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Wayfair, What's Fair, and Undue Burden

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I. INTRODUCTION

The Supreme Court's decision in *South Dakota v. Wayfair, Inc.*[1] evaluated the state tax jurisdiction or "nexus" rules that apply under the so-called "dormant" aspect of the Commerce Clause.[2] *Wayfair* overruled, as "unsound and incorrect," the physical presence nexus rule of *National Bellas Hess, Inc. v. Department of Revenue of Illinois*,[3] and *Quill Corp. v. North Dakota*,[4] as applied to a state use tax collection duty.[5] *Wayfair* concluded that this standard was inconsistent with the Court's longstanding construction of the dormant Commerce Clause.[6]

Wayfair was a 5-4 decision featuring two concurrences that leave somewhat uncertain what part of its analysis a majority of the Justices assented to.[7] All nine Justices expressed antipathy to the physical presence rule. Also, there was apparently broad consensus that in the absence of the physical presence rule, state tax nexus is to be evaluated applying due process principles.[8] *Wayfair*, like other recent state court cases decided by the Court, illustrates that the Court continues to be concerned with state tax discrimination and a related concept, the impermissible

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1 138 S. Ct. 2080 (2018).

2 *See* U.S. CONST. art. I, § 8, cl. 3; Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) ("The Commerce Clause empowers Congress '[t]o regulate Commerce . . . among the several States,' and although its terms do not expressly restrain 'the several States' in any way, we have sensed a negative implication in the provision since the early days . . . [which] has come to be called the dormant Commerce Clause . . . . " (internal citations omitted)).

3 386 U.S. 753 (1967).

4 504 U.S. 298 (1992).

5 *Wayfair*, 138 S. Ct. at 2099. The rule also applied to the use tax collection requirement as imposed by localities. *See Quill,* 504 U.S. at 313 n.6. In this Article, reference to the states' use tax collection duties is intended to also reference such duties as imposed by these localities.

6 *See Wayfair*, 138 S. Ct. at 2093–94. *See also infra* notes 22–26, 87–89 and accompanying text.

7 *See Wayfair*, 138 S. Ct. at 2087.

8 *See id.* at 2093; U.S. CONST. amend. XIV, § 1.

imposition of a double tax.[9] But *Wayfair* suggests that neither discrimination nor double taxation will typically be implicated when a state asserts a use tax collection duty.[10]

The most confusing aspect of *Wayfair* is the majority's ambivalent, vague suggestion that state tax jurisdiction can also be evaluated utilizing the dormant Commerce Clause principle of "undue burden."[11] Undue burden is an inquiry that derives from the 1970 case, *Pike v. Bruce Church, Inc.*,[12] which pertained to a state statute that regulated commercial activity and not to the imposition of a state tax.[13] The *Pike* balancing test has not been applied in the state tax context and is no longer favored by the Court even in the regulatory context. *Quill* originally introduced the undue burden notion into the state tax context, but did so in a way that did not require the application of that test.[14] Moreover, *Wayfair* rejected the reasoning that *Quill* used to invoke *Pike*. *Wayfair* suggests that the Court itself would not actually apply the undue burden standard to the imposition of a state's use tax collection duty—and that test has no logical application with respect to other state taxes. Further, because the undue burden test has no history with respect to state taxes, it is not clear how it would be applied to such taxes.

Wayfair's reference to the undue burden standard seems intended to encourage states to simplify their state and local use tax collection systems as they apply to out-of-state vendors—particularly small vendors. This is certainly a laudable purpose. But the reference risks creating needless litigation and confused lower court reasoning—a consequence that would hearken back to the after-effects of *Quill*. Ironically, *Wayfair* creates this prospect even though it was critical of the litigation and confusion wrought by *Quill*.[15] There was no need for *Wayfair* to invoke the undue burden principle, as what the Court apparently sought to achieve could be better accomplished through a straightforward application of the Due Process Clause.

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9 *See, e.g.*, Comptroller of Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015). *See also* Granholm v. Heald, 544 U.S. 460 (2005); Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n, 545 U.S. 429 (2005); S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999); Gen. Motors Corp. v. Tracy, 519 U.S. 278 (1997); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).

10 *See Wayfair*, 138 S. Ct. at 2099.

11 *Id.* at 2098–99.

12 397 U.S. 137 (1970).

13 *See id.* at 138; *see also* David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1, 1–2 (2007) (noting that the second aspect of the dormant Commerce Clause test applied to non-tax state regulations is "commonly referred to as the 'undue burden' standard").

14 *See* Quill Corp. v. North Dakota, 504 U.S. 298, 305, 314–15 (1992).

15 *See Wayfair*, 138 S. Ct. at 2092, 2097–98.

This Article proceeds in four Parts. Part One revisits the holdings and history of *Bellas Hess* and *Quill*. Part Two discusses the history and text of the South Dakota statute at issue in *Wayfair*. Part Three considers the legal theories evaluated by the Court in *Wayfair*—in particular the notions of discrimination, due process, and undue burden. Part Four offers some concluding remarks.

II. BELLAS HESS AND QUILL

Wayfair overruled *Quill* and *Bellas Hess*,[16] both of which pertained to a state's attempt to impose a use tax collection duty on an out-of-state vendor making sales to in-state consumers.[17] The use tax serves as a complement to the sales tax and acts to prevent a consumer from seeking to avoid sales tax by purchasing goods outside the state.[18] The tax achieves this result since it applies to the in-state use or consumption by the purchaser of products from a vendor located outside the state when such purchases are not otherwise subject to tax.[19] In general, the use tax is technically owed by the consumer.[20] But states require vendors to collect the use tax because obtaining the tax from consumers is a difficult administrative chore and consumer self-compliance is notoriously low.[21]

In the years prior to *Bellas Hess*, the Court retreated from its pre-existing dormant Commerce Clause doctrine.[22] That doctrine posited that the states could not impose direct burdens, including taxes, on interstate, as opposed to intrastate, commerce.[23] The Court abandoned this "free market" approach in part because, as the twentieth century progressed, the distinction between interstate and intrastate commerce became difficult to define.[24] The Court also became concerned about arbitrary and inconsistent judicial

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16 *Id.* at 2099.

