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NOTES

FINDING THE WAY: SUBSTANTIAL NEXUS AFTER *WAYFAIR*

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INTRODUCTION

On June 21, 2018, the United States Supreme Court decided *South Dakota v. Wayfair*, a decision that overruled the judicially created physical presence rule established in *Quill Corp. v. North Dakota ex rel. Heitkamp* and *National Bellas Hess, Inc. v. Department of Revenue of State of Illinois*.¹ The United States Supreme Court held that states may now require a remote seller to collect and remit sales and use tax without having a physical presence in the taxing state.²

For the fifty years before the Supreme Court decided *Wayfair*, a state could only require a seller with physical presence in the state to collect and remit its sales or use tax.³ This formal, bright-line rule allowed taxpayers to avoid the imposition of a state's sales and use tax by structuring their business operations to ensure that they did not maintain an office, own property, or have employees in a particular state.⁴ The disparate tax treatment of in-state and out-of-state sellers led to what is commonly referred to as the "tax gap."⁵ The "tax gap" refers to use tax revenue corporate and individual buyers owe but fail to pay on purchases from sellers not physically present in the state, i.e. remote sellers.⁶

Before *Wayfair*, states could not require remote sellers to collect and remit

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1. *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018); *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1991); *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753 (1967).

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

3. *Quill*, 504 U.S. at 301-02.

4. *Bellas Hess*, 386 U.S. at 758-60.

5. Rubinder Bal, *Closing the Use Tax Loophole: Why Consumer Self-Assessment is a Viable Solution*, 66 EMORY L.J. 885, 887 (2017) [hereinafter *Closing the Tax Loophole*].

6. *Id.*

its taxes.⁷ Rather, the buyer was responsible for paying the tax due on the sale.⁸ Most buyers do not pay the tax, however, either because they do not know they owe tax, or they simply choose not to pay it.⁹ Moreover, it was not feasible for state departments of revenue to pursue every resident buyer who may not have paid tax on purchases from remote sellers.¹⁰ Accordingly, due to the barrier of the physical presence rule, remote sellers have been able to use states' economic marketplaces and infrastructure, without paying their fair share for that use.¹¹ Indeed, the Government Accountability Office estimated that the tax gap in South Dakota is between \$48 and \$58 million annually.¹²

To curtail the loss of tax revenue caused by the physical presence rule and to adjust to the evolution of the e-commerce industry, the South Dakota legislature enacted SDLRC Codified Law 10-64-2, which proclaimed economic presence, not physical presence is sufficient to levy a tax on remote sellers, in direct conflict with *Quill*, with the goal of having the United States Supreme Court reconsider the validity of *Quill*'s physical presence rule under the Commerce Clause.¹³ The South Dakota Supreme Court found this law to be unconstitutional under the binding precedent of *Quill*.¹⁴ After granting certiorari, the U.S. Supreme Court overruled *Quill* and found the physical presence rule unsound.¹⁵ Although state governments won a substantial victory because the *Wayfair* Court struck down the physical presence rule, the battle is not over yet. Uncertainty remains. If not physical presence, what satisfies substantial nexus under the Commerce Clause?

Post-*Wayfair*, tax administrators and taxpayers alike now need to know how state governments and businesses should operate under this new rule. Put another way: What new rule defines the connection necessary for a state to have taxing jurisdiction over a remote seller? The *Wayfair* decision gives little guidance, explicitly leaving the task of filling in the details to a polarized Congress. By overturning *Quill* without explaining the way forward, the U.S. Supreme Court has abdicated its responsibility to settle the unsettled.

Part I of this Note examines the history of sales and use taxation of remote sellers and the struggle to define substantial nexus before the *Quill* decision. Part II of this Note analyzes the *Quill* decision and the aftermath. Part III discusses how *Wayfair* progressed to the Supreme Court and examines the *Wayfair* decision. Part IV examines what constitutes substantial nexus after *Wayfair* and proposes a new standard. Finally, Part V addresses shortcomings of the *Wayfair* decision and recommends a specific congressional action to establish a uniform

7. *Id.*

8. *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2088 (2018).

9. *Closing the Tax Loophole*, *supra* note 5, at 914-15.

10. *Id.* at 890.

11. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753, 762-64 (1967) (Fortas, J., dissenting).

12. *Wayfair*, 138 S. Ct. at 2088.

13. *Id.*; S.D. CODIFIED LAWS § 10-64-2 (2019).

14. *Wayfair*, 138 S. Ct. at 2088-89.

15. *Id.* at 2099.

economic nexus standard, suggests compliance with the Streamlined Sales and Use Tax Agreement, and identifies the one party that should be responsible for the collection and remittance of sales and use tax on out-of-state purchases. This solution will provide state governments and the business community with a fair way forward in a world without *Quill*.

I. THE BUILDUP TO *WAYFAIR*

A. Sales Tax

Sales tax is a transactional tax generally imposed on the transfer by a retail merchant of tangible personal property acquired in a retail transaction for the purpose of resale to another for consideration.¹⁶ The buyer is liable for paying sales tax, but general practice for in-state purchases is for a seller to collect and remit this tax.¹⁷ Retail merchants have a fiduciary duty to collect and remit sales tax to the taxing state.¹⁸ South Dakota, the state that recently challenged the physical presence rule in *Wayfair*, like many states, imposes a sales tax.¹⁹ Normally, sellers collect and remit this tax to their respective Departments of Revenue, but if the tax is not collected by the seller, the burden is on consumers to pay a similar use tax.²⁰

B. Use Tax

Use tax is imposed on the storage, use, or consumption of tangible personal property in the state if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.²¹ Use tax is a compensatory tax, designed to prevent the avoidance of sales taxes and ensure that residents remain on equal competitive footing with nonresidents who enter the state to do business.²² Taken together, the sales and use taxes provide a uniform scheme of taxation, with sales tax focusing on goods purchased within the state and use tax focusing on goods purchased outside the state for storage, use, or consumption within the state.²³

C. National Bellas Hess, Inc. v. Department of Revenue of State of Illinois

The Supreme Court first addressed the power of states to tax a non-resident in the context of mail-order sales in the 1967 case of *National Bellas Hess, Inc.*

16. See 67B AM. JUR. 2D *Sales and Use Taxes* § 1 (2019) [hereinafter *Sales and Use Taxes*].

17. *Id.*

18. *Id.*

19. *Wayfair*, 138 S. Ct. at 2088.

20. *Id.*

21. See *Sales and Use Taxes*, *supra* note 16, § 6.

22. See *Rhoades v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047-48 (Ind. T.C. 2002).

23. See *Sales and Use Taxes*, *supra* note 16, §§ 1, 135.

*v. Department of Revenue of State of Illinois.*²⁴ *Bellas Hess* established what is now known as the physical presence rule.²⁵ The physical presence rule mandated that taxpayers must have more than a de minimis physical presence in the taxing state in order for the taxing state to require the taxpayer to collect and remit use tax.²⁶ As a mail-order seller, *Bellas Hess*'s only contacts with the state of Illinois were via common carrier.²⁷ *Bellas Hess* owned no property and employed no sales representatives in Illinois.²⁸ The Illinois Supreme Court held that *Bellas Hess* was required to collect and remit sales tax on its out-of-state sales.²⁹ *Bellas Hess* challenged the Illinois Supreme Court's decision on the grounds that it violated both the Commerce Clause and the Due Process Clause.³⁰

The U.S. Supreme Court looked to several prior decisions where it had drawn a sharp distinction between mail-order sellers with property and employees within a state and "those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business."³¹ The Court found this distinction valid and refused to deviate from it.³² As part of the justification for its ruling, the Court reasoned that allowing Illinois to require *Bellas Hess* to collect and remit use tax would subject *Bellas Hess* to a multiplicity of jurisdictions in which it would be taxed.³³ The Court reasoned that ensuring that the economy is free of such an "unjustifiable local entanglement" was the very purpose of the Commerce Clause.³⁴

D. Complete Auto v. Brady

In 1977, the U.S. Supreme Court addressed the issue of remote sellers in *Complete Auto Transit v. Brady*.³⁵ The Court in *Complete Auto* established a four-part test for determining when a tax should survive a commerce clause challenge.³⁶ Under *Complete Auto*, the Court will uphold a tax if the tax is "[1] applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state."³⁷ Even in 1977, Justice

24. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753 (1967).

