's, with several announcing plans to return any additional revenue in the form of cuts to other taxes.

But in another sense, *Wayfair* is the most significant case of this Supreme Court term. E-commerce now represents 11 percent of all retail sales, growing by 15 percent each year. Forty *amicus* briefs were filed in the case, with groups normally allied on other issues finding themselves on opposing sides.[6] The attorney line to attend oral arguments in the case was the second longest of the term, behind only *Janus*.[7] The lineup of the justices was unusual: Justices Anthony

[3] Wayfair, 138 S. Ct. at 2101 (Roberts, C.J., dissenting).

[4] A somewhat-related law still remains in force: the Internet Tax Freedom Act (ITFA), a two-sentence bill passed by Congress as a temporary three-year measure in 1998, extended several times, and ultimately made permanent in 2016. ITFA bans new state or local taxes on internet access, and multiple or discriminatory taxes on internet commerce. Accordingly it expressly bans taxes that apply to internet sales but not offline sales.

[5] See, e.g., James Brumley, For Most Online Retailers, the Online Sales Tax Decision Is Non-Story, Investor Place, Jun. 23, 2018, https://finance.yahoo.com/news/most-online-retailers-online-sales-201634136.html; Corinne Ruff, Overstock to Collect Sales Tax Following SCOTUS Decision, Retail Dive, Jun. 26, 2018, https://www.retaildive.com/news/overstock-to-collect-sales-tax-following-scotus-decision/526547.

[6] Briefs supporting South Dakota included ones submitted by scholars Alex Brill and Alan Viard of the American Enterprise Institute; the city of Little Rock, Arkansas; trade associations for wholesalers, retailers, and shopping centers; 41 states and D.C., including many Republican-controlled states; Senators Heidi Heitkamp (D-ND), Lamar Alexander (R-TN), Richard Durbin (D-IL), and Mike Enzi (R-WY); and 60 tax and law professors of all ideological stripes. Briefs supporting Wayfair included ones submitted by New Hampshire and Montana; trade associations for catalog mailers and auctioneers; Etsy; practitioner group Tax Executives Institute; the National Taxpayers Union; the Competitive Enterprise Institute; and the Cato Institute. The Tax Foundation filed a brief in support of neither party, asking the Court to uphold South Dakota's law but to provide guidance stating that particular features of that law meant it did not burden interstate commerce.

[7] Discussion between the author and the marshal of the Court Apr. 17, 2018. Tax counsels for L.L. Bean win the most tenacious award, having slept out overnight in freezing cold (in their employer's gear) to be first in the public line (not counting paid line-standers). Non-lawyers who arrived after 5 a.m. did not get to see the oral argument.

Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Samuel Alito, and Neil Gorsuch making up the majority, and Chief Justice John Roberts and Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissenting. It ended up being Justice Kennedy's final majority opinion, and his influence was felt on the decision. More than just about a South Dakota law, the case involved weighty and long unsettled questions such as due process limitations on jurisdiction, the proper roles of Congress and the courts in enforcing limitations on state actions taxing or regulating interstate commerce, the standard by which the Supreme Court should overrule prior decisions, the thorny question of state regulations that impact producers in other states, and how (or whether) to tax activities that happen everywhere and nowhere in the cloud or on the internet.

Wayfair may prove to be the first case where the Supreme Court truly confronted the need to pair, on one hand, constitutional and legal systems that define protections and obligations based on physical presence within geographic lines, and on the other, economic activities that are increasingly borderless, instantaneous, and nonphysical. As with all good constitutional stories, it starts in 1789.

Halting a Trade War, 1789 Edition

On September 17, 1787, the draft Constitution was approved by the Constitutional Convention, and it ultimately took effect on March 4, 1789, following state ratifications. The Convention had originally been called to consider amendments to the Articles of Confederation, which had governed, or more accurately failed to govern, the country since 1781.

The biggest shortcomings of the national government under the Articles of Confederation were its inability to raise revenue except through requests to the states and its requirement that all legislation be approved unanimously by each state.[8] "Attempted requisitions were regarded by the sovereign states as voluntary contributions or alms and were generally ignored. The payment of taxes came finally to be regarded as a romantically honorable act, or even as a sort of amiable and

[8] See Jared Walczak, How Failed Tax Policy Led to the Constitutional Convention, Tax Foundation, Sept. 16, 2016, https://taxfoundation.org/how-failed-tax-policy-led-constitutional-convention.

quixotic manifestation of eccentricity."[9] Attempts from 1783 through 1786 to enact federal taxes failed to achieve unanimous support, and the United States government quickly started going broke.

Another major shortcoming was that the Articles of Confederation neither prohibited trade wars between the states nor empowered the national government to stop them. States with ports taxed commerce bound for interior states, tariff wars proliferated, and the national economy was imperiled. New York imposed special entrance and clearance fees on all vessels heading to or from New Jersey or Connecticut. New Jersey retaliated by imposing a tax of 30 shillings a month on a lighthouse that New York City had purchased in Sandy Hook, New Jersey. Fisher Ames wrote, "The king of New York levied imposts upon New Jersey and Connecticut, and the nobles of Virginia bore with impatience their tributary dependence upon Baltimore and Philadelphia. Our discontents were fermenting into civil war."[10] Writing in 1824, U.S. Supreme Court Justice William Johnson described these actions as "destructive to the harmony of the states, and fatal to their commercial interests abroad. This was the immediate cause that led to the forming of a convention."[11]

James Madison orchestrated the Annapolis Convention in 1786 to attempt to halt this trade war, but only five states showed up. He then became determined to fix the issue in what became the Constitution by empowering the national government to restrain state actions that harm interstate commerce:

> [T]he desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned,

[9] Randolph Paul, Taxation in the United States 5 (1954).

[10] Allan Nevins, The American States During and After the Revolution, 1775–1789 at 555–57 (1927).

[11] Gibbons v. Ogden, 22 U.S. 1, 224 (Johnson, J., concurring). One biographer of Chief Justice John Marshall believes that Johnson's opinion was written in large part by Marshall himself, going "even further than the Court's opinion and express[ing] what was almost certainly Marshall's own view of the federal government's [exclusive] power." Joel Richard Paul, Without Precedent: Chief Justice John Marshall and His Times 370 (2018).

> before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain. The necessity of a superintending authority over the reciprocal trade of confederated States has been illustrated.[12]

The Constitution thus contains several restrictions on states' ability to tax or burden interstate activity. Justice Joseph Story, praising these provisions in his *Commentaries* in 1833, wrote that "there is . . . wisdom and policy in restraining the states themselves from the exercise of [taxation] injuriously to the interests of each other. A petty warfare of regulation is thus prevented, which would rouse resentments, and create dissensions, to the ruin of the harmony and amity of the states."[13] The Import-Export Clause prohibits states from imposing taxes on imports beyond what is needed for inspection duties.[14] The Tonnage Clause prohibits state charges on shipping freight.[15] The Privileges and Immunities Clause protects the right of citizens to cross state lines in pursuit of an honest living.[16] And then there's the Commerce Clause.

[12] The Federalist No. 42 (James Madison).

[13] Joseph Story, Commentaries on the Constitution 2 (1833), at § 1013.

[14] U.S. Const. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."). See, e.g., Michelin Corp. v. Wages, 423 U.S. 276, 286 (1976) (stating that the Import-Export Clause prohibits import taxes that "create special protective tariffs or particular preferences for certain domestic goods."). Justice Clarence Thomas, a critic of dormant commerce clause jurisprudence, nonetheless argues that taxes that discriminate against nonresidents should be invalidated by the courts under the Import-Export Clause. See Camps Newfound / Owatanna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) ("That the expansion effected by today's decision finds some support in the morass of our negative Commerce Clause case law only serves to highlight the need to abandon that failed jurisprudence and to consider restoring the original Import-Export Clause check on discriminatory state taxation to what appears to be its proper role.").

[15] U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage . . .").

[16] U.S. Const. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). See, e.g., United Bldg. & Constr. Trades v. Mayor of Camden, 465 U.S. 208, 219 (1984) (identifying "pursuit of a common calling" as a privilege of citizenship protected by the Constitution); Saenz v. Roe, 526 U.S. 489 (1999) (invalidating a law that did not restrict state travel per se but discouraged the crossing of state lines with a punitive and discriminatory law);

The Other Commerce Clause: From Complete Bar to *Complete Auto*

Readers of the *Cato Supreme Court Review* are familiar with the Commerce Clause. Over the course of cases from *McCullough* to *Schechter Poultry* to *Jones & Laughlin* to *Darby Lumber* to *Wickard* to *Lopez* to *Raich*, the Supreme Court transformed Congress's power to "regulate commerce . . . among the several States" into a federal power to regulate even non-commerce within one state, if it affects or could potentially affect interstate markets. Much of what the federal government does, for good or for ill, is thanks to this broad reading of the Commerce Clause.