17 *See* Quill Corp. v. North Dakota, 504 U.S. 298, 301 (1992); Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 754 (1967). This Article refers to the issue as addressed by these cases with respect to a state's use tax collection duty, but the same issue can also arise in connection with a state's sales tax collection duty. *See, e.g., Quill*, 504 U.S. at 317. The South Dakota law referenced in *Wayfair* technically imposed sales tax and not use tax because the incidence of the tax—with respect to "goods, wares or merchandise" sold at retail to in-state "consumers or users"—was imposed upon the vendor. *See* S.D. CODIFIED LAWS § 10-45-2 (2016). *See also infra* note 108 and accompanying text.

18 *See, e.g.*, Nelson v. Sears Roebuck, 312 U.S. 359, 361, 363 (1941); Henneford v. Silas Mason Co., 300 U.S. 577, 581 (1937).

19 *Sears Roebuck*, 312 U.S. at 361–63.

20 *Id.* at 363.

21 *See Wayfair*, 138 S. Ct. at 2088. *See also* Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1132 (10th Cir. 2016).

22 *See* Michael T. Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, 55 SANTA CLARA L. REV. 565, 573–77 (2015).

23 *See id.* at 573–75.

24 *See id.* at 573–76.

applications of these concepts because such rulings had the potential to unjustly infringe upon state sovereignty.[25] The Court was guided by its oft-stated conclusion that it was not the purpose of the Commerce Clause to prevent interstate business from paying its fair share of state tax.[26]

As a consequence of the Court's doctrinal evolution, in the mid-part of the twentieth century, state tax jurisdiction was extended to companies whose only contact with a state was the activity of salespersons. Formerly, such contacts had been deemed "interstate" and therefore not sufficient to create taxing jurisdiction. But in a series of cases, the Court rejected this rule.[27] Eventually, the Court extended the principle that permitted the imposition of state tax based upon the activity of salespersons to circumstances where the representatives were not company employees and were engaged in activities other than actually making sales.[28]

Bellas Hess involved a fact pattern that further challenged the Court's doctrinal evolution. In *Bellas Hess*, the out-of-state business was a mail-order vendor that conducted significant business in the state without the use of any sales or other representatives.[29] Although the Court had previously departed from the view that the "interstate" nature of a company's in-state contacts could insulate that company from tax, *Bellas Hess* took a step backwards. The Court held that a state could not impose a use tax collection duty upon a seller whose only connection with customers in a state was through the use of common carriers and the United States mail.[30] *Bellas Hess* justified its conclusion by stating that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail-order transactions here involved."[31] The Court also supported its logic by focusing on the particular complexities that relate to the collection of use tax—including the fact that such obligations are imposed not only by states but also by numerous municipalities.[32]

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25 *See id.* at 575.

26 *See id.* at 575 & n.64.

27 *See, e.g.*, Scripto, Inc. v. Carson, 362 U.S. 207, 208–09 (1960); Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 454 (1959). *See also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 321 (1945).

28 *See, e.g.,* Tyler Pipe v. Wash. Dep't of Revenue, 483 U.S. 232, 249–50 (1987).

29 Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 754, 754–55 (1967).

30 *Id.* at 758.

31 *Id.* at 759.

32 *Id.* at 759–60.

The Court noted that, despite its holding, the domain was one where Congress possessed "the power of regulation and control."[33]

Bellas Hess was a 6-3 decision.[34] Writing for the dissenting Justices, Justice Fortas stated that "[t]here should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect from Illinois customers and to remit the use tax."[35] Citing the Court's prior precedent with respect to sales representatives, the dissent argued in favor of "a sensible, practical conception of the Commerce Clause."[36] The dissent also argued that where a mail-order vendor's exploitation of the state's economic market is pervasive, the case for jurisdiction is just as strong as, or perhaps stronger than, where the out-of-state company is subject to tax through the use of in-state sales representatives.[37] The dissent dismissed the majority's focus on compliance burdens, noting that this analysis underestimated the capacity of technology to ease those difficulties.[38]

Quill involved similar facts to *Bellas Hess*.[39] By the time of *Quill*, the Court's Commerce Clause doctrine had further evolved, and had specifically concluded, in the case of *Complete Auto Transit v. Brady*,[40] that interstate commerce was not immune from state taxation.[41] That conclusion eradicated the conceptual underpinnings of *Bellas Hess*.[42] The Court's progression of cases between *Bellas Hess* and *Quill* caused the state of North Dakota to posit in *Quill* that *Bellas Hess* had been effectively overruled.[43]

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33 *Id.* at 760. *Quill* would later question whether this was in fact so, given that *Bellas Hess* was decided on both Commerce Clause and Due Process grounds. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992).

34 *See Bellas Hess*, 386 U.S. at 760 (Fortas, J., dissenting).

35 *Id.* at 761–62 (Fortas, J., dissenting). Justice Fortas was joined by Justices Black and Douglas. *See id.* at 760.

36 *Id.* at 764–66 (citing Scripto, Inc. v. Carson, 362 U.S. 207 (1960)).

37 *Id.* at 764–65.

38 *Id.* at 766.

39 Quill Corp. v. North Dakota, 504 U.S. 298, 301 (1992).

40 430 U.S. 274 (1977).