25. *Id.* at 757.

26. *Id.* at 756-78.

27. *Id.* at 754. Mail-order seller refers to sellers who are in the business of mailing their goods, via common carrier, to consumers. *Id.*

28. *Bellas Hess*, 386 U.S. at 754.

29. *Dep't of Revenue v. Nat'l Bellas Hess, Inc.*, 214 N.E.2d 755, 760 (Ill. 1966).

30. *Bellas Hess*, 386 U.S. at 756.

31. *Id.* at 758.

32. *Id.*

33. *Id.* at 759.

34. *Id.* at 760.

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

36. *Id.* at 279.

37. *Id.*

Blackmun, writing for the majority, penned his frustrations with the reoccurring issue of defining a state's authority to tax remote sellers in the opening line of the opinion, stating, "[o]nce again we are presented with 'the perennial problem of the validity of a state tax for the privilege of carrying on within a state, certain activities' related to a corporation's operation of an interstate business."³⁸

The *Complete Auto* Court characterized the tax as a "privilege tax," or a tax on the privilege of doing business within a state.³⁹ There was no claim that "the activity [was] not sufficiently connected to the State to justify a tax, or that the tax [was] not fairly related to benefits provided the taxpayer, or that the tax discriminate[d] against interstate commerce, or that the tax [was] not fairly apportioned."⁴⁰ Rather, the appellant merely challenged the validity of the tax on the grounds that the tax was imposed "on nothing other than the 'privilege of doing business that is interstate."⁴¹ The Court rejected this challenge, because "there is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,'" and opted for the previously enumerated four-pronged test.⁴²

II. *QUILL*

A. *The Quill Decision*

By the early 1990's, mail-order sellers had come a long way since the Court decided *Bellas Hess*.⁴³ A study conducted by the Advisory Commission on Intergovernmental Relations estimated that the potential revenue from untaxed interstate mail-order sales for the entire U.S. was \$3.27 billion in 1992.⁴⁴ The industry as a whole, however, reached total sales of over \$183.3 billion by 1989.⁴⁵ Twenty-five years after the *Complete Auto* decision, the U.S. Supreme Court, in *Quill*, was asked to reexamine whether a state can require an out-of-state mail-order seller with no property or personnel in the state to collect and pay a use tax on goods purchased for use within the state.⁴⁶ In *Quill*, the United States Supreme Court reviewed a decision that affirmed a use tax collection obligation on remote sellers because of "'wholesale changes' in both the economy and the law."⁴⁷ *Quill*, a mail-order seller of office supplies, had no employees or property in North

38. *Id.* at 274 (citing *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, (1975)).

39. *Complete Auto*, 430 U.S. at 279.

40. *Id.* at 287.

41. *Id.* at 289.

42. *Id.* at 288-89.

43. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 303-4 (1992).

44. Advisory Comm'n on Intergovernmental Relations, *State Taxation of Mail Order Sales: Estimates of Revenue Potential 1990-1992*, 1 <https://library.unt.edu/gpo/acir/Reports/information/M-179.pdf> [perma.cc/RT3G-MLDQ].

45. *State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 209 (N.D. 1991).

46. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992).

47. *Id.* at 303.

Dakota.⁴⁸ Similar to *Bellas Hess*, Quill solicited its business in North Dakota via catalogs and the like.⁴⁹ Its solicitation reached roughly 3,000 customers, amounting to nearly \$1 million in sales during the year in question.⁵⁰ North Dakota assessed use tax on Quill's retail sales to customers and, the trial court, unsurprisingly, found in favor of Quill as the case was too factually similar to *Bellas Hess*.⁵¹

Like *Bellas Hess* before it, Quill claimed violations of both the Due Process Clause and the Commerce Clause.⁵² In a significant departure from the *Bellas Hess* decision, the United States Supreme Court found that the Commerce Clause and the Due Process Clause “pose distinct limits on the taxing powers of the States.”⁵³ The Court further reasoned that “while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause.”⁵⁴ The Court explained that “although we have not always been precise in distinguishing between the two, the Due Process Clause and the Commerce Clause are analytically distinct.”⁵⁵ According to *Quill*, the Due Process Clause “requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”⁵⁶

The Court acknowledged that in light of major Due Process decisions such as *International Shoe*⁵⁷ and *Shaffer*,⁵⁸ the modern commercial atmosphere dictated that when a corporation had fair warning that the nature of its business could subject it to another state's jurisdiction, “[t]he requirements of due process [were] met irrespective of a corporation's lack of physical presence in the taxing State.”⁵⁹ Based on this analysis, the Supreme Court agreed with North Dakota that the Due Process Clause did not prevent the state from levying a use tax against Quill.⁶⁰

Despite affirming the North Dakota Supreme Court on Due Process grounds, the United States Supreme Court held the state's imposition of the tax unconstitutional on Commerce Clause grounds.⁶¹ After reciting major developments in the Commerce Clause jurisprudence since the *Bellas Hess* decision, the Court stated that although *Bellas Hess* might be decided differently if it were decided under the modern Commerce Clause jurisprudence, it was still

48. *Id.* at 302.

49. *Id.*

50. *Id.*

51. *Id.* at 303.

52. *Id.* at 303-04.

53. *Id.* at 305.

54. *Id.*

55. *Id.*

56. *Id.* at 306 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)).

57. *See generally* *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

58. *See generally* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

59. *Quill*, 504 U.S. at 308.

60. *Id.*

61. *Id.* at 317-18.

consistent with the *Complete Auto* test.⁶² Following *Complete Auto*, the Court stated that it will uphold a tax, despite a Commerce Clause challenge, “so long as the ‘tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.’”⁶³ The *Bellas Hess* decision, thus, coincides with the four requirements of the *Complete Auto* test establishing that mail-order retailers, like Quill, that do not have a physical presence within the taxing state do not meet the standard for substantial nexus.⁶⁴

So, although the United States Supreme Court agreed with the North Dakota Supreme Court that this particular form of taxation did not violate the Due Process Clause, it found that Quill’s lack of physical presence in North Dakota prevented the State from imposing a use tax under the Commerce Clause.⁶⁵ As further justification for its decision, the Supreme Court emphasized that the physical presence rule provided the added benefit of certainty and the administrative ease of a “bright-line” test.⁶⁶ The physical presence rule had now withstood almost thirty years of challenges, from *Bellas Hess* to *Quill*, but that did not stop state governments from trying to find ways around it.

B. Kill Quill

In the aftermath of *Quill*, states attempted numerous ways to get around the barrier of the physical presence rule. These efforts are commonly referred to as the “Kill *Quill*” movement.⁶⁷ The Streamlined Sales Tax Project (“SSTP”), succeeded by the Streamlined Sales and Use Tax Agreement (“SSUTA”), is one way states have confronted the issues caused by *Quill*.⁶⁸ Since 1999, a subset of states has been working to simplify the collection of sales tax in hopes that Congress would finally be persuaded to allow states to require remote sellers to collect and remit sales and use tax.⁶⁹ The goal of the SSUTA is to, “(1) significantly reduce, if not eliminate, the current compliance and administrative burdens imposed upon remote sellers; and (2) preserve state and local sovereignty.”⁷⁰ Today, twenty-four states are members of the SSUTA, but these

62. *Id.* at 310.

63. *Id.* at 311 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

64. *Id.*

65. *Id.* at 312-13.

66. *Id.* at 317-18.

67. Sarah Vergel De Dios, Sarah McGahan & Harley Duncan, *Ride or Die? Recent Efforts to Erode or Overturn Quill*, 27-OCT J. MULTISTATE TAX’N 8, 9 (2017).