Forget all that, for this is about a different Commerce Clause, sometimes called the dormant Commerce Clause or the negative Commerce Clause. The dormant Commerce Clause is a restriction on state laws that discriminate against interstate commerce, which is inferred by the grant of the power to regulate interstate commerce to the federal government. The "dormant" term comes from Chief Justice Marshall's majority opinion in *Gibbons v. Ogden*, where he explained that because the power to regulate interstate commerce was exclusively federal, it "must be placed in the hands of agents or lie dormant."[17] States can pass laws that affect or even regulate interstate commerce, but they are invalid if they discriminate against interstate commerce or excessively burden it.

Gibbons involved a stereotypical application of this doctrine. In 1808, New York granted a 30-year monopoly to Robert Livingston and Robert Fulton, giving them exclusive navigation rights for all boats for all bodies of water in New York state, including approaches to neighboring states. Aaron Ogden began a ferry service between Elizabethtown, New Jersey, and New York City with a license from this monopoly, doing business with Thomas Gibbons. The partnership went sour. Gibbons then obtained a federal license under a 1793 coastal trade law and began running a rival ferry on the same

id. at 511–12 (Rehnquist, J., dissenting) ("The right to travel clearly embraces the right to go from one place to another, and prohibits States from impeding the free passage of citizens); Erwin Chemerinsky, Constitutional Law 450 (2d ed. 2002) ("The vast majority of cases under the [Article IV] privileges and immunities clause involve states discriminating against out-of-staters with regard to their ability to earn a livelihood.").

[17] Gibbons, 22 U.S. at 189. See also Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 252 (1829) (describing "the power to regulate commerce in its dormant state").

route, captained by Cornelius Vanderbilt. Ogden sued to enforce the monopoly, and New York state courts enjoined Gibbons from operating his ferry. In the U.S. Supreme Court, Gibbons's lawyer, Daniel Webster, argued that Congress had sole power of interstate commerce and the New York monopoly was void there.

The Supreme Court ruled in favor of Gibbons, finding that the ferry was interstate commerce and that the license granted under the federal 1793 law pre-empted any state license. That Congress had not specifically acted in this instance was to no avail; the Commerce Clause, the Court said, was written "*to regulate commerce*; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law."[18] That Congress did not act did not mean that states could.

So strong was the concern over states' misuse of their power, that the rule for a century and a half was that states could not tax interstate commerce at all. Unimportant and noncontroversial U.S. Supreme Court opinions contained language that would be shocking to us today, such as "[a] State is . . . precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States" or "[n]o State has the right to lay a tax on interstate commerce in any form."[19]

This complete bar eroded as the rise of multistate corporations created concern that an out-of-state company could "exploit" in-state markets without paying taxes to support in-state government services. The rule also became untenable as more and more economic activity became interstate. Few people today never buy or sell anything from someone in another state. These economic changes, together with the Supreme Court's defining the constitutional term "commerce among the several States" to encompass nearly all economic activity, and a federal government that has taken on many new areas of action and regulation, have led to a greatly expanded scope for the federal government and a narrowed exclusive scope for the states. A complete ban on taxation of anyone engaged in interstate commerce would greatly hobble state taxation.

[18] Gibbons, 22 U.S. at 11 (emphasis in original).

[19] Freeman v. Hewitt, 329 U.S. 249, 252-53 (1946); Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

That something had to change became apparent in the 1950s, when the Court treated economically identical taxes differently based on "magic words" in the statute. The Court invalidated a license tax imposed on the in-state gross receipts of an out-of-state company, but upheld a franchise tax on an out-of-state company's "going concern value," measured by in-state gross receipts.[20] Justices and scholars became dissatisfied with a legal test that simply rewarded draftsmanship while missing the important question: "whether the challenged tax produced results forbidden by the commerce clause."[21]

Consequently, the Court abandoned its formal rule in the *Complete Auto* case of 1977, instead ruling that states may tax interstate commerce if the tax meets a four-part test: nexus, fair apportionment, nondiscrimination, and fairly related.[22]

Substantial Nexus

Substantial nexus is a sufficient connection between the state and the taxpayer. We'll come back to it.

Fair Apportionment

Fair apportionment means that the state cannot tax beyond its fair share of interstate commerce. It is determined by internal consistency: if every jurisdiction had the same tax, would it result in more than 100 percent of the business's income being subject to tax?[23]

What percent of a company's income can one state subject to its taxation? If all states can tax 100 percent of a company's income, that would lead to double taxation. Before the 20th century, most corporations were chartered by one state and therefore did not legally exist in other states. The rise of multistate corporations, and state corporate income taxes, gave rise to the need to apportion income among several states.

[20] See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 284 (1977) (comparing Ry. Express Agency v. Virginia, 347 U.S. 359 (1954) (Railway Express I) and Ry. Express Agency v. Virginia, 358 U.S. 434 (1959) (Railway Express II)).

[21] *Id.* at 285.

[22] *Id.* at 279.

[23] See Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983) (applying the internal consistency test).

In 1957, a three-factor apportionment formula was developed as the Uniform Division of Income for Tax Purposes Act (UDITPA), equally weighing sales, property, and payroll. If a company has 25 percent of its sales in State A, 100 percent of its property in State A, and 75 percent of its payroll in State A, then State A can subject two-thirds of that company's income to its corporate tax (25 plus 100 plus 75, divided by 3, is 66.66). Only three states adopted UDITPA, most preferring to game apportionment rules to benefit favored (in-state) companies.

After a series of decisions where the Supreme Court upheld state power to tax businesses based on the presence of door-to-door salespeople and independent contractors, Congress passed a temporary restriction on new state laws on those areas (still on the books today) and set up a committee to recommend permanent legislation.[24] The Willis Commission, as it was called, spent the early 1960s holding hearings and recommending a uniform state income tax base and an evenly weighted two-factor apportionment formula (property and payroll). Sales was not included in the formula in the view that the purpose of the corporate income tax is to pay for government services it uses, which is where its property and payroll are, not its sales.

States were alarmed by the Willis Commission's proposed formula, and successfully pressured Congress to withdraw the bill in return for states adopting the UDITPA formula. By 1970, most states had done so and Congress dropped the proposals. Since then, however, states have again begun gaming apportionment formulas, competing with each other to weigh the sales factor more heavily. Half the states today have a sales-factor-only formula, which benefits in-state companies.[25] The Supreme Court upheld the single sales-factor formula in 1978 as compliant with internal consistency, and further held in 1987 that gross receipts taxes need not be apportioned as they are inherently apportioned.[26]

[24] See Northwestern Cement Co. v. Minnesota, 358 U.S. 450 (1959), overruled by Interstate Income Act of 1959, P.L. 86-272, codified at 15 U.S.C. §§ 381–384; Scripto v. Carson, 362 U.S. 207 (1960).

[25] UDITPA is probably better called DITPA nowadays.

[26] See Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978); Tyler Pipe Co. v. Washington, 483 U.S. 232 (1987).

Nondiscrimination

A state cannot tax out-of-state activity or taxpayers while exempting similar in-state activity or taxpayers. Justice Anthony Kennedy, drawing on writings by Madison and Hamilton, wrote in 1994, "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[27]

States have tried to enact pretty much every permutation of discriminatory taxation, and the Supreme Court has been vigilant about stopping them all. It disallowed a New York tax solely on out-of-state activity that left identical in-state activity untaxed;[28] a Louisiana tax on all activity but where in-state activity receives significant credits;[29] a New York tax on out-of-state activity simultaneous with an exemption for in-state activity;[30] a Hawaii tax on all activity that exempted in-state activity;[31] a Pennsylvania fee on all activity coupled with reduced taxes on in-state activity;[32] an Ohio tax credit for all activity that was disallowed for out-of-state taxpayers;[33] a Massachusetts tax on all activity with the revenue distributed to in-state taxpayers only;[34] a Maine tax exemption given only to taxpayers engaged in in-state activity;[35] and a Maryland tax on all activity with a partial credit for out-of-state activity and a full credit given for in-state activity only.[36]

Several of these cases featured dissents from Justices Thomas and Antonin Scalia, as they disagreed with the whole notion of the dormant Commerce Clause. Justice Thomas has described it as an

[27] C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994) (quoting The Federalist No. 22, at 143–145 (A. Hamilton) (C. Rossiter ed. 1961); James Madison, Vices of the Political System of the United States, in 2 Writings of James Madison 362–63 (G. Hunt ed. 1901)).

[28] See Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 (1977).

[29] See Maryland v. Louisiana (1981), 451 U.S. 725 (1981).

[30] See Westinghouse Elec. Co. v. Tully, 466 U.S. 388 (1984).