41 *Id.* at 278–79. In *Goldberg v. Sweet*, the Court noted:

> The wavering doctrinal lines of our pre-*Complete Auto* cases reflect the tension between two competing concepts: the view that interstate commerce enjoys a "free trade" immunity from state taxation; and the view that businesses engaged in interstate commerce may be required to pay their own way. *Complete Auto* sought to resolve this tension by specifically rejecting the view that the States cannot tax interstate commerce, while at the same time placing limits on state taxation of interstate commerce.

Goldberg, 488 U.S. 252, 259 (1989) (internal citations omitted).

42 *Quill*, 504 U.S. at 323 (White, J., concurring in part and dissenting in part) (stating that the Court's subsequent cases "disavowed" the "whole notion" underlying *Bellas Hess* "that interstate commerce is immune from state taxation" (internal citation omitted)).

43 *Id.* at 301. North Dakota declined to follow *Bellas Hess* because "'the tremendous social, economic, commercial, and legal innovations' of the past quarter-century have

In response, the *Quill* Court stated that it generally agreed with North Dakota's analysis.[44] The Court also recognized that "contemporary Commerce Clause jurisprudence might not dictate the same result [as in *Bellas Hess*] were the issue to arise for the first time today . . . ."[45] But the Court nonetheless re-affirmed *Bellas Hess*.[46]

Quill not only retained *Bellas Hess*, it also effectively expanded the Court's ruling in that case. *Bellas Hess* concluded that a vendor that limited its contacts with a state to those of mail and common carrier could not be subject to state tax—a rule that was generally limited to a mail-order vendor such as the litigant. *Quill* went further, concluding that an out-of-state business could not be subject to a state's use tax collection duty unless it had an in-state "physical presence."[47] *Quill* was clear that physical presence would not exist if a vendor limited its state contacts to the use of mail and common carriers—hence preserving the *Bellas Hess* rule.[48] But the definition of "physical presence" was otherwise ambiguous, as Justice White noted in his dissent,[49] and as numerous state tax cases later illustrated.[50] The saving grace, if there was one, was that the Court suggested that its rule was limited to the use tax collection duty[51]—something that later state cases would also generally affirm.[52]

Bellas Hess had been decided on both Commerce Clause and due process grounds—legal inquiries that the Court concluded were "closely related."[53] *Bellas Hess* stated that, notwithstanding the Court's holding, Congress was free to create jurisdictional standards that would govern the assertion of a state's use tax collection.[54] But *Quill* noted that, despite the Court's prior

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rendered its holding 'obsole[te].'" *Id.* (quoting State v. Quill Corp., 470 N.W. 2d 203, 208 (N.D. 1991)). *See* State v. Quill, 470 N.W. 2d at 209–13 (citing Supreme Court cases indicating the change in the "legal landscape").

44 *Quill*, 504 U.S. at 301–02.

45 *Id.* at 311.

46 *Id.* at 301–02.

47 *Id.* at 317–18. *Bellas Hess* never mentioned the phrase "physical presence." *See generally* Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967).

48 *Quill*, 504 U.S. at 301.

49 *Id.* at 337 (White, J., concurring in part and dissenting in part). Justice White's opinion in *Quill* was technically a concurrence in part and a dissent in part because he agreed with the Court's due process analysis. But as Justice White disagreed with the holding and the physical presence rule more generally, this Article will refer to his opinion as a dissent. *Id.*

50 For cases decided in the immediate aftermath of *Quill*, see Michael T. Fatale, *State Tax Jurisdiction and the Mythical 'Physical Presence' Constitutional Standard*, 54 TAX LAW. 105, 118–30 (2000).

51 *Quill*, 504 U.S. at 314.

52 *See* Fatale, *supra* note 22, at 583–584 n.106.

53 Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 756 (1967).

54 *Id.* at 760.

statement, Congress may have felt unable to act, because Congress cannot generally override due process protections.[55] In order to make clear that Congress *could* act, *Quill* justified its re-affirmation of *Bellas Hess* only on Commerce Clause grounds.[56]

Quill overruled the component of *Bellas Hess* that determined that a mail-order vendor lacked sufficient due process connections with the state to be subject to tax.[57] The Court in *Quill* noted that when a commercial actor's efforts are "purposefully directed" toward residents of a state, physical contacts are not necessary for an assertion of jurisdiction under the Due Process Clause.[58] The Court observed that the state tax jurisdictional standard resembles that which is applied for purposes of determining adjudicative jurisdiction.[59] It held that this standard was met on the facts since the taxpayer's in-state activity consisted of the "continuous and widespread solicitation of business."[60] The Court noted that when these are the facts, a taxpayer "clearly has 'fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign.'"[61]

Eight of the nine Justices in *Quill* supported the re-affirmation of *Bellas Hess* on stare decisis grounds. The majority opinion stated that "the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizable industry."[62] It noted also that the "'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis*, therefore counsels adherence to settled precedent."[63] This analysis helps explain how the majority could state a Commerce Clause rule that it simultaneously suggested was not supported by constitutional principles. But the three-person concurrence could not go so far, and aligned itself with the majority only on stare decisis grounds.[64] *Quill*'s reliance analysis was also predicated, in part, on the conclusion that if the Court overruled *Bellas Hess*, vendors that had relied upon that prior holding could be liable for

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55 *Quill*, 504 U.S. at 318.

56 *Id.* at 309–14.

57 *Id.* at 306–08.

58 *Id.* at 307–08 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

59 *Id.*

60 *Id.* at 308.

61 *Id.* (alterations in original) (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).

62 *Id.* at 317.

63 *Id.* (quoting Runyon v. McCrary, 427 U.S. 160, 190–91 (1976) (Stevens, J., concurring)).