68. Judith Lohman, *Streamlined Sales and Use Tax Agreement*, OLR RESEARCH REPORT (Sept. 19, 2006), <https://www.cga.ct.gov/2006/rpt/2006-R-0558.htm> [<https://perma.cc/WP3Z-JKRP>].

69. Lila Disque, *Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1165-66 (2016).

70. Joseph Bishop-Henchman, *The History of Internet Sales Taxes from 1789 to the Present*

states represent only thirty-one percent of the United States population.⁷¹

Attributional nexus and click-through nexus laws are two more prominent *Quill* work-arounds. Attributional or affiliate nexus laws “generally try to come within the confines of the Supreme Court’s nexus jurisprudence because they usually presume or dictate that nexus is established for an out-of-state retailer based on the in-state physical presence and activities of an affiliate or unrelated party.”⁷² The Supreme Court routinely upheld such laws “if the in-state person’s actions are ‘significantly associated with an out-of-state retailer’s ability to establish and maintain a market for sales in the state.’”⁷³

Attributional or affiliate nexus was a state’s counter-punch to taxpayers isolating nexus-creating business functions into separate business entities, protecting their profits from taxation by multiple jurisdictions.⁷⁴ States have successfully asserted attributional or affiliate nexus with remote sellers by claiming the business subjected itself to the taxing power of the state by exerting control over its in-state subsidiary.⁷⁵ On the other hand, taxpayers using this isolation strategy have often prevailed if they can prove that the segregation was done for business purposes other than reducing tax expense.⁷⁶

Some states have enacted click-through nexus statutes to create substantial nexus with remote Internet sellers that have agreements to place links on in-state residents’ websites that “click-through” to the remote sellers’ inventory.⁷⁷ States justified taxation of these transactions by arguing that the remote seller has contractual presence in the taxing state through its use of contracts with the in-state resident website operators.⁷⁸ New York was the first state to attempt this strategy, but Amazon.com and Overtsock.com promptly challenged.⁷⁹ The Supreme Court of New York upheld the click-through nexus law, and the New York Court of Appeals denied certiorari.⁸⁰ As a result, other states have passed click-through nexus laws, and remote sellers are moving away from these

Day: South Dakota v. Wayfair, 2018 CATO SUP. CT. REV. 269, 287 (quoting 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)).

71. Streamlined Sales Tax Governing Board, Inc., <https://www.streamlinedsalestax.org/about-us/about-sstgb> (last visited Dec. 1, 2018) [perma.cc/W3WY-Q26Y].

72. Vergel De Dios et al., *supra* note 67, at 8.

73. *Id.* (quoting *Tyler Pipe Industries, Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 250 (1987))

74. *See generally*, *Geoffrey, Inc. v. S.C. Tax Comm’n*, 437 S.E.2d 13 (1993).

75. *See generally, id.*

76. Nathaniel T. Trelease, *Taxing Internet Sales: Bringing the Old Economy to the New Economy*, 32-DEC COLO. LAW. 11, 22 (2003).

77. Vergel De Dios et al., *supra* note 67, at 8-9.

78. *Id.*

79. David H. Gershel, *The Day of Reckoning: The Inevitable Application of State Sales Tax to Electronic Commerce*, 14 TUL. J. TECH. & INTELL. PROP. 335, 347 (2011).

80. *Amazon.com, LLC v. N. Y. State Dep’t of Taxation and Finance*, 913 N.Y.S.2d 129, 146 (N.Y. App. Div. 2010).

agreements with in-state representatives.⁸¹

Attributional and click-through nexus laws were not states' sole statutory attempts to overcome the physical presence rule. In *Direct Marketing Association v. Brohl*, the United States Supreme Court examined another attempt to avoid *Quill* and Justice Anthony Kennedy explicitly called for revisiting the *Quill* doctrine.⁸² The Colorado law at issue in *Direct Marketing* imposed a notice reporting obligation on sellers who did not collect and remit sales and use tax on out-of-state purchases.⁸³ Under Colorado law, these non-collecting sellers are required to provide both customers and the Department of Revenue with notice of the amount of tax they are required to remit to the state, based on their purchases.⁸⁴ Although the case was limited to a preliminary procedural issue, Justice Kennedy used it as an opportunity to emphasize the need to revisit *Quill*.⁸⁵

Justice Kennedy also argued that *Quill* was an opportunity for the court to rethink *Bellas Hess*, especially given the technological and economic changes our nation had undergone since the Court created the physical presence rule.⁸⁶ Justice Kennedy noted that “[w]hen the Court decided *Quill*, mail-order sales in the United States totaled \$180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled \$3.16 trillion per year in the United States.”⁸⁷ Justice Kennedy condemned the *Quill* decision stating that *Quill* was “questionable even when decided” and that it “now harms [s]tates to a degree far greater than could have been anticipated earlier.”⁸⁸ More recently, Kennedy’s invitation has led to a rise in the proposal of economic nexus standards that would eliminate the physical presence rule.⁸⁹

III. WAYFAIR

A. Wayfair Genesis

In 2016, one year after Justice Kennedy’s offer to revisit *Quill*, the South Dakota legislature mustered the strength to challenge *Quill* and enacted SD ST § 10-64-2.⁹⁰ The law was written to prevent retroactive application, ensure taxpayers with *de minimis* sales were not assessed, and leap forward toward a

81. Gershel, *supra* note 79, at 344. The other states include North Carolina, Rhode Island, and Illinois. *Id.*

82. *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J. concurring).

83. *Id.* at 1128.

84. *Id.*

85. *Id.* at 1135.

86. *Id.* at 1134-35.

87. *Id.* at 1135.

88. *Id.*

89. Joseph Bishop-Henchman, Hannah Walker & Denise Grabe, *Fiscal Fact No. 609: Post-Wayfair Options for States*, TAX FOUND. 4 (Aug. 2018), <https://files.taxfoundation.org/20180904165435/Tax-Foundation-FF6091.pdf> [<https://perma.cc/LN5T-ZR5H>].

90. S.D. CODIFIED LAWS § 10-64-2 (2016).

hearing by the South Dakota Supreme Court.⁹¹ The law authorizes the state to bring a declaratory judgement against any taxpayer believed to be in violation of the law.⁹² South Dakota, a state with no income tax, further highlighted the concern for the loss of revenue by declaring a state of emergency with the passage of SD ST § 10-64-2.⁹³ Shortly after the passage of this law, South Dakota sent notices to remote sellers it believed fell within the ambit of the new legislation.⁹⁴ Three large volume remote sellers, Wayfair, Overstock.com, and Newegg, all of which exceeded the statutory *de minimis* threshold, refused to collect and remit tax to the state.⁹⁵ Pursuant to the provisions of the statute, the State then brought a declaratory judgement against all three.⁹⁶

While South Dakota was fully aware *Quill* was still the established governing law, the State argued by bringing this suit it was accepting Justice Kennedy's invitation to kill *Quill*.⁹⁷ The South Dakota Supreme Court was sympathetic to the state's position and acknowledged its claim did have merit.⁹⁸ Yet, as the Court was bound by *Quill*, it found in favor of the remote sellers and left the task of revisiting *Quill* to the United States Supreme Court.⁹⁹

B. The Wayfair Decision

In a decision written by Justice Anthony Kennedy, the Court would again address the issue of sales and use taxation of remote retailers.¹⁰⁰ The Court began with a recitation of the law established by *Quill* and *Bellas Hess*, then immediately pointed out just how staggeringly low consumer compliance rates are.¹⁰¹ Such low consumer compliance reduced tax revenue by as much as \$33 billion annually, and South Dakota alone lost between \$48 million and \$58 million in tax revenue each year.¹⁰² After reciting the history of the Commerce Clause jurisprudence, Justice Kennedy distilled the doctrine to two key principles: "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce."¹⁰³ The Court also acknowledged that *Complete Auto* still serves as the accepted framework for determining the validity of a tax under the Commerce

91. S.D. CODIFIED LAWS § 10-64-2; § 10-64-5; § 10-64-6.

92. S.D. CODIFIED LAWS § 10-64-4.

93. § 10-64-6.