[31] See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

[32] See Am. Trucking Ass'n v. Scheiner, 483 U.S. 266 (1987).

[33] See New Energy Co. v. Limbach, 486 U.S. 269 (1988).

[34] See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

[35] See Camps Newfound/Owatanna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).

[36] See Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015).

"exercise of judicial power in an area for which there is no textual basis," in order to reach "what intuitively seemed to be a desirable result and in some cases arguably was the constitutionally correct result."[37] Justice Scalia, sharing the objection over the textual basis for the doctrine, added that the dormant Commerce Clause results in judges doing things beyond "interpreting a legal text, discerning a legal tradition, or even applying a stable body of precedents. It instead requires us to balance the needs of commerce against the needs of state governments. That is a task for legislators, not judges." Scalia ultimately decided to "vote to set aside a tax under the negative Commerce Clause if (but only if) it discriminates on its face against interstate commerce or cannot be distinguished from a tax this Court has already held unconstitutional."[38]

Justices Scalia and Thomas were therefore automatic votes to sustain most state tax laws from challenge. In *Wayfair*, Justice Thomas was consequently part of the majority, rejecting Wayfair's effort to strike down the South Dakota law. He was joined by Justice Scalia's successor on the bench, Justice Neil Gorsuch, who cryptically expressed discomfort with the dormant Commerce Clause doctrine:

> The Commerce Clause is found in Article I and authorizes *Congress* to regulate interstate commerce. Meanwhile our dormant commerce cases suggest Article III *courts* may invalidate state laws that offend no congressional statute. Whether and how much of this 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 are questions for another day.[39]

This author has suggested that Congress could address this objection by codifying the *Complete Auto* standard into federal law, thereby giving judges a statutory basis for enforcing the dormant Commerce Clause doctrine.[40] Congress has codified limits on state tax authority

[37] Camps/Newfound/Owatanna, 520 U.S. at 618 (Thomas, J., dissenting).

[38] Wynne, 135 S. Ct. at 1810–11 (Scalia, J., dissenting).

[39] Wayfair, 138 S. Ct. at 2100–01 (Gorsuch, J., concurring).

[40] See Joseph Henchman, The Limits of State Tax Powers: A Modest Reply to Justice Scalia, Tax Foundation, May 27, 2015, https://taxfoundation.org/limits-state-tax-powers-modest-reply-justice-scalia (suggesting federal codification of the *Complete Auto* test); Joseph Bishop-Henchman, Post-Wayfair Options for Congress, Written Testimony to

in particular circumstances, such as with discriminatory taxation of federal employees, interstate travel, or railroad property.

Fairly Related

The state tax must be fairly related to services provided to the taxpayer. The Court has subsequently interpreted this to mean "reasonably related to services received by the taxpayer," with a tax's excessiveness a legislative matter instead of a judicial one.[41]

In *Wayfair*, the Court majority observed that a state law that "regulat[es] 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," citing a balancing test from *Pike v. Bruce Church, Inc.*[42]

Do You Have Substantial Nexus?

To return to the topic of substantial nexus—a sufficient connection between the state and the taxpayer—a running issue is whether and how it is different from due process. The Court conflated nexus and due process jurisdiction in *Bellas Hess*, separated them in *Quill*, and now leaves open the question of to what extent states may constitutionally regulate out-of-state actors.

Civil Procedure 101: Due Process from Pennoyer *to* International Shoe

On Ninth Street in Columbia, Missouri, a town of 96,000 (including 33,000 students) and home of the annual Ragtime and Jazz Festival, Richard King opened a small cabaret club, The Blue Note, in 1980. By 1996 business was good and King decided to set up a website for the club. Shortly thereafter, he learned that the Bensusan Restaurant Co. of Manhattan had filed a lawsuit against him, in New York federal court, for violating its "The Blue Note" trademark registered in 1985. King's only contact with New York was that his website could be accessed from that state.[43]

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the U.S. House Committee on the Judiciary, Jul. 24, 2018, https://taxfoundation.org/post-wayfair-options-congress (suggesting federal codification of the *Complete Auto* test and the *Wayfair* checklist).

41 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 627 (1981) ("The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution.").

42 Wayfair, 138 S. Ct. at 2091 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

43 See Bensusan Rest. Corp. v. King, 126 F.3d 25, 26 (2d Cir. 1997).

Courts have long been sympathetic to people like King, who face the expense and worry of defending (often meritless) lawsuits in a faraway place. The U.S. Constitution's Due Process clause has been held to protect such individuals "against the burdens of litigating in a distant or inconvenient forum" by ensuring that states do not "reach out beyond the limits imposed on them . . . in a federal system."[44] That principle—that it is unfair to be sued in a state where one has virtually no connections—is generally undisputed. The problem arises in drawing the line separating "virtually no connections" from "sufficient minimum contacts."

The historical line was physical presence. Looking at the Due Process Clause, the Court in *Pennoyer v. Neff* explained that "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[45] Unless a defendant appeared in person, enforcing a judgment against him was considered so unfair that it violated the U.S. Constitution. If there was such a judgment, other states could refuse to enforce it as an abuse of power. At the dawn of the 20th century, scholar Thomas M. Cooley summarized the rule in his *Constitutional Limitations* (1903): "No state has authority to invade the jurisdiction of another, and by service of process compel parties there resident or being to submit their controversies to the determination of its courts."

The physical presence requirement for personal jurisdiction was first significantly challenged by the rise of interstate property ownership and motorist accidents caused by out-of-state drivers. States could seize (attach) the in-state property of an out-of-state defendant pending the outcome of the case, provided the state gave notice to the owner. While those "in rem" actions—as well as divorce actions, which were treated similarly—were within the confines of the physical presence rule, it allowed states to reach defendants who lived outside the state. Courts also developed the concept of implied consent to allow states to reach outside their borders to prosecute nonresident motorists who inflicted damages or injury within the state. By driving on the state's roads, a motorist was held to have automatically consented to jurisdiction over any lawsuits that might

[44] World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980).

[45] Pennoyer v. Neff, 95 U.S. 714, 733 (1878).

arise from the driving, although he had to receive notice of the lawsuit.[46]

The physical presence rule was stretched the most in suits involving corporate defendants, because corporations are a legal fiction and their physical existence is intangible. Some states required that corporations appoint an agent to receive service of process, and if a corporation was "present" without such an appointment, a state official was designated to receive service of process on its behalf. Determining presence became the critical question. "Under both the presence theory and the implied consent theory, the first question to be asked was whether the corporation was 'doing business' within the state. . . . '[D]oing business' gradually came to be a test in and of itself."[47]

In 1945, in *International Shoe v. Washington*, the Court abandoned the physical presence rule in favor of defendant-specific multifactor fairness inquiry. The case (and its progeny) look at a company's conduct in the state, evaluating whether there are "minimum contacts" with the jurisdiction such that a lawsuit involving the nonpresent defendant does not offend "traditional notions of fair play and substantial justice."[48]

As applied today, out-of-state corporate defendants with continuous and systematic activity in the state, or even single or occasional acts, can be required to answer a lawsuit based on that specific activity ("specific jurisdiction"). However, the Court over the past decade has worked to narrow the extent of potential personal jurisdiction, holding (over consistent objections from Justice Sonia Sotomayor) that out-of-state corporate defendants cannot be forced to answer general lawsuits unrelated to their in-state activity ("general jurisdiction") in a state that is not "fairly regarded as home," where they do not have continuous and systematic business contacts.[49]

Is this standard the right one? It's still not a requirement for in-state presence of people or property but the standard is less broad

[46] See, e.g., Hess v. Pawloski, 274 U.S. 352, 355 (1927).

[47] Jack H. Friedenthal, Arthur R. Miller, & John E. Sexton, Civil Procedure: Cases and Materials, at 74 (8th Ed. 2001, John J. Cound, ed.).

[48] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[49] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915–24 (2011); See also Daimler AG v. Bauman, 134 S. Ct. 746 (2014); BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549 (2017); Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017).

than it used to be. Future expansive cases of internet taxation may therefore raise due process as a viable objection.[50]

National Bellas Hess

In the 1960s, Illinois sought to require catalog mailer National Bellas Hess to collect Illinois sales tax on its sales to Illinois residents. The company was headquartered in Missouri, and while it sent catalogs and deliveries to Illinois by mail, it had no salespeople or property in the state, nor did it advertise in the state. It did not sell only in Illinois, but in every state in the country.

In 1967, the Court struck down the Illinois attempt, stating that "the Constitution requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[51] The Court concluded that was missing in this case, and that a state cannot impose a tax collection requirement on a company "whose only connection with customers in the State is by common carrier or the United States mail."[52] The Court further described the danger it was avoiding:

> And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."