64 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2092 (2018) ("Three Justices based their decision to uphold the physical presence rule on *stare decisis* alone." (citing *Quill*, 504 U.S. at 320 (Scalia, J., concurring))). Justice Scalia's concurring opinion in *Quill* was joined by Justices Kennedy and Thomas. *Quill*, 504 U.S. at 320 (Scalia, J., concurring). *See also Quill,* 504 U.S. at 320 (Scalia, J., concurring) ("I would not revisit the merits of [the *Bellas Hess*] holding, but would adhere to it on the basis of *stare decisis*.").

"substantial" retroactive taxes.[65] Justice White stated in his dissent that he believed this concern influenced the Court's result.[66]

As in *Bellas Hess*, the *Quill* majority supported its constitutional ruling with the further conclusion that the states' use tax collection laws were burdensome as applied to an out-of-state mail-order vendor.[67] The Court referenced the balancing test applied to state regulations as set forth in the 1970 dormant Commerce Clause case, *Pike v. Bruce Church, Inc*.[68] Under that test, state laws that regulate commercial conduct can be struck down when they are unduly burdensome.[69] But the Court's analogy seemed inapt, as state taxes are not the equivalents of state regulations—and indeed, as the Court has stated, "are not regulations in any sense of that term."[70]

Regulations imposed upon commercial conduct are often burdensome because individual states can impose conflicting rules that "materially restrict the free flow of commerce across state lines, or interfere with [such commerce] in matters with respect to which uniformity of regulation is of predominant national concern."[71] For example, *Quill* cited *Kassel v. Consolidated Freightways Corp.*,[72] where Iowa limited the size of certain trucks to a length that was not common in the adjacent states—a result that caused these trucks to sometimes travel longer distances merely to avoid Iowa.[73] This resulted in private costs that the Court concluded exceeded the benefits to Iowa.[74] A similar pre-*Pike* case is *Southern Pacific Co. v. Arizona*,[75] cited by *Wayfair*, in which an Arizona law prohibited passenger trains with more than fourteen cars and prohibited freight trains with more than seventy cars where 93% to 95% of Arizona train traffic continued outside the state and acceptance of longer train lengths in other states was

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65 *Quill*, 504 U.S. at 317, 318 n.10.

66 *See id.* at 332 (White, J., concurring in part and dissenting in part).

67 *See id.* at 314 n.6.

68 *See id.* at 312. The Court in *Quill* indirectly referenced the balancing test of *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970), by citing the decision of *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 671 (1981), which itself referenced the balancing test set forth in the *Pike* decision. *See Kassel*, 450 U.S. at 670–71.

69 *See Pike*, 397 U.S. at 142.

70 Nw. Portland Cement Co. v. Minnesota, 358 U.S. 450, 461 (1959).

71 S. Pac. Co. v. Arizona, 325 U.S. 761, 770 (1945). *See* John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 340 (2003) ("[R]egulatory burdens cases typically involve a state regulation that is out of sync with neighboring states, or with states nationwide.").

72 *Quill*, 504 U.S. at 312.

73 *Kassel,* 450 U.S. at 665, 674–75.

74 *See id.* at 671–75, 678–79.

75 325 U.S. 761 (1945).

the "standard practice."[76] Because this was so, *Southern Pacific* concluded that "the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service."[77]

In contrast, the imposition of a state use tax collection duty does not materially restrict the free flow of commerce across state lines.[78] As the Court has repeatedly stated when evaluating state taxes, "businesses engaged in interstate commerce may be required to pay their own way."[79] Also, while it is hypothetically possible that two states could attempt to apply sales or use tax to the same transaction, credits as applied between the states typically address that concern.[80] Moreover, as a general matter the right of taxation is of greater importance to state sovereignty than the ability to merely regulate commercial conduct, as taxes fund all other state activity.[81]

Recognizing the differences between taxes and regulations, the Court's Commerce Clause doctrine applies different tests to evaluate the validity of each.[82] By taking *Pike*, a rule that applies to the state regulation of commercial actors and adapting it to the imposition of a state tax, *Quill* stated an exception to these

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76 *See S. Pac. Co.*, 325 U.S. at 771; *see also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018).

77 *S. Pac. Co.*, 325 U.S. at 783–84.

78 *See* Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 364 (1941) (rejecting the taxpayer's claim that imposition of the state's use tax collection duty resulted in "an unconstitutional burden on a foreign corporation"); *see also* Monamotor Oil Co. v. Johnson, 292 U.S. 86, 95 (1934) ("The [state] statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.").

79 *See* Goldberg v. Sweet, 488 U.S. 252, 259 (1989) (evaluating a tax imposed on interstate phone calls that the Court equated to a sales tax). *See also* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623–24 (1981) ("[I]t was not the purpose of the [C]ommerce [C]lause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business.") (quoting Colonial Pipeline Co. v. Traigle, 421 U.S. 100, 108 (1975) (evaluating the imposition of a use tax)).

80 *See, e.g.*, Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 192–94 (1995); Regency Transp. v. Comm'r of Revenue, 42 N.E.3d 1133, 1139–40 (Mass. 2016).

81 *See, e.g.*, Arkansas v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821, 826 (1997) ("The States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation. . . . The power to tax is basic to the power of the State to exist."); *see also* Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax,* 2012 MICH. ST. L. REV. 41, 42 n.3, 44 (2012) (citing cases and constitutional history); Hayes R. Holderness, *Taking Due Process Seriously: The Give and Take of State Taxation,* 20 FLA. TAX REV. 371, 385 & n.42 (2017) (citing cases).