94. State v. Wayfair, 901 N.W.2d 754, 759 (S.D. 2017).

95. *Id.*

96. *Id.*

97. *Id.* at 761.

98. *Id.*

99. *Id.*

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

101. *Id.* at 2088.

102. *Id.*

103. *Id.* at 2091.

Clause.¹⁰⁴ Justice Kennedy noted that “[e]ach year, the physical presence rule becomes further removed from the economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.”¹⁰⁵

In addition to the prevailing concept throughout that nexus should reflect the times – the twenty-first century – the Court gave three main reasons for reversing *Quill*. First, the substantial nexus prong of the *Complete Auto* test does not require physical presence; second, the physical presence rule creates market distortions; and third, *Quill*’s bright-line rule is an arbitrary and formalistic distinction that is inconsistent with the current Commerce Clause jurisprudence.¹⁰⁶ In addressing its own previous misuse of the physical presence rule, the Court pointed to language of the *Quill* decision indicating that, “it is an inescapable fact of modern commercial life that a substantial amount of business is transacted...[with no] need for physical presence within a State in which business is conducted.”¹⁰⁷ The *Quill* majority supported its use of the physical presence rule by asserting that states could potentially violate the Commerce Clause and unduly burden interstate commerce by forcing mail-order firms to comply with the tax laws of a multiplicity of jurisdictions.¹⁰⁸ The *Wayfair* Court, however, rebuked this point by pointing out that today compliance costs are not really related to whether a firm maintains a physical presence in a given state.¹⁰⁹

Next, the Court addressed the market distortions created by the physical presence rule. Under *Quill*, local businesses and interstate businesses that maintain a physical presence are, by default, at a competitive disadvantage relative to remote sellers.¹¹⁰ Because consumer compliance rates for remitting sales and use tax are so low, remote sellers can essentially offer lower prices by simply avoiding physical presence in a particular state.¹¹¹ In considering the limiting effect that *Quill* could have on the economy, the Court pointed out that the physical presence rule provides firms with a disincentive to expand their operations into multiple states.¹¹²

To address the arbitrary, formalistic distinction created by *Quill*, Justice Kennedy used a simple hypothetical where there are two firms on each side of the Nebraska-South Dakota border; one firm maintains a small warehouse on the South Dakota side and the other maintains a large warehouse just across the border on the Nebraska side.¹¹³ Both firms sell their products online, but under

104. *Id.*

105. *Id.* at 2092.

106. *Id.*

107. *Id.* (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 308 (1992)).

108. *Id.* at 2093.

109. *Id.*

110. *Id.* at 2094.

111. *Id.*

112. *Id.*

113. *Id.*

Quill only the former would have to collect sales and use tax in South Dakota.¹¹⁴

The Court acknowledged the importance and force of *stare decisis*, but concluded that given the change in commercial and technological reality, “*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.”¹¹⁵ Ultimately, the Court explicitly overruled *Bellas Hess* and *Quill* and found that the first prong of the *Complete Auto* test is met if the taxpayer “‘avails itself of the substantial privilege of carrying on business’ in that jurisdiction.”¹¹⁶ This, the Court stated, is clearly the case for SD ST § 10-64-2.¹¹⁷ In an opinion of nearly twenty pages, the Court addressed the South Dakota law being challenged for only a mere two paragraphs.¹¹⁸ Addressing the constitutionality of this law was the Court’s chance to provide guidance as to what constitutes substantial nexus after *Wayfair*. Alas, the Court did nothing more than a cursory analysis of why the nexus requirement of the South Dakota law is sufficient.¹¹⁹

IV. SUBSTANTIAL NEXUS AFTER *WAYFAIR*

A. *Substantial Nexus According to Wayfair*

The four-pronged test from *Complete Auto* remains the framework for analyzing the constitutionality of a state’s imposition of sales and use tax.¹²⁰ Under *Quill*, the physical presence rule provided a bright-line test to determine whether a remote seller had substantial nexus, the first prong of the *Complete Auto* test.¹²¹ Absent the certainty of a formalistic rule, the *Wayfair* decision gave little guidance about what constitutes substantial nexus now. The *Wayfair* Court stated that substantial nexus was sufficient when a taxpayer “‘avails itself of the substantial privilege of carrying on business’” in a state.¹²² Are the standards therefore identical under the Due Process Clause and the Commerce Clause?

The Court recalled that it is well established that, “the sale of goods or services ‘has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State.’”¹²³ The question the Court then posed is whether that sale in and of itself establishes substantial nexus with the taxing state.¹²⁴ The Court explicitly pointed to language touting the due

114. *Id.*

115. *Id.* at 2097.

116. *Id.* at 2099 (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, at *11 (2009)).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 2091.

121. *Id.* at 2092.

122. *Id.* at 2099 (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, at *11 (2009)).

123. *Id.* at 2092 (quoting *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995)).

124. *Id.* at 2093.

process standard indicating that “[t]his nexus requirement is ‘closely related,’¹²⁵ to the due process requirement that there be ‘some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.’”¹²⁶ The Court further emphasized that a business need not have physical presence in a state to meet the due process standard for substantial nexus.¹²⁷

Considering the content of substantial nexus, the Court focused on aligning with the reality of modern e-commerce.¹²⁸ The Court stated that the taxpayers in *Wayfair* clearly had sufficient nexus due to their “economic and virtual contacts” with the state.¹²⁹ It is illogical that one employee or warehouse could create substantial nexus but “‘physical’ aspects of pervasive modern technology should not.”¹³⁰ Furthermore, the Court noted that the advent of targeted marketing and widespread, instant Internet access allowed “‘a business [to] be present in a State in a meaningful way without’ that presence ‘being physical in the traditional sense of the term.’”¹³¹ Indeed, the Court clearly rejected a substantial nexus rule that ignores substantial virtual connections to a state.¹³²

The Court fell short of affirmatively establishing the new standard for substantial nexus.¹³³ Although the Court stated that “the first prong of the *Complete Auto* tests simply asks whether the tax applies to an activity with a substantial nexus with the taxing State,” that was always the essential question.¹³⁴ If the Court’s answer is that substantial nexus “is established when the taxpayer [or collector] ‘avails itself of the substantial privilege of carrying on business’ in that jurisdiction,” whether this is the identical inquiry as that for Due Process and how economic and virtual contacts should be considered remains unanswered.¹³⁵

In reality, therefore, all the Court has done is trade one ambiguous standard for another. Clearly drawing on the language from Due Process nexus jurisprudence, the Court states only that substantial nexus in the context of taxation is “closely related,” not that it is the same as the Due Process nexus requirement.¹³⁶ We are thus left to wonder what it means to avail oneself of the substantial privilege of carrying on business in a jurisdiction in this e-commerce world of indefinite economic and virtual contacts.¹³⁷ The relationship between

125. *Id.* (quoting *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of State of Ill.*, 386 U.S. 753, 756 (1967)).

126. *Id.* (quoting *Miller Bros. Co. v. Maryland.*, 347 U.S. 340, 344-45 (1954)).

127. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

128. *Id.* at 2095.

129. *Id.* at 2099.

130. *Id.* at 2095.

131. *Id.* (quoting *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1224, 1135 (2015)).

132. *Id.*

133. *Id.*

134. *Id.* at 2099 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

135. *Id.* (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, at *11 (2009)).

136. *Id.* at 2093 (quoting *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of State of Ill.*, 386 U.S. 753, 756 (1967)).

137. *Id.* at 2099.

availing oneself of the substantial privilege of carrying on business in a jurisdiction to “the Court’s pre-existing Due Process Clause nexus test of ‘purposefully availing’ oneself of ‘the benefits of an economic market in the state,’” is almost certainly going to be litigation fodder in the coming years.¹³⁸ Surely if the Court intended to make the Commerce Clause and Due Process nexus standards identical it would have used the universally understood Due Process language for both. The Court, however, chose to use different language, leaving the door open for future litigation.