[50] The Cato Institute's *Wayfair* brief sought to raise this Due Process issue immediately. See Trevor Burrus & Matthew Larosiere, South Dakota v. Wayfair: A Taxing Decision, Cato at Liberty, Jun. 21, 2018, https://www.cato.org/blog/south-dakota-v-wayfair-taxing-decision. The Court's opinion acknowledged the point but left it for another day, given that a due process objection had not been raised and *Wayfair*'s in-state activities were considerable.

[51] Bellas Hess, 386 U.S. at 756 (cleaned up).

[52] *Id*. at 758.

> The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.[53]

Three justices dissented, detailing National Bellas Hess's "large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market" and observing that it therefore "enjoys the benefits of, and profits from the facilities nurtured by, the State of Illinois as fully as if it were a retail store or maintained salesmen therein."[54] Perhaps some interstate catalog activity should be excused from use tax collection obligations "because of its sporadic or minor nature," the dissenters conceded, but they found no Commerce Clause or Due Process Clause violation.[55]

Quill

Ten years later (1977), having articulated the nexus requirement in *Complete Auto*, the Court had to define it. *Complete Auto* did not cite *Bellas Hess*, and *Bellas Hess* itself was unclear whether physical presence was a requirement of the Due Process Clause or the Commerce Clause. In a case involving magazine sales but no other presence, the Court did quickly reject a California attempt to enact a "slightest presence" nexus standard, three weeks after *Complete Auto*.[56] So was *Bellas Hess* still good law?

As the 1980s rolled on, academics criticized *Bellas Hess* as arcane, formalistic, and outmoded. "The economic, social, and commercial landscape upon which Bellas Hess was premised no longer exists, save perhaps in the fertile imaginations of attorneys representing mail order interests. . . . The burgeoning technological advances of the 1970s and 1980s have created revolutionary communications abilities and marketing methods which were undreamed of in 1967."[57] In 1987, the Court ruled that an out-of-state company's independent contractors in a state created nexus for that company,

[53] *Id.* at 759.

[54] *Id.* at 762 (Fortas, J., dissenting).

[55] *Id.* at 763 (Fortas, J., dissenting).

[56] Nat'l Geographic v. Cal. Bd. of Equalization, 430 U.S. 551 (1977).

[57] State v. Quill Corp., 470 N.W.2d 203, 208 (N.D. 1991).

reaffirming a 1960 decision predating *Bellas Hess*.[58] State courts began disregarding the *Quill* decision and authorities hoped that the rise of new technologies would relax the Court's concern about the burdens of tax collection. North Dakota decided to give it a shot.

Seeking an unsympathetic defendant, North Dakota sent a deficiency notice to office supply catalog company Quill Corporation, directing them to collect the state's sales and use tax. The company had some $1 million in sales to 3,000 customers in North Dakota but no property or employees in the state; all deliveries were made by mail or common carrier. North Dakota was one of 34 states that had enacted tax obligations on nonpresent companies, up from 11 at the time of *Bellas Hess*.

The 8-1 decision in *Quill* arrested that trend, with Justice John Paul Stevens's opinion for the Court giving several reasons for its decision, finding that the company could not be forced to collect North Dakota's sales tax.

First, the Court emphasized the nexus requirement of *Complete Auto*. By requiring a connection between a taxing state and a company, nexus "ensure[s] that state taxation does not unduly burden interstate commerce."[59] In North Dakota, any company that advertised three times in ways that reached residents of the state became obligated to collect taxes for the state, and the Court described that obligation as a burden on interstate commerce.

Second, the Court discussed "the continuing value of a bright-line rule."[60] The physical presence rule "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes."[61] Justice Scalia separately wrote that the only litigation that seemed to arise in 25 years of applying *Bellas Hess* were state efforts to overrule it: "Concern that reaffirmance of *Bellas Hess* will lead to a flurry of litigation over the meaning of 'physical presence,' . . . seems to me contradicted by 25 years of experience under the decision."[62]

[58] See Scripto, Inc. v. Carson, 362 U.S. 207 (1960). *Quill* described these two cases as the "furthest extension" of nexus. See Quill, 504 U.S. at 306.

[59] Quill, 504 U.S. at 313.

[60] *Id.* at 317.

[61] *Id.* at 315.

[62] *Id.* at 321 (Scalia, J., concurring).

Third, the Court expressed concern about disrupting settled expectations.[63] "A bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals."[64] Justices Scalia, Kennedy, and Thomas wrote a separate opinion basing their decision on a refusal to upset those expectations: "Having affirmatively suggested that the 'physical presence' rule could be reconciled with our new jurisprudence, we ought not visit economic hardship upon those who took us at our word."[65]

The Court also clarified that the physical presence rule is grounded in the Commerce Clause, not the Due Process Clause. "The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State."[66] While the Quill Corp. had sufficient minimum contacts to be within the *jurisdiction* of the state under the Due Process Clause, its lack of physical presence was insufficient nexus to be within the *taxing power* of the state under the Commerce Clause.

Because the rule is grounded in the Commerce Clause, the Court noted that Congress has the power to alter it. "No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusion."[67] Justice Scalia was even more direct: "Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess*

[63] It is state tax lawyer lore that North Dakota was going to win the case until its attorney general, Nicholas Spaeth, was asked at oral argument by Justice Sandra Day O'Connor whether overruling *Bellas Hess* would result in multiyear retroactive collection. His colleagues, including then-State Tax Commissioner, now-Senator Heidi Heitkamp (D-ND), had urged him to unequivocally foreclose any retroactive collection authority. Spaeth instead replied, "It might." Multistate Tax Commission attorney Alan Friedman, who assisted the case, coordinated a number of states to file a supplemental brief foreclosing retroactive collection, but Spaeth vetoed it and it was not filed. See Billy Hamilton, Remembrance of Things Not So Past: The Story Behind the Quill Decision, 59 State Tax Notes 807 (2011). The Supreme Court has not definitively spoken on the extent of permissible retroactive state tax collection under the Due Process Clause. See Joseph Henchman & Kavya Rajasekar, The Bounds of Retroactive State Taxes, Tax Foundation, Feb. 9, 2017, https://goo.gl/7LWSGn.

[64] Quill, 504 U.S. at 316.

[65] *Id*. at 321 (Scalia, J., concurring).

[66] *Id*. at 308.

[67] *Id*. at 318.

by simply saying so."[68] That would not be the case with the Due Process Clause, which Congress cannot override.[69]

Justice Byron White dissented, calling physical presence "anachronistic," "artificial," and not premised on "economic reality."[70] He favored abandoning all nexus inquiry beyond the minimum contacts rule of personal jurisdiction. White had been in the *Bellas Hess* majority; his change of heart arose primarily out of a sense of injustice at the fact that some sales escape taxation, and the erroneous belief that technological change has made keeping track of thousands of tax laws, rates, and exemptions no longer burdensome. Citing the states' legal briefs as expert authority, White asserted that "the costs of compliance . . . , in light of today's modern computer and software technology, appear to be nominal."[71] Although White indicated some concern about retroactive collection of taxes if the physical presence rule was abandoned, he did not even address the likelihood that multiple states will seek to tax the same companies and the same sales.

25 Years of Nothing: How *Wayfair* Happened

Attempts to Meet Quill's *Challenge and Reduce State Compliance Burdens*

Frustrated by congressional inaction in overruling *Quill*, states set up the Streamlined Sales & Use Tax Agreement (SSUTA) in 1999 to "(1) significantly reduce, if not eliminate, the current compliance and administrative burdens imposed upon remote sellers; and (2) preserve state and local sovereignty."[72] As one scholar observed, "If a more uniform sales and use tax regime were in place, or if the specter of thousands of local jurisdictions were removed, the commerce clause nexus standard would approach

[68] *Id.* at 320 (Scalia, J., concurring).

[69] See *id.* at 313 ("Thus, the 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce.").

[70] *Id.* at 321 (White, J., concurring in part and dissenting in part).

[71] *Id.* at 332.