82 *See* Fatale, *supra* note 81, at 60, 63–64 (noting that the Court has applied *Pike* and a second test evaluating whether the state action is discriminatory to regulations, whereas taxes have been evaluated under a four-part test as stated in *Complete Auto Transit v. Brady*, 430 U.S. 274, 278–79 (1977)).

otherwise distinct general rules. *Quill* seemed to defend its logic by suggesting that the use tax collection duty—the collection of tax by an intermediary—is akin to a regulation as opposed to the imposition of a tax.[83] But the Court did so without explaining the break with its pre-existing cases, which were to the contrary.[84] This faulty logic supports the notion that *Quill*'s analysis was more result-driven than doctrinal.[85]

In any event, although *Quill* referenced the *Pike* undue burden test, it did not apply that test—nor did it suggest to lower state courts that they were to apply that test—as the Court's analysis was intended merely to reaffirm the holding in *Bellas Hess* and to posit a physical presence "bright-line" rule.[86] The bright-line rule was to establish a "demarcation of a discrete realm of commercial activity that is free from interstate taxation"[87]—a proposition directly at odds with the thrust of the Court's prior dormant Commerce Clause cases.[88] Therefore, *Quill* invoked *Pike* to support a result that was legally questionable even at the time of the Court's decision.[89]

Although six Justices supported the Court's undue burden reasoning in *Bellas Hess*, only five did so in *Quill*.[90] Justice White in

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83 *See* Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992) (noting that the Court had previously ruled that that the dormant Commerce Clause "bars state *regulations* that unduly burden interstate commerce" (emphasis added) (citing Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981))); *see also Quill*, 504 U.S. at 313 n.6 (referencing the special burdens that result from the use tax collection duty). *Cf.* Capital One Bank v. Comm'r of Revenue, 899 N.E.2d 76, 85 n.17 (Mass. 2009) (noting the special burdens that exist in the use tax collection context as evaluated in *Quill*, as compared to the lesser burdens that result from the imposition of a corporate income tax). *See also* Swain, *supra* note 71, at 339–43 (evaluating *Quill* as "a regulatory burdens case, not a tax case").

84 *See, e.g.*, Nelson v. Sears Roebuck & Co., 312 U.S. 359, 364 (1941) (upholding a use tax collection duty imposed with respect to a vendor's out-of-state mail-order sales as made to in-state consumers; concluding the tax and the related burdens were justified because they pertained to the vendor's privilege of doing business in the state). *See generally* Fatale, *supra* note 81, at 60, 63–64.

85 *See* Charles Rothfeld, *Quill: Confusing the Commerce Clause*, 56 TAX NOTES 487, 491–92 (1992) ("[B]y purporting to find value in the 'undue burdens' analysis, the Court was able to justify leaving the *Bellas Hess* Commerce Clause holding in place while scrapping a due process ruling that (though no more vulnerable on the merits) stood as an obstacle to action by Congress.") (concluding that *Quill* was effectively a "political decision" primarily intended to provoke action by Congress); *see also* Swain, *supra* note 71, at 342 (stating that in seeking to "find a substantive law justification for allowing the doctrine of stare decisis to control the outcome," *Quill*, in part, "shoehorns its Commerce Clause burden concerns" into the nexus analysis).

86 *Quill*, 504 U.S. at 305–06, 315, 317.

87 *Id.* at 314–15.

88 *See supra* notes 22–28, 41–45 and accompanying text.

89 *See id.*

90 *See* Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 760 (1967) (Fortas, J., dissenting) (joined by Justice Black and Justice Douglas); *see also Quill*, 504 U.S. at 320–21 (Scalia, J., concurring) (joined by Justice Kennedy and Justice Thomas); *id.* at 321–22 (White, J., concurring in part and dissenting in part).

his *Quill* dissent recognized that a taxpayer could be subject to potentially unlawful "multiple tax burdens,"[91] but concluded that there was no such threat on the facts of the case.[92] The *Quill* majority, as noted, specifically punted the entire issue to Congress, and apparently expected that, having done so, Congress would act.[93]

Between *Bellas Hess* and *Quill*, the Court clarified the purpose inherent in its dormant Commerce Clause jurisprudence. In the early twentieth century that purpose was to prevent states from imposing direct burdens on interstate commerce in order to protect free trade.[94] In the latter part of the century the focus shifted to concerns about "economic protectionism" or "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[95] But with respect to the latter purpose, *Quill* also was out-of-step. The lower North Dakota court, reversed by *Quill*, noted that since "the 'very object' of the Commerce Clause is protection of interstate business against discriminatory local practices, it would be ironic to exempt Quill from this burden and thereby allow it to enjoy a significant competitive advantage over local retailers."[96] But of course that is precisely what the *Quill* Court did.[97]

III. THE SOUTH DAKOTA STATUTE

The South Dakota statute at issue in *Wayfair* had its genesis in a prior action in which the state of Colorado sought to enhance its collection of use tax derived from sales made by out-of-state vendors lacking in-state physical presence.[98] In that circumstance, Colorado required these vendors, sometimes referred to as "remote vendors," to provide large dollar consumers with year-end statements as to their purchases.[99] Colorado also required these vendors to provide the state's revenue agency with the purchase information of such large dollar consumers.[100] The general notion was that this notice

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91 *See Quill,* 504 U.S. at 326 (White, J., concurring in part and dissenting in part).

92 *See id.* at 328 (White, J., concurring in part and dissenting in part).

93 *Id.* at 318–19.

94 *See supra* notes 22–24 and accompanying text.

95 *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (stating also, "[t]he modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'") (quoting New Energy Co. v. Linbach, 486 U.S. 269, 273–74 (1988)).

96 *Quill*, 504 U.S. at 304 n.2 (quoting State v. Quill Corp., 470 N.W.2d 203, 214–15 (N.D. 1991)).

97 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2094 (2018) ("*Quill* puts both local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers.").

98 *See* State v. Wayfair, Inc., 901 N.W.2d 754, 757–58 (S.D. 2017) (citing Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015)).

99 *Id.*

100 *Id.*

and reporting—similar to what the federal government requires using IRS Form 1099—would tend to increase self-reporting by individual consumers.