Although not a clearly defined standard, the Court did leave clues about what constitutes substantial nexus after *Wayfair*. The Court found that South Dakota’s law requiring 200 transactions or \$200,000 of sales in the state was “clearly sufficient based on both the economic and virtual contacts . . . [because that] quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota.”¹³⁹ Without such guidance, substantial nexus that is “closely related” to Due Process nexus, in theory, could make one transaction enough to require a remote seller to collect and remit sales and use tax.¹⁴⁰ The Court’s emphasis on the economic and virtual ties that the taxpayers have with South Dakota may therefore distinguish the two standards.¹⁴¹ Without further guidance from the Court, the substantial nexus standard seems to float somewhere between economic and Due Process nexus.

B. What Substantial Nexus Should Be

The *Wayfair* Court may have intended to align the substantial nexus standard with that of Due Process when it gave a brief explanation of what now constitutes substantial nexus.¹⁴² Adhering to the requirements of Due Process nexus as the standard for substantial nexus, however, would be a mistake. The Due Process standard of purposefully availing oneself to the economic benefits of a jurisdiction may be a good starting point, but it is far too broad to engender uniform interpretation. In the context of sales and use tax, the more practical nexus standard should be based on economic nexus.¹⁴³ Indeed an economic nexus should be the substantial nexus standard. First, the Court in *Wayfair* held that the economic nexus standard of the South Dakota law at issue was “clearly sufficient,” providing underlying authority for an economic nexus standard.¹⁴⁴ Although the Court was not precise in its discussion of the necessary elements of SD ST § 10-64-2, it did explain that the level of economic activity at issue in

138. WALTER HELLERSTEIN, *STATE TAXATION 10* (Thompson Reuters/Tax & Accounting, 3rd ed. 2001 & Supp. 2019).

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

140. *Id.* at 2093 (quoting *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of State of Ill.*, 386 U.S. 753, 756 (1967)).

141. *Id.* at 2099.

142. *Id.*

143. Economic nexus is a nexus based on a measure of economic activity within a jurisdiction.

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

Wayfair “could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota.”¹⁴⁵ Thus, an economic nexus standard based on SD ST § 10-64-2 is likely to be upheld if challenged.¹⁴⁶

Second, many states have already enacted economic nexus standards in their responses to *Wayfair*.¹⁴⁷ Of the forty-five states that have sales and use taxes, thirty-four have already adopted some form of economic nexus standard for the purposes of sales and use tax.¹⁴⁸ There is variation among these standards, but the underlying concept is the same; most of these economic nexus standards are based on either a level of sales revenue within a jurisdiction or a certain number of transactions.¹⁴⁹ Any economic nexus standard should include a minimum dollar or transaction threshold to protect small sellers and startups from growth-impeding taxes.¹⁵⁰ Finally, an economic nexus standard should incorporate the certainty of a bright-line rule with requirements that reflect economic realities of the modern marketplace. The physical presence rule was “artificial at its edges,”¹⁵¹ and “[m]odern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*.”¹⁵² A new bright-line rule, that bases nexus on economic activity, is the way forward.

V. FINDING THE WAY FORWARD

A. State Responses to *Wayfair*

Some states, like Indiana, modeled legislation after the South Dakota law upheld in *Wayfair*.¹⁵³ Other states took slightly different approaches, or have yet to make major moves toward compliance with *Wayfair*.¹⁵⁴ Now that the Court has issued its opinion, much of the legislation is aimed at complying with what has been called the *Wayfair* Checklist.¹⁵⁵ Derived from the elements of the South Dakota law the Supreme Court heralded as preventing undue burden on interstate commerce, the *Wayfair* Checklist includes: (1) a de minimis threshold; (2) explicit rejection of retroactive enforcement; (3) single state-level administration of all sales taxes in the state; (4) uniform definitions of products and services; (5) simplified tax rate structure; (6) access to sales tax administration software

145. *Id.*

146. *Id.*

147. Bishop-Henchman et al., *supra* note 89, at 8-19.

148. *Id.*

149. *Id.*

150. *Id.* at 6.

151. *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992).

152. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2095 (2018).

153. Bishop-Henchman et al., *supra* note 89, at 6. These states include Georgia, Indiana, Iowa, Kentucky, Minnesota, New Jersey, North Dakota, South Dakota, Utah, Vermont, and Wyoming.

Id.

154. *Id.* at 7-13.

155. *Id.* at 1.

provided by the state; and (7) a stipulation that sellers who use the software are not liable for errors derived from relying on it.¹⁵⁶

As of February 13, 2019, thirty-two states are enacting, or have already enacted, legislation that requires sales and use tax collection by remote sellers.¹⁵⁷ Eleven states have adopted statutes compliant with the entire *Wayfair* Checklist.¹⁵⁸ Another thirteen states have passed legislation consistent with the last five of the seven elements of the Checklist.¹⁵⁹ The remaining twenty-six states either have no sales tax or are not members of the SSUTA and therefore, are compliant with just two of the elements of the Checklist.¹⁶⁰ By failing to establish a clear nexus standard and leaving states to their own devices, the Supreme Court has invited the creation of numerous, and varying, nexus standards.

Wayfair failed to answer another important question: Who is responsible for the collection of sales and use tax when the transaction occurs through a marketplace facilitator, such as Amazon or E-bay? Marketplace facilitators provide a platform for third-party sellers to sell their products, so in effect these transactions involve two sellers. With no mention of marketplace facilitators in the *Wayfair* decision, states have been left to deal with this issue on their own. For example, Alabama requires marketplace facilitators with sales greater than \$250,000 in Alabama to collect tax on behalf of third-party sellers or comply with notice reporting requirements similar to Colorado's that were at issue in *Direct Marketing*.¹⁶¹ Washington, New Jersey, and Connecticut also require collection and remittance for marketplace facilitators, while Oklahoma requires only notice reporting.¹⁶² States that do not include a statutory provision that clearly identifies the party responsible for collection of sales and use tax in the case of a marketplace facilitator are opening the door for two potential issues. First, the absence of a statutory provision could lead to double collection, where both the third-party seller and the marketplace facilitator are collecting the tax. Second, this lack of clarity could lead to litigation between marketplace facilitators and third-party sellers as to who is responsible for collecting and remitting the tax. These issues were not addressed by the *Wayfair* Court, so for now states are free to assign the responsibility of collection and remittance to either party.

B. The Path of the Dissent

Chief Justice Roberts, in his dissenting opinion, agreed with the majority that

156. *See generally, id.*

157. *Id.* at 1.

158. *Id.* at 8.

159. *Id.* at 10-18. These states include Arkansas, Kansas, Michigan, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Rhode Island, Washington, West Virginia, and Wisconsin. *Id.*

160. *Id.* at 18.

161. ALA. CODE § 40-23-199.2 (2018).

162. CONN. GEN. STAT. ANN. 12-408e (West 2018); N.J. STAT. ANN. § 54:32B-3.6 (West 2018); OKLA. STAT. ANN. tit. 68 § 1394 (West 2017); WASH. REV. CODE ANN. § 82.08.053 (West 2017).

Bellas Hess had been decided wrongly, but he argued that it is not the role of the Court to answer questions of economic policy, even to correct a mistake of the Court's own making.¹⁶³ The Chief Justice characterized the problem with *Quill*'s physical presence rule as an issue of economic policy, not of misinterpretation of the Due Process Clause and dormant Commerce Clause.¹⁶⁴ The Court's affirmation of the physical presence rule in *Quill*, *stare decisis* aside, was done because "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."¹⁶⁵ Moreover, Chief Justice Roberts was concerned that the majority's lack of adherence to *stare decisis* encroached on separation of powers, seeing *Quill* as a deliberate effort to "[toss] [the ball] into Congress's court" for it to decide if it so chooses.¹⁶⁶ The dissent emphasized that the Commerce Clause grants Congress, not the Supreme Court, the plenary power to regulate interstate commerce, and it argued Congress is better equipped to do so.¹⁶⁷ Legislators are better positioned to consider legitimate competing interests and analyze the facts supporting these interests to establish a new governing rule.¹⁶⁸ Chief Justice Roberts feared that by stepping into Congress's shoes, the Court is making worse the mess it already had.¹⁶⁹ He is not alone.