[72] Brian S. Masterson, Note, Collecting Sales and Use Tax on Electronic Commerce: E-Confusion or E-Collection, 79 N.C. L. Rev. 203, 226 (2000).

the due process standard, and the physical presence test would be obviated."[73]

Twenty-three states are members of Streamlined.[74] Joining means committing to centralizing state-level sales tax administration, conforming to uniform definitions of products, providing sellers with rate lookup software, and forgoing fractional rates on favored products. SSUTA has been less successful than it could be, due to the nonparticipation by most states, including the large states of Arizona, California, Florida, Illinois, Massachusetts, New York, and Texas. Some states refuse to join to maintain idiosyncratic sales tax practices, such as Maryland's "rounding rule," requiring vendors to round remainders of four and above up, rather than the more common practice of rounding up only remainders of five and above, or Chicago's decision to tax sales of bottled water, soda, non-soda drinks, restaurant meals, candy, and groceries all at different tax rates.[75]

A series of proposed federal bills sought to (1) allow states to collect sales tax from remote sellers while (2) requiring states to simplify their tax systems. The level of simplifications required steadily improved as the bills evolved, from the earlier Main Street Fairness Act to the Marketplace Equity Act to the Marketplace Fairness Act (MFA) to the Remote Transactions Parity Act (RTPA). The MFA was approved by the Senate in a 69 to 27 vote in May 2013, but did not come to a vote in the House.[76] RTPA, with protections against interstate audits, was nearly included in 2018 omnibus budget legislation in an effort by Rep. Kristi Noem (R-SD) to act before the *Wayfair* decision was announced. The chairman of the House Judiciary Committee, Rep. Bob Goodlatte (R-VA), opposed both bills and refused to

[73] John A. Swain, State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century, 38 Ga. L. Rev. 343, 363–64 (2003).

[74] 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. See Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org (last visited Aug. 9, 2018).

[75] See, e.g., How Does Avatax Handle Rounding in Maryland?, Avalara, Aug. 5, 2016, https://goo.gl/YdyA1W; Tax List, City of Chicago, https://goo.gl/28y3Mj (last visited Aug. 9, 2018).

[76] See Joseph Henchman, The Marketplace Fairness Act: A Primer, Tax Foundation, Jul. 2014, https://taxfoundation.org/marketplace-fairness-act-primer.

hold hearings or votes on them. Supporters included state officials and brick-and-mortar retailers who face competition that need not collect sales taxes.

Goodlatte did, however, put forward a proposal based on the International Fuel Tax Agreement (IFTA). Under IFTA, truckers pay fuel taxes to a central clearinghouse, which then divvies up the money up among states based on total miles traveled. Truckers therefore don't have an incentive to fill up in low-tax states nor do they need to comply with dozens of different state fuel tax forms. Goodlatte's proposal, which never got even as far as draft legislation, envisioned internet retailers collecting a sales tax at the rate of their state of origin,[77] with the revenue remitted via a voluntary clearinghouse to the state where the product was delivered. If enacted, it would transform the sales tax on consumers into a leaky tax on businesses, with sellers facing strong incentives to locate in no-sales-tax states or foreign jurisdictions.

Failed Attempts to Expand Quill*'s Nexus Standard to Protect Taxpayers*

Quill's physical presence rule only applied to sales taxes. There's really no reason it should have been limited to just that tax; if the principle of physical presence is constitutionally derived, it should apply to business taxes as well.

The conceptual argument for physical presence is stronger for business and individual taxes: a major justification for taxes is the "benefit principle," the idea that people owe taxes as a way of paying for services used where they reside. Sales taxes should thus be owed where residents buy their goods and services, corporate income taxes should be owed where the corporation has property and employees, and individual income taxes owed where people reside and work. Internationally, jurisdiction to tax business is defined by permanent establishment, a concept very similar to physical presence.

No luck, however: the Supreme Court consistently refused to hear cases seeking to expand *Quill* in this regard. A credit card company was forced to pay a West Virginia business tax despite having no

[77] "Origin" is a difficult-to-define term for a corporation, as it can be state of headquarters, state of incorporation, state where distribution facilities are located, state where most business takes place, or perhaps nowhere at all.

property or employees in the state.[78] A Delaware company, holding and leasing out intellectual property for the popular Toys 'R' Us chain—and thus taking advantage of Delaware's lack of tax on such transactions—was forced to pay South Carolina business tax on the basis of having accounts receivable (customers) in the state.[79] KFC's royalty arm was forced to pay Iowa business tax on the basis of franchised restaurants in the state.[80] A nonresident company was forced to pay Kentucky's business tax because it was a member of a partnership that did business in the state.[81] General Motors was forced to pay Seattle's business tax on the basis of its wholesale contracts with dealers and its advertising, despite having no property or employees in the city.[82] A New Jersey company had to pay Washington business tax based on the periodic presence of salespeople who did not work permanently in the state.[83] A Tennessee attempt to collect business taxes on the basis that the physical credit cards they provided in-state customers constituted in-state property was rejected by the state court, but the Supreme Court declined to hear the state's appeal.[84] States with gross receipts taxes, like Ohio and Washington, have been particularly assertive of expansive nexus.

Bloomberg Tax's annual hefty volume, *Survey of State Tax Departments* (now over 500 pages), consists of state tax departments explaining what sorts of activities will result in tax nexus within a state.[85] Four states declined to answer at all (New York, Ohio, Oklahoma, and South Carolina). A further seven states unhelpfully said their

[78] Tax Comm'r of West Virginia v. MBNA America Bank, 640 S.E.2d 226 (W.V. 2006), cert. denied, 551 U.S. 1141 (2007).

[79] Geoffrey Inc. v. South Carolina Tax Comm'n, 437 S.E.2d 13 (S.C. 1993), cert. denied, 510 U.S. 992 (1993).

[80] KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308 (Iowa 2010), cert. denied, 565 U.S. 817 (2011).

[81] Ky. Dep't of Revenue v. Asworth, LLC, No. 2007-CA-002549-MR (Ky. Ct. App. Feb 5, 2010), cert. denied, 562 U.S. 1200 (2011).

[82] General Motors Corp. v. City of Seattle, 25 P.3d 1022 (Wash. Ct. App. 2001), review denied, 84 P.3d 1230 (Wash. 2001), cert. denied, 535 U.S. 1056 (2002).

[83] Lamtec Corp. v. Dep't of Revenue of Washington, 246 P.3d 788 (Wash. 2011), cert. denied, 565 U.S. 816 (2011).

[84] J.C. Penney Nat'l Bank v. Comm'r of Revenue, 19 S.W.3d 831 (Tenn. Ct. App. 1999), cert. denied, 531 U.S. 927 (2000).

[85] See Bloomberg Tax, Survey of State Tax Departments (2018), https://www.bna.com/state-tax-survey.

answers cannot be relied upon as guidance by taxpayers (Alabama, Florida, Georgia, Indiana, Iowa, Massachusetts, and New Mexico). The remaining states provide a variety of bewildering and mostly inconsistent rules for when activity creates a tax obligation. Does attending a trade show or a seminar create nexus in the state hosting it? Does having one nonsales telecommuting employee in the state create nexus? Does shipping in a returnable container versus a common carrier create nexus? Does placing an internet browser cookie on someone's computer create nexus in that someone's state? Does downloading an app in a hub airport while waiting between two interstate flights create nexus in the state of that hub airport? Once established, how long does nexus last? It is not just that we have different answers for different states, but also that many states supply vague or indeterminate nonanswers to many of these questions.

A proposed federal law, the Business Activity Tax Simplification Act (BATSA), would establish a stronger nexus standard than just physical presence. Under BATSA, a business would only be subject to tax burdens in a state where they have property or employees for at least 15 days in a year. It would address taxation in instances of fleeting physical presence, such as an incident where New Jersey seized a truck of merchandise the instant it crossed into the state, demanding that the owning and now-physically-present company remit $46,200 in tax payments.[86] (The company paid.) State governments strongly oppose BATSA, as it would reduce state business tax collections by several billion dollars annually.[87]

Another proposed federal law, the Mobile Workforce State Income Tax Simplification Act, would establish a stronger nexus standard than just physical presence for individual income taxes. Mobile Workforce would limit states from imposing or collecting individual

[86] See Joseph Henchman, BATSA Hearing: Shaken Down on the New Jersey State Line, Tax Foundation, Feb. 21, 2008, https://taxfoundation.org/batsa-hearing-shaken-down-new-jersey-state-line.

[87] See, e.g., Joseph Henchman, Thoughts on the BATSA Hearing, Tax Foundation, Jun. 25, 2008, https://taxfoundation.org/thoughts-batsa-hearing. Judiciary Committee Chairman Rep. John Conyers (D-MI) echoed this point, asking the witnesses what he is supposed to tell Gov. Jennifer Granholm (D-MI) when the BATSA bill might reduce that state's revenues by $400 million. My answer would be that it is money Michigan probably shouldn't be collecting in the first place, and a tax reform based on broad bases and low rates (as opposed to Michigan's current narrow bases and high rates) would improve the state's fiscal situation and business climate.

income tax on those who are in the state for fewer than 30 days. Most states technically require such payments when someone is in the state for even a day, and even require withholding to be set up in advance. Since all states provide a credit for taxes paid to another state, today people fill out 20 or 30 tax returns for a net national wash. Most everyone, except New York officials and state tax administrators, support this legislation and it has bipartisan cosponsorship. State tax administrators instead urge states to voluntarily adopt a more convoluted model, which no state has.[88] The bill excludes entertainers and athletes from its protections, which it shouldn't.