Remote vendors that would be subject to the Colorado statute sued to enjoin its enforcement and succeeded in enjoining that statute for six years.[101] Along the way, a dispute arose as to whether the case belonged in federal or state court, and that specific question ascended to the Supreme Court.[102] The Court's unanimous ruling, in *Direct Marketing Ass'n v. Brohl*, was that the case could be tried in federal court.[103] However, the most significant thing about the Court's decision was Justice Kennedy's concurrence. In that concurrence Justice Kennedy departed from the merits of the case to recognize that the Colorado statute was only enacted as a means through which the state could capture use tax revenue that it was proscribed from directly collecting from remote vendors because of *Quill*.[104] Justice Kennedy, who was one of the Justices that previously concurred in *Quill*, stated that it was time for the Court to reconsider that earlier decision.[105]

The South Dakota statute was a response to Justice Kennedy's entreaty in *Direct Marketing Ass'n*.[106] The statute was passed in March of 2016.[107] "The Act provided that any sellers of 'tangible personal property' in South Dakota without a 'physical presence in the state . . . shall remit' sales tax according to the same procedures as sellers with 'a physical presence.'"[108] This collection obligation, however, was limited "to sellers with 'gross revenue' from sales in South Dakota of over $100,000 per calendar year or with 200 or more 'separate transactions' in the state within the same time frame."[109] The Act included provisions that ensured its immediate application and that enabled the state to bring an expedited declaratory action against vendors that were not in compliance.[110] The Act also included several

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101 *See* Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1132 (10th Cir. 2016). *See also Direct Marketing Association Reaches Settlement with Colorado,* TAX NOTES: TAX ANALYSTS (Feb. 24, 2017).

102 Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015).

103 *Id.* That later federal court case resolved in the State's favor. *See Direct Mktg. Ass'n*, 814 F.3d at 1129. Justice (then-Judge) Gorsuch, who later sided with the State in *Wayfair*, concurred in the court's decision and in so doing criticized *Quill*. *Id.* at 1148–51.

104 *Direct Mktg. Ass'n,* 135 S. Ct. at 1134–35 (Kennedy, J., concurring).

105 *Id.*

106 *See* State v. Wayfair, 901 N.W.2d 754, 757–58 (S.D. 2017).

107 *Id.* at 759 (citing S. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016)).

108 *Id.* at 758 (citing S.D. S. 106 § 1).

109 *Id.* (citing S.D. S. 106 §§ 1–2).

110 *Id.* (citing S.D. S. 106 §§ 2–3).

provisions that enjoined its enforcement while litigation was ongoing and that precluded retroactive enforcement.[111]

Litigation concerning the Act commenced in April of 2016.[112] There were three vendors that took part in the litigation and the limited factual record was the same for each.[113] Those facts, which were agreed to by the parties, were that each seller lacked a physical presence in South Dakota; each met the sales and transaction requirements for application of the Act; and no seller was registered to collect South Dakota sales tax.[114] Because the Act did not require physical presence for the assertion of nexus, the State conceded that its statute was unconstitutional under *Quill*.[115] Therefore, the State quickly lost two cases at the South Dakota circuit court and supreme court—the result that it wanted.[116] The State then filed a petition for review with the United States Supreme Court.[117]

The Court took the case and rendered its decision in June of 2018. The posture of the case—featuring a skeletal factual record and two parties that agreed with the legal analysis of the lower courts—was certainly unusual. And the speed with which the case got to the Court—a little over two years from the time that the state statute to be construed was enacted—was lightning fast. But as Justice Kennedy had previously stated in his *Direct Marketing Ass'n* concurrence, and the state legislation repeated in its justification for the law, the significance of the issue to a state was substantial.[118] And as later noted in Justice Kennedy's opinion in *Wayfair*, the Court had a special rationale for taking the case, as *Quill* represented a "false constitutional premise of the Court's own creation."[119]

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111 *Id.* (citing S.D. S. 106 §§ 3, 5–6).

112 *Id.* at 759.

113 *Id.*

114 *Id.* at 759–60.

115 *Id.* at 760.

116 *See id.* at 760–61 (referencing the lower court's decision "based on undisputed statements of material fact and the parties' briefs" and also noting the state supreme court's affirmation of that lower court decision). During the litigation, the State also succeeded in contesting the taxpayers' attempt to move the case to federal court. *See generally* South Dakota v. Wayfair, Inc., 229 F. Supp. 3d 1026 (D.S.D. 2017).

117 Petition for Writ of Certiorari at 12, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494), 2017 WL 4404984 *12.

118 Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1134–35 (2015) (Kennedy, J., concurring); *Wayfair*, 901 N.W. 2d at 765–67 (quoting S.B. 106 §§ 8-9, 2016 Legis. Assemb., 91st Sess. (S.D. 2016)).

119 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096 (2018).

IV. THE *WAYFAIR* ANALYSIS

Some aspects of the *Wayfair* decision are less than clear because the result was 5-4 and the two concurring Justices clearly disagreed with the three other Justices in the majority on certain issues. The analysis below probes the decision, including the differences among the Justices.