C. A Congressional Way Forward

The United States Supreme Court was wrong to overturn *Quill*, but not because *Bellas Hess* and *Quill* were correctly decided. Rather than trying to finagle its way around more than fifty years of *stare decisis* in order to correct its mistake, the Court should have left the job of overturning *Quill* to Congress. Upholding *Quill* surely would have caused widespread criticism, but perhaps this could have been the final push Congress needed.

Moreover, by overturning *Quill* the Court failed to provide a way forward. *Wayfair* states what the law is not, without clearly explaining what the law is or should be. Describing South Dakota's nexus requirements as "clearly sufficient," does not identify a standard that can be used to determine what constitutes substantial nexus under the *Complete Auto* test in the absence of the physical presence rule.¹⁷⁰ The Court merely lists the elements of SD ST § 10-64-2 with approval, giving no indication as to whether they are necessary for substantial nexus.¹⁷¹ Accordingly, states are left to wonder whether these elements are now implicit requirements for the *Complete Auto* test or if they are no more than mere

163. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101 (2018) (Roberts, C.J., dissenting).

164. *Id.*

165. *Id.* at 2102 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992)).

166. *Id.*

167. *Id.*

168. *Id.* at 2104.

169. *Id.*

170. *Id.* at 2099.

171. *Id.*

suggestions.

Had the Supreme Court left overturning *Quill* to the legislature, Congress could have provided clarity, certainty, and uniformity with a rule as intentionally broad or specific as it deemed appropriate. The Court's reversal of its precedent, however, ended fifty years of taxpayers' reliance without doing more than slapping a band-aid on the wound. In an amicus brief, Senators Ted Cruz (TX), Steve Daines (MT), and Mike Lee (UT) implored the Court to refrain from overturning *Quill* and allow the legislature to tackle the issue and reach a workable, long-lasting solution.¹⁷² They argued that Congress is in the best position to weigh the competing interests and address the changes in the national economy.¹⁷³ The three bills currently pending in Congress are evidence of competing views on this issue, and despite what some may think, "this is not an issue that Congress is ignoring, just now considering, or considering half-heartedly."¹⁷⁴ Congress has been actively wrestling with this issue since 2001, but has yet to reach a consensus on the best way forward.¹⁷⁵ The most salient point made by this group of senators is that overturning *Quill* will lead to more legislation from the bench and more cases like *Wayfair* and *Quill* defining the scope of the Dormant Commerce Clause.¹⁷⁶ Rather than opening the door to a whole new line of cases, like those that followed *Quill*, it would have been better to leave the task of overturning *Quill*, wrongly decided or not, to Congress. Hindsight is 20-20. *Quill* is gone, and now states must wade back into the mist of substantial nexus with only the dim light of *Wayfair* to guide them until Congress chooses to provide a workable solution.

D. A Call for Congressional Action

Four other senators filed an amicus brief for the *Wayfair* decision arguing that *Quill* should be overturned and if it is overturned, that Congress is willing and able to step in.¹⁷⁷ Additionally, "Congress has the means to collect evidence and to craft narrow solutions," as well as amend the solution as time passes and our economic and technological landscape evolves.¹⁷⁸ A legislative solution would likely be better informed through Congress's information gathering capabilities and would have the added benefit of amendment. Should technological innovation or economic development make the legislative solution impractical,

172. Brief for United States Senators Ted Cruz et al. as Amici Curiae Supporting Respondents at 1, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494), 2018 WL 1733145.

173. *Id.*

174. *Id.* at 10.

175. *Id.*

176. *Id.* at 14.

177. Heidi Heitkamp (N.D.), Lamar Alexander (Tenn.), Richard Durbin (Ill.), Michael Enzi (Wyo.); Brief for Four United States Senators in Support of Petitioner as Amici Curiae Supporting Petitioner at 1-2, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494), 2018 WL 1202848 [hereinafter *Brief for Four Senators*].

178. *Id.* at 20.

like the physical presence rule, a statute can be amended and does not face the daunting barrier of *stare decisis*.

The Court's decision in *Quill* did almost everything it could to reserve this issue for Congressional jurisdiction. As the Court's mistake has been exacerbated by the growth of the online retail industry, Congress has been unable to come to a consensus as to how it should address the issue.¹⁷⁹ Likely frustrated with Congress's inability to act, the Supreme Court stepped outside of its constitutionally allotted role in an attempt to fix its mistake. In doing so, the Court removed perhaps the one element of certainty states and remote sellers had: the physical presence rule. Despite its many flaws, the *Quill* decision got one thing right. In the absence of a statutory standard, there is something to be said for the benefits of a judicially established bright-line rule.¹⁸⁰ However, certainty is not a panacea that saves a standard that is illogical, especially here when such dramatic changes have occurred in the way goods are sold since 1967 or even 1992.¹⁸¹ Still, the physical presence rule provided a familiar framework during the last fifty years in which remote sellers and tax administrators could operate. *Wayfair* is a victory for logic and reason, but it has opened the floodgates to an abundance of substantial nexus litigation.¹⁸² To dam the flood, Congressional action is crucial, now more than ever.

Congress has long considered possible solutions to the physical presence rule.¹⁸³ Two bills, proposed in April of 2017, would have provided a framework for the collection of sales and use tax from remote sellers in a world without *Quill*.¹⁸⁴ First, the Remote Transaction Parity Act provides states who are currently members of the Streamlined Sales and Use Tax Agreement the ability to begin collecting sales and use taxes from any remote seller not covered by a "small remote seller" exception.¹⁸⁵ The bill also gives states which are not members of the SSUTA an alternative option for collecting this tax from remote sellers, provided the states comply with several other requirements.¹⁸⁶ The bill

179. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018) (citing *State v. Wayfair, Inc.*, 901 N.W.2d 754, 760 (S.D. 2017)).

180. *Quill Corp. v. North Dakota*, 504 U.S. 298, 316 (1992).

181. DEP'T OF COMMERCE, CB18-21, QUARTERLY RETAIL E-COMMERCE SALES: 4TH QUARTER 2017, U.S. CENSUS BUREAU NEWS (Feb. 16, 2018).

182. *See Ass'ns for Accessible Medicines v. Frosh*, 742 Fed. App'x 720 (Mem) (4th Cir. 2018); *Georgalis v. Facebook, Inc.*, 2018 WL 6018017 (N.D. Ohio 2018); *Huzar v. Groupon, Inc.*, 2018 WL 3619388 (N.D. Ill. 2018); *Ala. Dep't of Revenue v. Scholastic Book Clubs, Inc.*, 2018 WL 4266694 (Ala. Civ. App. 2018); *Walgreens Specialty Pharmacy LLC v. Comm'r*, 916 N.W.2d 529 (Minn. 2018); *Kansler v. Miss. Dep't of Revenue*, 263 So.3d 641 (Miss. 2018); *Targa Resources Partners, L.P. v. Dir., Div. of Tax'n*, 2018 WL 6444399 (N.J.T.C. 2018); *Ferrellgas Partners, L.P. v. Dir., Divs. of Tax'n*, 2018 WL 6444500 (N.J.T.C. 2018); *Greenscapes Home and Garden Products, Inc. v. Comm'r*, 2019 WL 480201 (Ohio Ct. App. 2019).

183. *See, e.g.*, H.R. 2193, 115th Cong. (2017); S. 976, 115th Cong. (2017).