Successful Attempts to Use Quill*'s Nexus Standard to Expand State Tax Power*

Even though a corporation's physical presence is difficult to ascertain, corporations being intangible pieces of paper (often in Delaware) through which people act, the physical presence rule was sometimes described as an effective bright-line limitation on state tax power. This author was one such person, worried that the drift toward economic nexus standards in the business tax context would be unlikely to limit state tax overreaching if applied more broadly.[89]

But states discovered ways to turn the *Quill* shield into a sword. Prior to the *Wayfair* decision, 31 states had found a way to pass a law requiring tax collection by out-of-state internet sellers.

New York's "click-through nexus" law was mimicked by 21 other states.[90] The law includes in its definition of physical presence any person who is paid by an out-of-state company for referral links to the out-of-state company's website, if the out-of-state company has sales of at least $10,000 per year in the state. So if Amazon.com paid someone

[88] See, e.g., Buckingham, Doolittle & Burroughs, LLC, MTC Proposes Measures to Simplify State Income Tax Withholding for Mobile Employees, Apr. 21, 2001, https://www.bdblaw.com/mtc-proposes-measures-to-simplify-state-income-tax-withholding-for-mobile-employees.

[89] See Joseph Henchman, Why the Quill Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction, 46 State Tax Notes 387 (2007).

[90] N.Y. Tax Law § 1101(b)(8)(vi). Similar laws were adopted by Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, and Washington. Idaho enacted a version while *Wayfair* was being considered, in March 2018.

commissions for items purchased thanks to links from someone's website, Amazon.com had nexus with New York despite the lack of any other physical presence in the state. This statute was upheld by state courts, finding that contracts with in-state nonemployees who solicit customers for compensation constitutes substantial nexus.[91] While these statutes provide for an ability to rebut the presumption that solicitation occurred, rebutting such presumption would inherently be futile, as it is hard to prove what has not been done by individuals on the internet.

Colorado's "notice and reporting" law was mimicked by nine other states.[92] The law requires that out-of-state internet retailers (1) provide Colorado purchasers a "transactional notice" at the time of purchase, informing them that the purchase may be subject to Colorado's use tax; (2) provide an "annual purchase summary" with the dates, amounts, and categories of purchases of all Colorado purchasers with purchases over $500; and (3) file with the Colorado Department of Revenue an annual report listing their customers' names, addresses, and total purchases. Reporting requirements under these notice-and-reporting statutes are deliberately cumbersome so as to compel collection. A panel of the Tenth Circuit, which included then-Judge Gorsuch, upheld the Colorado statute after concluding that *Quill*'s holding applied to sales and use tax collection and not to the imposition of regulatory requirements.[93] One version of the law was struck down on First Amendment grounds.[94] However, the Supreme

[91] Overstock.com, Inc. v. New York State Dep't of Taxation & Fin., 987 N.E.2d 621, 626 (N.Y. 2013), cert. denied 571 U.S. 1071 (2013) ("Active in-state solicitation that produces a significant amount of revenue qualifies as more than a 'slightest presence.'").

[92] Colo. Rev. Stat. § 39-21-112(3.5). Similar laws were adopted by Alabama, Kentucky, Louisiana, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, and Washington.

[93] See Direct Marketing Association v. Brohl, 814 F.3d 1129 (10th Cir. 2016).

[94] A North Carolina revenue ruling similar to the Colorado statute was struck down on these grounds. See Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154 (W.D. Wash. 2010). The ACLU joined with Amazon.com to challenge this, noting the danger of unnecessarily requiring disclosure of purchases such as the movie *Lolita* or the book *How to Leave Your Husband*, or even the name of the website as some websites sell embarrassing things. The court held that the First Amendment forbids state tax collectors from knowing what taxpayers are buying. *Id*. at 1170 ("Citizens are entitled to receive information and ideas through books, films and other expressive materials anonymously.").

Court declined to hear an appeal from both Colorado and federal judge rulings that the law was constitutional.[95]

Three states passed regulations requiring sales tax collection by out-of-state entities that engage in an enumerated list of activities.[96] While none of the activities by themselves constitutes physical presence, the thinking is that they cumulatively constitute substantial nexus.

Massachusetts and Ohio pursued "cookie nexus" enactments that define the placement of website cookies on the computers of in-state users as physical presence in the state.[97] Cookie nexus essentially gives a state the power to tax any seller on the planet if one of their residents accesses the vendor's website or downloads its app. Advertising in a state has historically not created nexus, or even personal jurisdiction, and the Massachusetts and Ohio provisions create obligations solely for the online equivalent of advertising, cookies, and apps.

Overruling Quill

In March 2015, Justice Kennedy asked for an opportunity to overrule *Quill*.[98] The case was *DMA v. Brohl*, a unanimous decision reversing the Tenth Circuit and holding that federal courts could hear a challenge to Colorado's notice-and-reporting law.[99] Kennedy's four-page concurring opinion described *Bellas Hess* as a doctrinal aberration, regretted that *Quill* did not revisit the physical presence rule in light of *Complete Auto*, and acknowledged state revenue losses from the inability to collect sales taxes on remote sales.

[95] See Direct Marketing Ass'n v. Brohl, 2016 WL 9735793 (D. Colo. Nov. 1, 2016), cert. denied 137 S. Ct. 591 (U.S. Dec. 12, 2016); Direct Marketing Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016), cert. denied 137 S. Ct. 593 (U.S. Dec. 12, 2016).

[96] Ala. Admin. Code r. 810-6-2.90.03; Miss. Code R. § 35.IV.3.09; Tenn. Comp. R. & Regs. 1320-05-01-.129.

[97] Reg. 830, 830 Mass. Code Regs. 64H.1.7 (withdrawn); Ohio Rev. Code § 5741.01(I)(2)(i).

[98] See Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124, 1134 (Kennedy, J., concurring).

[99] See *id.*, reversing Direct Marketing Ass'n v. Brohl, 735 F.3d 904 (10th Cir. 2013). The Tenth Circuit had held that the challenge was barred by the Tax Injunction Act, a federal law that limits federal courts' ability to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

South Dakota answered the challenge.[100] Its law, S.B. 106, required sales tax collection by out-of-state sellers if they have a minimum of $100,000 in sales or 200 transactions per year in the state. This *de minimis* threshold, or safe harbor, has the effect of excluding those sellers with incidental sales into the state and where establishing collection mechanisms might outstrip the business's incremental revenue from selling into South Dakota. South Dakota's statute also has a provision barring retroactive collection. South Dakota passed the law with unanimous votes and it was signed into law on March 22, 2016, to take effect on May 1, 2016.

South Dakota was well-chosen as the state to bring the challenge. South Dakota is a full member of SSUTA. Unlike other states that decry the erosion of their sales tax base while exempting goods and services that total over half their economy, South Dakota taxes it all. South Dakota taxes groceries (taxed in full by only seven states of the 45 plus the District of Columbia with the tax), clothing (taxed in full by 39 states), nonprescription drugs (taxed by 35 states), personal services such as dry cleaning and haircuts (taxed in full by only four states), real estate transactions (taxed by only three states), legal transactions (taxed by only three states), accounting services (taxed by only three states), and even lobbying services (taxed by only six states). Internet sales are the only thing South Dakota does not tax, because it could not under *Quill*. And while there are local sales taxes in South Dakota, the state keeps it simple in requiring them to adhere to the state base of transactions and only at uniform rates. Finally, South Dakota has no state individual income or corporate income tax; sales and property taxes are essentially its only taxes and make up three-quarters of total South Dakota state and local tax revenue.

The case moved quickly. On April 28, 2016, South Dakota notified four companies of the pending effective date. Three of the companies (Wayfair, Overstock.com, and Newegg) refused to collect, citing

[100] The South Dakota law had been developed by attorney Eric Citron; presented to and then approved in January 2016 by the State and Local Taxation Task Force of the National Conference of State Legislatures, a forum for state legislators, state fiscal officers, the business community, and other interested parties; and championed by South Dakota State Senator Deb Peters (R). See Maria Koklanaris, EXCLUSIVE: SD's Counsel on Wayfair's Road to High Court, Law360, May 4, 2018, https://www.law360.com/articles/1040455/exclusive-sd-s-counsel-on-wayfair-s-road-to-high-court.

Quill, and sued. By the law's own terms, its enforcement was suspended until the conclusion of legal proceedings. On January 17, 2017, a federal court declined to entertain jurisdiction, considering it a state tax matter.[101] On March 6, 2017, a South Dakota Sixth Judicial Circuit judge ruled in favor of Wayfair, citing *Quill*. The South Dakota Supreme Court heard oral argument on August 29, 2017, and issued its opinion shortly thereafter, affirming the trial court.[102] The petition for writ of certiorari followed on October 2, 2017, and was granted on January 12, 2018.[103] Oral argument was heard on April 17 and the decision handed down on June 21.