A. Physical Presence and State Sovereignty

One thing that was clear in *Wayfair* was the Court's ultimate conclusion pertaining to its prior construction of the dormant Commerce Clause. The Court concluded that the "[t]he physical presence rule of *Quill* is unsound and incorrect," and that *Quill* and *Bellas Hess* "should be, and now are, overruled."[120] Both cases needed to be overruled because, although the physical presence rule was only specifically stated in *Quill*, the rule was a general re-affirmation of the logic in *Bellas Hess*.[121] The Court stated that *Quill* was "wrong on its own terms when it was decided in 1992" and "since then the Internet revolution has made its earlier error all the more egregious and harmful."[122]

The Court's holding was by a 5-4 vote, but there was no question concerning the antipathy of all nine Justices to the pre-existing physical presence rule. Within the majority, Justice Thomas stated in concurrence that *Bellas Hess* and *Quill* "can no longer be rationally justified,"[123] and Justice Gorsuch noted in concurrence that *Bellas Hess* and *Quill* were a "mistake."[124] Justice Thomas went so far as to state that he should have joined Justice White's dissent in *Quill*, which was harshly critical of the *Quill* physical presence rule,[125] and Justice Gorsuch similarly cited the White dissent favorably.[126] Even Chief Justice Roberts' four-person dissenting opinion concluded that, although he would have retained the physical presence rule on stare decisis grounds, "*Bellas Hess* was wrongly decided."[127] Underlying all of these statements was the notion that *Bellas Hess* and *Quill* were

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120 *Id.* at 2099.

121 *See id.* at 2091–92.

122 *Id.* at 2097.

123 *Id.* at 2100 (Thomas, J., concurring) (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 333 (1992) (White, J., concurring in part and dissenting in part)).

124 *Id.* (Gorsuch, J., concurring).

125 *Id.* (Thomas, J., concurring) (citing *Quill*, 504 U.S. at 322 (White, J., concurring in part and dissenting in part)).

126 *Id.* (Gorsuch, J., concurring) (citing *Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part)).

127 *Id.* at 2101 (Roberts, C.J., dissenting). Presumably, Chief Justice Roberts could not call *Quill* a mistake, given the prior decision in *Bellas Hess* that *Quill* re-affirmed, invoking stare decisis, and his later vote for stare decisis in *Wayfair*. *See id.*

mistaken specifically because the cases retained vestiges of the Court's pre-existing "free trade" doctrine.[128]

Wayfair's rejection of the physical presence rule as a dormant Commerce Clause requirement also finally resolved, implicitly and without fanfare, the question of whether physical presence was required in any other state tax context—including in particular for purposes of state corporate income tax.[129] Although the physical presence rule as established by *Quill* was limited to the states' use tax collection duty, numerous taxpayers and practitioners claimed in the aftermath of the case that the rule also applied in the corporate income tax area.[130] The state cases that evaluated this question almost invariably ruled that it did not—and most of these cases were denied certiorari by the Supreme Court.[131] But taxpayers and practitioners continued to claim that the issue remained unresolved, arguing that the precedential value of the state cases was limited to their jurisdictions, and to their facts.[132] Taxpayers and practitioners generally claimed that only a Supreme Court decision could finally resolve the question. *Wayfair*'s unanimous denunciation of the physical presence rule finally accomplished that resolution.

Another clear aspect of the *Wayfair* decision was the Court's determination that the physical presence rule is in conflict with principles of state sovereignty. The Court noted "the necessity of allowing the States the power to enact laws to implement the political will of their people."[133] It stated that "[t]he physical presence rule . . . is not just a technical legal problem—it is an extraordinary imposition by the Judiciary on the States' authority to collect taxes and perform critical public functions."[134] The Court stated that, "[i]f it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error."[135] Justices Thomas

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128 *See Quill*, 504 U.S. at 322–24 (White, J., concurring in part and dissenting in part); *see also supra* notes 22–46 and accompanying text.

129 *See, e.g.*, Andrea Muse, *Wells Fargo Adjusts Income Tax Reserves Following Wayfair*, TAX NOTES (July 23, 2018), https://www.taxnotes.com/editors-pick/wells-fargo-adjusts-income-tax-reserves-following-wayfair [http://perma.cc/AR3R-RT8A].

130 *See* Fatale, *supra* note 50, at 130–41; Fatale, *supra* note 22, at 583–84 n.106.

131 *See* Fatale, *supra* note 22, at 583–84 n.106.

132 *See, e.g.*, Reply Brief Amicus Curiae of the Council on State Taxation in Support of Appellant at 11–12, Crutchfield Corp. v. Testa, 88 N.E.3d 900 (Ohio 2016) (No. 15-0386).

133 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090 (2018).

134 *Id.* at 2095.

135 *Id.* at 2096. Similarly, the Court acknowledged that there could be legal questions about state implementation of its decision but stated that prospect "cannot justify retaining [an] . . . anachronistic rule that deprives States of vast revenues from major businesses." *Id.* at 2099.

and Gorsuch in their concurring opinions were not as explicit in revering state sovereignty, but both made clear that they do not accept the full breadth of the Court's dormant Commerce Clause jurisprudence, because pursuant to that case law "*courts* may invalidate state laws that offend no congressional statute."[136] Antipathy to the dormant Commerce Clause is effectively an endorsement of state sovereignty because the doctrine imposes significant limitations upon the states' sovereign rights.[137]

One of the more significant questions posed at the *Wayfair* oral argument and in the parties' briefs was whether the striking of the physical presence rule would be retroactive in its effect.[138] It had been widely thought after *Quill* that a primary reason that North Dakota lost that case was because the State's attorney told the Court that, if the State won, it would seek retroactive taxes.[139] In *Wayfair*, the State of South Dakota and the states that joined South Dakota as amici knew that the Court would be concerned with this issue and attempted to address it.[140] But it was nonetheless generally assumed by the parties that if *Wayfair* overturned *Quill*, the ruling would be retroactive.[141] *Wayfair* fulfilled this expectation.[142] The Court did not declare an

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136 *Id.* at 2100 (Gorsuch, J., concurring) (emphasis in original). Justice Thomas stated more generally, similar to his numerous prior statements (*see, e.g.*, McBurney v. Young, 569 U.S. 221, 237 (2013)), that the Court's entire dormant Commerce Clause jurisprudence "can no longer be rationally justified." *Id.* (Thomas, J., concurring) (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 333 (1992) (White, J., concurring in part and dissenting in part). *See also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (noting that the dormant Commerce Clause is "unmoored from any constitutional text" and has resulted in court decisions evaluating "state action far afield from the discriminatory taxes it was primarily designed to check").