184. H.R. 2193, 115th Cong. (2017); S. 976, 115th Cong. (2017).

185. H.R. 2193, 115th Cong. (2017).

186. *Id.*

includes a “Small Seller Phase-In” which allows states to collect sales and use tax from all remote sellers doing business in their state based on a threshold level of the seller’s gross income, and the bill lowers the threshold level incrementally each year.¹⁸⁷

Second, the Market Place Fairness Act, proposed on the same day as the Remote Transactions Parity Act, contains essentially the same provisions, but excludes the Small Seller Phase-In provision and prohibits states from collecting sales and use tax from remote sellers, unless the remote seller has gross income of more than \$1 million.¹⁸⁸ Of the many attempts to expand state taxation on remote sellers, the Marketplace Fairness Act has gained the most traction.¹⁸⁹ One of the main objectives of both the Marketplace Fairness Act and the Remote Transaction Parity Act was the abolition of the physical presence rule.¹⁹⁰ *Wayfair* has done just that.¹⁹¹ Because the physical presence rule is a thing of the past, states are free to adopt their own economic nexus standards, but the Remote Transaction Parity Act or “[t]he [Marketplace Fairness Act] ... would impose similar requisites on all states thus lessening the complexity created by states adopting a myriad of economic nexus rules.”¹⁹²

In 1959, before the U.S. Supreme Court addressed the issue of remote sellers in the sales and use tax context, the Court addressed the problems remote sellers created for the collection of net income tax on foreign corporations.¹⁹³ Two conflicting state court opinions drew the attention of the Court.¹⁹⁴ The Supreme Court of Minnesota upheld the collection of net income tax on foreign corporations, while the Supreme Court of Georgia found that such a tax violated both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.¹⁹⁵ Minnesota placed a tax upon the net income of both residents and nonresidents, including, “domestic and foreign corporations . . . whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both.”¹⁹⁶ Minnesota calculated this tax using three different methods: the taxable sales assignable to Minnesota as a percentage of total taxable sales; the taxpayer’s tangible property in Minnesota as a percentage

187. *Id.*

188. S. 976, 115th Cong. (2017).

189. Disque, *supra* note 69, at 1174.

190. H.R. 2193, 115th Cong. (2017); S. 976, 115th Cong. (2017).

191. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

192. Sylvia F. Dion, *As States Rush to Adopt Economic Nexus Post-Wayfair, Is Congressional Action Needed?*, CPA PRACTICE ADVISOR (Sept. 20, 2018), <https://www.cpapracticeadvisor.com/news/12428984/as-states-rush-to-adopt-economic-nexus-post-wayfair-is-congressional-action-needed> [<https://perma.cc/H38U-SCD8>].

193. *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452 (1959).

194. *Stockham Valves & Fittings, Inc. v. Williams*, 213 Ga. 713 (Ga. 1957); *State v. Nw. States Portland Cement Co.*, 250 Minn. 32 (Minn. 1957).

195. *Stockham Valves & Fittings, Inc. v. Williams*, 213 Ga. 713 (Ga. 1957); *State v. Nw. States Portland Cement Co.*, 250 Minn. 32 (Minn. 1957).

196. *Portland Cement*, 358 U.S. at 453 (quoting MINN. STAT. § 290.03 (1957)).

of its total tangible property; and the taxpayer's payroll in Minnesota as a percentage of its total payroll.¹⁹⁷

Resolving the issue for both cases, the United States Supreme Court found that states have the power to levy taxes on the net income from operations of a foreign corporation so long as the tax "is not discriminatory and is properly apportioned to local activities."¹⁹⁸ Before this decision, it was generally accepted that states could not impose a tax on a business or individual engaged only in interstate commerce within that state.¹⁹⁹ Unsurprisingly, the remote sellers lobbied aggressively against this decision and urged that allowing the states to tax such a wide range of activity would place an undue burden on interstate commerce.²⁰⁰

Only a few months after the Supreme Court decided *Portland Cement*, the lobbyists prevailed, and Congress enacted P.L. 86-272.²⁰¹ It took a mere two months after the Supreme Court decided *Portland Cement*, for the Senate Select Committee on Small Business to hold public hearings that quickly led to a Senate bill that would ultimately become P.L. 86-272.²⁰² This law codified the legality of the imposition of net income tax, but it prohibited states from imposing the tax on businesses that did nothing more than solicit the sale of goods if the orders were approved outside the state and the goods were delivered from a location outside the state.²⁰³ Congress certainly proved it could react quickly to provide clarity on an issue regarding the imposition of net income tax on remote sellers after *Portland Cement*, but the same cannot be said for congressional reaction to provide clarity regarding state's authority to impose sales or use tax on remote sellers.

Prompt legislation notwithstanding, one issue that states, businesses, and courts wrestled with following the passage of P.L. 86-272 was defining key terms such as "solicitation" and "delivery"²⁰⁴ These definitions were critical to the scope of this federal legislation, but their absence left state courts to draw a line in the sand and taxpayers with the burden of discovering the limits of P.L. 86-272 through expensive litigation.²⁰⁵ However, the drafters of P.L. 86-272 admitted that they did not view this congressional action as a permanent solution.²⁰⁶ The statute was "an attempt to formulate a standard of minimally requisite contacts

197. *Id.* at 453-54.

198. *Id.* at 452.

199. Philip M. Tatarwicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 TAX LAW. 293, 296 (1985).

200. *Id.* at 296-97.

201. James A. Amdur, Annotation, *Protection of Out-of-State Sellers from State Income Tax by Public Law 86-272*, 15 U.S.C.A. §§ 381 to 384, 182 A.L.R. FED. 291, § 2(a) (2002).

202. Tatarwicz, *supra* note 199, at 297.

203. Amdur, *supra* note 200.

204. Tatarwicz, *supra* note 201, at 293-94.

205. *Id.* at 294-95.

206. *Limitations on Power of States to Tax Net Income Derived from Interstate Commerce: P.L. 86-272*, 108 U. PA. L. REV. 1077, 1087 (1960).

for the purposes of net income taxation.”²⁰⁷ Congress and lobbying groups demonstrated in the months following *Portland Cement* that they are capable of remedying mistakes made by the Supreme Court and filling in gaps in the Court’s decisions. A congressional action establishing the limits of state power to tax remote sellers post-*Wayfair* is possible, but must provide clearly defined terms and a clear nexus standard.

E. The Way Forward

Congressional action, not prolonged litigation, is the way forward. Congress must pass a law that clearly defines what constitutes substantial nexus for the purposes of sales and use tax, mandates that all states with a sales and use tax scheme comply with the SSUTA, and identifies the party responsible for the collecting and remitting of sales and use tax. A congressional action that accomplishes these three goals will provide certainty, uniformity, and ease of administration for states and remote sellers. Without a congressionally established, bright-line rule, the war for defining substantial nexus will rage on. States and businesses will continue to find ways around judicially established standards, as they did for years under the *Quill* regime.²⁰⁸ Lobbyists for the remote sellers were consistently successful in maintaining the status quo.²⁰⁹ The *Wayfair* decision is certainly a resounding blow to their efforts to avoid this tax burden, but in the absence of a clear rule, there is still room for remote sellers to fight back. A clearly defined economic nexus standard that establishes nexus based on the amount of sales revenue or number of transactions a business has within a state not only follows the trends of state legislation post-*Wayfair*, but also would provide the benefit of certainty and administrative ease. Businesses would not have to comply with fifty different state standards, but just one uniform rule for collecting and remitting sales and use tax.

A practical and realistic legislative action must work to mitigate the cost of compliance for businesses while still assuring that states receive the tax revenue from remote sellers and that the law conforms with the economic realities of the times. The business community’s argument that the cost of compliance will create an undue burden, while diluted by software solutions as Chief Justice Roberts pointed out in his dissent in *Wayfair*, is not entirely unfounded.²¹⁰ Alas, in the post-*Wayfair* world, remote sellers will have to comply. What remains to be established is the extent to which remote sellers must comply. It is clear that some small businesses will escape *Wayfair*’s grasp, but for businesses that exceed any de minimis threshold, compliance may not be a walk in the park. The Court points out in *Quill* that there are 6,000 different taxing jurisdictions;²¹¹ however, this number is misleading. Not all of the 6,000 taxing jurisdictions have unique

207. *Id.* at 1083.

208. *See generally*, Vergel De Dios et al., *supra* note 67.