Oral argument left some supporters of the South Dakota law worried. Justice Ginsburg lobbed softballs at the state's attorney, but Justice Thomas stayed characteristically silent and Justice Kennedy stayed unusually silent. Kennedy chimed in only to observe that no one was arguing that the physical presence standard was correct.

The eventual dissenters consumed most of the questioning time. Justice Sotomayor began the state's argument time with a rapid-fire series of questions indicating her discomfort with the law.[104] Justice Breyer expressed frustration with the incomplete record and with how the Court might possibly resolve the case.[105] Chief Justice Roberts asked pointedly whether Congress might be better equipped to resolve the nexus standard. Justice Kagan asked tough questions of both sides.

Justice Kennedy delivered the opinion for the five-justice majority. After reciting the history of the dormant Commerce Clause, he summarized the doctrine: "First, state regulations may not discriminate against interstate commerce; and second, States may not impose

[101] See South Dakota v. Wayfair, Inc., 229 F. Supp. 3d 1026 (D. S.D. 2017).

[102] See State v. Wayfair, Inc., 901 N.W.2d 754 (S.D. 2017), aff'g State v. Wayfair, Inc., 2017 WL 4358293 (S.D. Cir. Mar. 6, 2017). South Dakota has no intermediate appeals court.

[103] 138 S. Ct. 735 (2018). The author, who was married on September 23, 2017, apologizes to his husband for spending part of their honeymoon working on an amicus brief in support of this petition.

[104] See Transcript of Oral Arg. at 3–5, South Dakota v. Wayfair, 138 S. Ct. 2080 (2018) (No. 17–494).

[105] *Id.* at 15 (Justice Breyer: "[T]he reason I'm asking like this is because I read through these briefs. When I read your briefs, I thought absolutely right. And then I read the other briefs, and I thought absolutely right. And you cannot both be absolutely right.").

undue burdens on interstate commerce."[106] He recited the *Complete Auto* test as the formulation of that doctrine, and then noted the emergence of the physical presence rule in *Bellas Hess* and its reaffirmance in *Quill*.

The opinion then gives three reasons for deeming *Quill* flawed. First, physical presence is not a necessary interpretation of substantial nexus from *Complete Auto*. Kennedy writes that "[t]he physical presence rule is a poor proxy for the compliance costs faced by companies that do business in multiple States," comparing a company with a salesperson in each state that must therefore collect tax in each state with a company with 500 people in one central location and a website accessible in every state that need only collect in one state. Second, the *Quill* rule creates market distortions between brick-and-mortar and online retailers—"a judicially created tax shelter," in the Court's words—and an incentive to avoid physical presence in multiple states purely for tax avoidance reasons.[107] Third, the physical presence standard is arbitrary and formalistic, rather than looking at the substance of a law's compliance burdens or discriminatory effect.

The Court acknowledged substantial reliance on its earlier decisions, conducting a *stare decisis* analysis. Against this reliance the Court listed the need to correct an error depriving states from exercising lawful powers, the strong growth of e-commerce and consequent growth in the states' revenue shortfalls from being unable to tax online sellers, and the variety of state laws working to "embroil courts in technical and arbitrary disputes about what counts as physical presence."[108]

The Court also acknowledged burdens associated with tax compliance but expressed hope that software and other systems will be able to reduce these costs. The Court noted that South Dakota, as a SSUTA member, had done much to make compliance easier. If not, the Court stated, Congress could act to address these problems through legislation. Finally, small sellers seeking relief from future state laws that impose excessive burdens on them "may still do so under other theories."[109]

[106] Wayfair, 138 S. Ct. at 2084.

[107] The Court cited Wayfair's website, which stated "One of the best things about buying through Wayfair is that we do not have to charge sales tax." *Id.* at 2096.

[108] *Id.* at 2098.

[109] *Id.* at 2099. This could be a reference to the Due Process Clause, other parts of the *Complete Auto* test, or the *Pike* balancing test. The Due Process question of to what

The Court then stated that "the physical presence rule of *Quill* is unsound and incorrect," and overruled *Quill* and *Bellas Hess*.[110] The Court concludes that the statute's standard of $100,000 in sales or 200 transactions can only be met if "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."[111]

The decision did not end there, and experts since have debated whether what follows is *dicta* or precedent. The Court remands the South Dakota law for further consideration. But first, it offers a checklist of why the law might just be constitutional:

> That said, South Dakota's tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce. First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act ensures that no obligation to remit the sales tax may be applied retroactively. S. B. 106, § 5. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system 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.[112]

Justice Thomas concurred to write that he should have joined the *Quill* dissent in 1992.[113] Justice Gorsuch concurred, joining the majority in full and adding that he questions Commerce Clause doctrine.[114]

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extent a state can regulate an out-of-state entity—raised by the Cato Institute in its amicus brief—is therefore left for another day. *Pike* compares the benefits to the state and burdens on the interstate business for a law otherwise valid under the Commerce Clause. The *Pike* test is very deferential to the state and therefore tough for a taxpayer to win.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 2099–2100.

[113] *Id.* at 2100 (Thomas, J., concurring).

[114] *Id.* at 2100 (Gorsuch, J., concurring).

Chief Justice Roberts, writing for the four dissenters, acknowledged that *Bellas Hess* was wrongly decided but urged that any change to the physical presence rule be undertaken by Congress.[115] Unlike in other contexts where only the Supreme Court can reverse a previous decision, Commerce Clause decisions by the Court can be changed by Congress. Roberts also took issue with the Court's sense of urgency, pointing out that states are already able to collect the vast majority of potential online sales tax revenue. He worried that the burden of getting it wrong will fall squarely on small sellers, another reason for Congress to draw where the line should be instead of the Court.

What Happens Next

States may now tax internet sales with some confidence, so long as the tax complies with jurisdiction to tax or regulate under the Due Process Clause, with the Internet Tax Freedom Act, with the *Complete Auto* test, with the *Wayfair* checklist, and with the *Pike* balancing test.[116] As of August 1, 2018, 10 states[117] have internet sales taxes complying with all those items, including the boxes of the *Wayfair* checklist:

1. *Safe harbor:* exclude "those who transact only limited business" in the state. (South Dakota's is $100,000 in sales or 200 transactions.)

[115] *Id.* at 2101 (Roberts, C.J., dissenting).

[116] Put another way, a state may tax interstate commerce if (1) it has personal jurisdiction over the person, either through (1a) in-state presence, (1b) an out-of-state person with systematic and continuous contacts in the case relating to the issue involved, or (1c) an out-of-state person whose activities are such that the state can rightly be regarded as home; (2) and the tax is neither (2a) on internet access or (2b) a multiple or discriminatory tax on internet commerce; and (3a) the person has substantial nexus in the state, which can be met with a (3a1) safe harbor excluding *de minimis* activity and (3a2) a ban on retroactivity and tax system and minimized burdens and simplifications for easy compliance, which may include (3a3) single state-level administration for all sales taxes in the state, (3a4) uniform definitions of products and services, (3a5) a simplified rate structure, (3a6) access to sales tax administration software, and (3a7) liability immunity for sellers who make errors while relying on the software, (3b) the tax is nondiscriminatory, not taxing out-of-state activity or taxpayers while exempting similar in-state activity or taxpayers, (3c) the tax is fairly apportioned, such that if every state adopted such a tax it would not result in multiple taxation, and (3d) the tax is fairly related to services received by the taxpayer; and (4) the tax otherwise does not impose burdens on interstate commerce clearly excessive in relation to the putative local benefits.

[117] Georgia, Indiana, Iowa, Kentucky, New Jersey, North Dakota, South Dakota, Utah, Vermont, and Wyoming.

2. *No retroactive collection.*
3. *Single state-level administration* of all sales taxes in the state.
4. *Uniform definitions* of products and services.
5. *Simplified tax rate structures.* (South Dakota requires the same tax base between state and local sales tax and no partial tax rates for certain items.)
6. *Software:* Access to sales tax administration software is provided by the state.
7. *Immunity:* Sellers who use the software are not liable for errors derived from relying on it.

An additional 13 states have completed items 3 through 7 of the *Wayfair* checklist automatically through SSUTA membership but have not yet passed enabling legislation to make them compliant with items 1 and 2 of the *Wayfair* checklist.[118]

Of the remaining 22 states plus the District of Columbia with a sales tax, significant state actions would be required before remote seller sales tax collection could proceed without it being an excessive burden on interstate commerce. This list includes large states such as Arizona, California, Florida, Illinois, Massachusetts, New York, Pennsylvania, and Texas. These states have so far resisted any sales tax simplifications or adherence to uniform rules. They are therefore risks for attempting to collect taxes without first improving their sales taxes as envisioned by *Wayfair*.