209. *Id.*

210. *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2103-04 (2018) (Roberts, C.J., dissenting).

211. *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992).

sales tax and use tax rates.²¹² Moreover, for the twenty-three states that are members of the SSUTA, harmonization of state sales tax is a requirement.²¹³ Still, especially for start-ups and smaller remote sellers, if all state laws are not harmonized, the cost of compliance with different sales and use tax rates and nexus requirements of even a fraction of the 6,000 total taxing jurisdictions is daunting. Software that facilitates the compliance with sales and use tax remittance is not cheap, but it is available and included in membership with the SSUTA.²¹⁴

Practically speaking, the cost of compliance is a legitimate concern, and perhaps the most significant barrier to a new equilibrium for states and remote sellers.²¹⁵ Businesses and tax software companies both recognize the challenges ahead. When asked about navigating the new landscape, David Campbell, CEO of TaxCloud, responded, “The first thing I tell merchants when they call is to calm down. . . . It’s understandable to be confused—this is definitely a daunting change—but all the necessary tools are already out there, readily available to sellers.”²¹⁶ The simple reality is that businesses need this software, even more so post-*Wayfair*. Many smaller or less sophisticated businesses will not have the expertise to navigate the myriad of taxing jurisdictions.²¹⁷ Access to an easy-to-use software mitigates that problem. Not only do the member states of the SSUTA pay for sellers to have access to sales tax software, but the SSUTA also allows for sellers to hire a certified service provider to handle their sales tax remittance on the member states’ dime and, for sellers that have developed their own software, the SSUTA allows for such software to be certified.²¹⁸

If remote sellers are required to remit sales and use tax from such a vast array of taxing jurisdictions, states should be willing to meet sellers in the middle and provide access to software. So long as the cost of the software does not exceed the additional revenue states are able to generate, states should consider this a victory. Further, the sellers that are likely to be the most cost-intensive for the purposes of sales tax software are likely to be the sellers who have already developed their own software. As such, these more expensive sellers will not be using the state-funded software if they opt to have their own software certified. Membership with the SSUTA also alleviates the issues of unclear definitions that followed *Portland Cement* as one of the main goals of the SSUTA is to establish

212. Brief of Four Senators, *supra* note 177, at 11-12.

213. *Id.* at 17-18.

214. *Id.*

215. Ryan Prete, *Retailers Needn’t Stress Post-‘Wayfair’: Tax Software Officials*, BLOOMBERG BNA (June 28, 2018), <https://www.bna.com/retailers-neednt-stress-n73014476973/> [<https://perma.cc/UC9G-NMN7>]

216. *Id.*

217. Eric Boehm, *The Supreme Court’s Online Sales Tax Ruling Is Already a Huge Headache for Small Businesses*, REASON FOUNDATION (Mar. 19, 2019), <https://reason.com/2019/03/19/the-supreme-courts-online-sales-tax-ruli/> [<https://perma.cc/GL8X-9K2X>].

218. Lohman, *supra* note 68, ¶ 16.

uniform definitions.²¹⁹

State legislation is needed to adopt the SSUTA.²²⁰ Thus, under this proposed regime, states wishing to reap the benefits of the *Wayfair* decision would have to make a choice: take the necessary steps to adopt the SSUTA or miss out on the sales and use tax revenue from remote sellers. State governments want the tax revenue that the U.S. Supreme Court has now ruled they are entitled to; but, remote sellers are not going to let one Supreme Court ruling eat away at their profits. Accordingly, this proposed regime suggests a more realistic approach from the states' perspective. Meeting in the middle by providing access to sales and use tax compliance software might just be enough to quell the unrest of the business community post-*Wayfair*.

A congressional action would also need to explicitly identify which party is responsible for the collection and remittance of sales and use tax. This will prevent issues associated with marketplace facilitators and third-party vendors. If the law clearly states, for example, that in the case where a marketplace facilitator's platform is used to conduct the transaction, then the third-party vendor is responsible for collecting and paying the sales and use tax, but the marketplace facilitator is responsible for notifying the third-party vendor of each transaction, the issues of double collection and conflict between the facilitator and third-party vendor are abated. Some marketplace facilitators may be better positioned to bear the burden of collecting and remitting this tax, but that may not always be the case. For that reason, this decision is better left to the policy experts in Congress, not judges.

Alas, the odds of congressional action are dismal, at best. Since the physical presence rule was challenged in *Quill*, Congress has been consistently unable to agree on a way forward.²²¹ Nothing about today's political climate makes a Congressional solution seem more likely. If Congress is unable to act, the Multistate Tax Commission should write new rules suggesting these three requirements. Much like the Uniform Law Commission, the Multistate Tax Commission writes model tax laws that many states use to draft their own state specific tax laws.²²² Even if Congress is unable to act, a model rule written by the Multistate Tax Commission could provide states with a model of how to best structure their sales and use tax laws in a world without *Quill*. Regardless of whether Congress or the Multi-State Tax Commission act, the states themselves should structure their legislation in response to *Wayfair* to comport to this recommendation. If states want to avoid further litigating this issue and avoid dissuading remote sellers from doing business in their states by having uniform sales and use tax laws, then states should take it upon themselves to establish a clear economic nexus standard, adopt the SSUTA, and clearly identify which party is responsible for collection and remittance.

219. *Id.* ¶ 3.

220. *Id.* ¶ 1.

221. Disque, *supra* note 69, at 1164.

222. See generally, *The History of the MTC*, MULTISTATE TAX COMM'N, <http://www.mtc.gov/The-Commission/MTC-History> (last visited March 7, 2019) [perma.cc/BXF9-TRPV].

CONCLUSION

Wayfair brought us no closer to a clear understanding of what constitutes substantial nexus in the realm of sales and use tax. Unless we want to face some of the same compliance issues and endless litigation we faced in the post-*Quill* era, Congress must establish a clear standard for substantial nexus and address the other issues states and remote sellers face, such as the cost of compliance and marketplace facilitators.

The Supreme Court tried to coax Congress into action and “extended a clear invitation to Congress to eliminate or modify the *Bellas Hess* rule” when it decided *Quill*, but it failed.²²³ Still, the Court was exceedingly clever in deciding *Quill*:

Its novel approach of bifurcating the concept of nexus so that it had a different meaning under the Due Process Clause from its meaning under the Commerce Clause allowed the Court to accomplish two goals: clearing the way for Congressional intervention while protecting the reliance interests of the mail order industry.²²⁴

The Court left the door open for Congress to step in “[b]y holding that due process nexus was satisfied” and “provid[ing] Congress with clear authority for overturning *Quill*.”²²⁵

It took only a matter of months for Congress to pass P.L. 86-272 following the uncertainty of net income tax and *Portland Cement*.²²⁶ Similarly, in both *Quill* and *Wayfair*, there are substantial factions on both sides of the issue. Yet, only in the net income tax arena did Congress grace the states and business community with clarity. There is no doubt that the Supreme Court’s decision to overturn *Quill* and *Bellas Hess* is correct from a logical standpoint. Alas, the Court overstepped and has now added to the uncertainty that surrounds substantial nexus. The Court certainly made it clear that the physical presence rule is no longer good law, but the Court failed to take the next step and establish what the proper rule is now. Chief Justice Roberts was absolutely correct to argue as adamantly as he did that this is an area for Congress to address. Now, it must do so.

Clearly defining what constitutes substantial nexus and conditioning states’ ability to require remote sellers to collect and remit sales and use tax on membership in the SSUTA should be a manageable middle ground for states and

223. Richard D. Pomp, *Revisiting Miller Brothers, Bellas Hess, and Quill*, 65 AM. U. L. REV. 1115, 1142 (2016).

224. *Id.* at 1144.

225. *Id.*

226. Tatarwicz, *supra* note 199, at 297.

remote sellers. The Supreme Court had the best of intentions when it overturned *Quill* and the physical presence rule, but by not providing adequate guidance as to what now constitutes substantial nexus, the Court failed to provide a fair way forward.