Alabama was considered by many experts in likely danger of pursuing retroactive collection, but its state Department of Revenue announced on July 3 that it would seek to collect only from October 1, 2018, prospectively. Two states have promulgated revenue rules currently seeking collection prior to the date of the *Wayfair* decision: Mississippi (transactions after December 1, 2017) and Tennessee (transactions after July 1, 2017). Comments by officials of both states suggest they will abandon these efforts to instead pursue legislation similar to South Dakota's. Several states have recently passed effective dates: Hawaii (January 1, 2018, recently revised to July 1, 2018[119]), Kentucky (July 1, 2018), Minnesota (June 21, 2018),

[118] Arkansas, Kansas, Michigan, Minnesota, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Rhode Island, Washington, West Virginia, and Wisconsin.

[119] Hawaiian officials changed their position after they were pointedly asked if they wanted to be the state to ruin it for all the other states, by collecting retroactively and thereby inviting a congressional response.

Oklahoma (July 1, 2018), and Pennsylvania (March 1, 2018). No other state has announced retroactive collection although the vast majority of states have yet to adopt enabling legislation that would specify effective dates. Minnesota's $10,000 *de minimis* threshold, however, might be the subject of the next lawsuit.

It is worth noting that many states are likely to use the *Wayfair* decision as an opportunity to reform their state tax systems. Alabama, Arizona, Colorado, and Louisiana impose significant compliance costs on their retailers, and the need to comply with *Wayfair* may enable them to overcome internal resistance to a better sales tax system. Several states, such as Missouri and Utah, have proposed that the additional revenue from internet sales tax be used to cut other taxes.

One open question is marketplaces: websites such as eBay or Etsy that provide a platform for sellers. These websites may act on their own initiative to provide their sellers with means to collect sales taxes. However, six states (Alabama, Connecticut, Minnesota, Oklahoma, Pennsylvania, and Washington) have enacted laws requiring marketplaces to collect for their sellers. There are potentially unintended consequences from changing the "merchant of record," as some of these laws do, and a danger of reaching offline hosts for gatherings of sellers such as swap meets and farmers' markets.

Another open question is local sales taxes, which are levied in 38 states. South Dakota's law did not explicitly authorize online sellers to collect local sales taxes. Arizona, Colorado, and Louisiana even permit local sales taxes to have a different base of taxable transactions than the state sales tax.[120] Nationally, a total of 10,708 jurisdictions in the United States impose a sales tax, ranging by state on the high end from 1,277 in Missouri, 1,153 in Texas, 908 in Iowa, and 800 in Alabama, to just one each in the states of Connecticut, Indiana, Kentucky, Maine, Maryland, Massachusetts, and Michigan.[121] Nearly all states require that all sales taxes in the state be collected by one entity, eliminating the need for sellers to comply with multiple filing. The two that don't, Colorado and Louisiana,

[120] See Jared Walczak & Scott Drenkard, State and Local Sales Tax Rates 2018, Tax Foundation, Feb. 13, 2018, https://taxfoundation.org/state-and-local-sales-tax-rates-2018.

[121] Email to author from Tricia Schafer-Petrecz, Pub. Relations & Soc. Media Lead, Vertex, Inc.

will either need to fix their system or likely forgo collection of those local taxes.

On July 24, 2018, just over a month after the *Wayfair* decision, U.S. House Judiciary Chairman Goodlatte held a hearing on post-*Wayfair* options for Congress.[122] Eight witnesses testified, but few legislators showed up to hear them. The ideas offered included codifying the *Wayfair* checklist so as to ensure states follow it, re-enacting the physical presence rule, passing BATSA, passing legislation limiting applicability of state regulations beyond their borders, enacting a multiyear moratorium on state *Wayfair*-enabling legislation, and doing nothing at all. States that had been urging passage of the Marketplace Fairness Act or the Remote Transactions Parity Act now invoke federalism and urge Congress to let them be.[123] Internet sellers, previously lobbying against congressional action or insisting on origin-sourcing solutions, now want a federal law codifying meaningful simplifications.[124] The smart money is, as usual, on Congress not passing anything. If anything passes, a ban on retroactive collection seemed to get the broadest consensus of support.[125]

There are those who look at this case and see only the sales tax they will now have to pay on their online purchases. Some may be mad, some may be indifferent, but the payments will happen and internet commerce will continue to grow.

There are those who look at this case and see states now able to collect owed taxes from scofflaw businesses who had taken advantage of an arcane judicial tax break. They are obviously pleased, if a

[122] Examining the *Wayfair* Decision and Its Ramifications for Consumers and Small Businesses, Hearing Before the H. Jud. Comm., 115th Cong. (2018), available at https://judiciary.house.gov/hearing/examining-the-wayfair-decision-and-its-ramifications-for-consumers-and-small-businesses.

[123] *Id.* (statement of Utah State Sen. Curt Bramble) ("I'm here today to ask Congress, and you Mr. Chair to continue doing what this committee and Congress has done thus far, and that is, nothing—to not act.").

[124] *Id.* (written statement of Steve DelBianco, President, NetChoice), http://netchoice.org/wp-content/uploads/2018-07-24-NetChoice-testimony-House-Judiciary-hearing-on-Wayfair.pdf (listing 20 proposed simplifications to be codified in federal law).

[125] On July 13, 2018, Wells Fargo announced a $481 million earnings restatement to account for potentially increased assertions of state business tax economic nexus following the *Wayfair* decision. See Andrea Muse, Wells Fargo Adjusts Income Tax Reserves Following Wayfair, State Tax Notes, Jul. 17, 2018, https://www.taxnotes.com/editors-pick/wells-fargo-adjusts-income-tax-reserves-following-wayfair.

little worried that some state might go too far and invite Congress to clamp down and rescind some of this authority.

There are those who look at this case and see a Commerce Clause that was meant to restrain states from enacting discriminatory or burdensome taxes, with physical presence a bizarre and ineffective proxy for this standard when it comes to sales taxes on a state's own residents. They are glad to see it go, if a little worried that economic nexus may spread further to where it doesn't belong, to business taxes or international taxes.

There are those who look at this case and see state politicians hungrily raising taxes on one of the most innovative business sectors, dumping the collection duties on out-of-state businesses with no ability to object, and poised to export more tax burdens in an Articles of Confederation redux. They are not happy about *Wayfair*, but nor were they happy with the status quo prior as states found ways to abuse the physical presence rule. As they vigilantly watch state enactments and wait for the passage of BATSA and Mobile Workforce and other preemption legislation, they can be reassured that at least Justice Thomas didn't win the day and *Wayfair* reaffirmed the judicial role in limiting state power under the Commerce Clause.

There are those who look at this case and see a state passing a regulation on out-of-state entities, asserting that its state law has power beyond its borders. *Wayfair* is just the latest of a series of disappointments for them, which stretch back to *International Shoe*'s ruling that selling into a state can sometimes mean obeying that state's laws, or even further back. But they can take solace in three things. First, South Dakota's *Wayfair* collection regulation is entirely related to its tax authority over its own residents, making it hard to expand easily to new and wild contexts. Second, any regulations have to apply equally within the state, or else be struck down as discriminatory. That doesn't preclude all petty tyrannies but it does stop many. Third, such laws still must be enforced, which itself is a limitation on extraterritorial regulation. South Dakota can seize merchandise at the state line, but it will need voluntary compliance, Customs cooperation, or China's acquiescence enforcing a tax deficiency judgment if a seller in that country won't collect South Dakota's sales tax.

There are those who look at this case and worry how, on one hand, a legal and regulatory system premised on employers and employees, wages and benefits, getting services if you're inside this border and not if you're not, will survive a collision with, on the other hand, an app-based, cloud-based, borderless, org-chart-less, instantaneous, everywhere-and-nowhere economy. For such people, they can take solace that consumption taxes like the sales tax might be the last tax standing. Businesses will pay nothing if their physical presence is in the cloud, income and payroll taxes get a lot harder to collect if everyone is their own app-based boss, and property taxes become more voluntary as mobility and technology mean people can do their job while living anywhere. But people still must buy stuff and pay their use tax. Governments might just have to be more responsive to those residents to keep tax revenues flowing.

We probably have a long time before we must truly confront these questions. Most people still work near their home, buy in their state, and sell where they can be. But there is admittedly a danger of waiting too long to act, as taxi companies and newspapers and Borders bookstores did. It is a testament to the Framers of the Constitution that their solutions to their problems remain relevant for us today. *Wayfair* revisited an application of a constitutional principle on how to collect one tax from residents of a state, but it left intact the timeless idea that parochial state interests do not get to burden interstate commerce. At least until the next case.