137 *See, e.g.*, Fatale, *supra* note 81, at 55–66.

138 *See generally* Transcript of Oral Argument, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494), 2018 WL 1811984 (the Court refers to retroactivity four times); *see also* Petitioner's Brief at 48–51, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494); Respondents' Brief at 62–65, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494).

139 *See* Billy Hamilton, *Remembrance of Things Not So Past: The Story Behind the Quill Decision*, 59 ST. TAX NOTES MAG. 807, 809–10 (2011); Fatale, *supra* note 81, at 86 & n.267.

140 *See* Petitioner's Brief, *supra* note 138, at 48–51; Brief For Colorado and 40 Other States, Two United States Territories, and the District of Columbia as Amici Curiae Supporting Petitioner at 18–21, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494).

141 *See* Respondents' Brief, *supra* note 138, at 62; *see also* Transcript Oral Argument, *supra* note 138, at 51 ("[T]his Court has indicated that a purely prospective ruling is inconsistent with its view of the law and made that very clear in the—in the Harper case.") (statement of the attorney for the respondent, Wayfair, referencing Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993)). *Quill* of course also assumed that a decision for the State would have been retroactive—which may have influenced the Court in finding against the State of North Dakota. *See supra* notes 65–66 and accompanying text.

142 The Court noted repeatedly that there would be no retroactivity with respect to the South Dakota law in question because the law itself—and not the Court's construction of the Constitution—foreclosed this possibility. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089, 2098 (2018). The Court also noted that if a state sought to apply a similar

exception to the general jurisprudential rule that its constitutional holdings are given retroactive effect.[143] Rather, it made clear that, post-*Wayfair*, the physical presence rule would not apply to prior tax periods.[144] Instead, the Court suggested that retroactive assertions of tax jurisdiction could potentially raise other constitutional issues.[145]

B. Discrimination and Double Taxation

Wayfair is consistent with the Court's modern Commerce Clause precedent in that it posits that the purpose of the Commerce Clause is to prevent "economic discrimination."[146] In contrast, *Quill* was problematic because it created "market distortions" and "artificial competitive advantages."[147] Post-*Wayfair*, the discrimination principle will not typically have any application to the imposition of a state's use tax collection duty since the effect of that imposition is merely to place in-state and out-of-state vendors on equal footing.[148] *Wayfair* seemingly acknowledged this consequence when it stated that "[c]omplex state tax systems could have the effect of discriminating against interstate commerce" but that, of relevance, "in-state businesses pay the taxes as well."[149]

Wayfair also suggested state laws that are not uniform could have the effect of discriminating against interstate commerce—which, the Court noted, state membership in the Streamlined Sales and Use Tax Agreement (SSUTA) would help to address.[150] The Court's cryptic reasoning, however, is logical only if one assumes that the application of these "complex state

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statute retroactively in a case where consumers had already self-reported the tax, the state could potentially be accused of imposing an unlawful double tax. *Id.* at 2099. These issues, the Court stated, "are not before the Court in the instant case; but their potential to arise in some later case cannot justify retaining this artificial, anachronistic rule that deprives States of vast revenues from major businesses." *Id.*

143 *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 90 (1993).

144 The Court noted the prospect that the decision could have retroactive effect pursuant to the law of a state other than South Dakota, where the state statute itself foreclosed this possibility. *Wayfair*, 138 S. Ct. at 2098–99. The Court concluded that such treatment in another state was an issue for a later day. *Id.* at 2099.

145 *See Wayfair*, 138 S. Ct. at 2099. For example, there could be a retroactivity issue arising under the Due Process Clause. *See infra* notes 200–202 and accompanying text.

146 138 S. Ct. at 2093–94; *see also supra* note 95 and accompanying text.

147 138 S. Ct. at 2092, 2094.

148 *See* Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 364–65 (1941) ("A tax or other burden obviously does not discriminate against interstate commerce where 'equality is its theme.'") (citing Henneford v. Silas Mason Co., 300 U.S. 577, 583–586 (1937); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 48–49 (1940); *see also Wayfair*, 138 S. Ct. at 2094, 2096 (noting that the Commerce Clause was intended to put in-state and out-of-state commercial actors on an "even playing field" and that the *Quill* physical presence rule was inconsistent with that goal).

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

150 *Id.* at 2099–100.

tax systems" could somehow result in an impermissible double tax—perhaps by enabling a state to claim a taxable sale that logically belongs to a second state.[151] Such a consequence would be somewhat reminiscent of the Court's recent decision in *Comptroller of the Treasury v. Wynne*.[152] Although *Wynne* is not referenced in the *Wayfair* majority opinion, it may have influenced the Court's reasoning.[153] But such double taxation under the state's sales tax laws is unusual and, in any event, is generally addressed, when it occurs, through the conferral of a state tax credit.[154]

The Court also made the peculiar statement that:

> Others [i.e., certain non-litigant interested parties] have argued that retroactive liability risks a double tax burden in violation of the Court's apportionment jurisprudence because it would make both the buyer and the seller legally liable for collecting and remitting the tax on a transaction intended to be taxed only once.[155]

The Court's suggestion is that if a state required a vendor to collect use tax on a retroactive basis, it could effectively be imposing double tax because the consumer might have already independently submitted the tax. This statement is peculiar in part because it is attributed not to the Court's own logic, but to persons that were not litigants in the case. Also—perhaps explaining the Court's ambivalence—double taxation does not necessarily result in a constitutional infringement.[156] Further, as the Court noted, one of the difficulties that the states faced when applying the *Quill* physical presence rule was that very few consumers independently submit use tax.[157]

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151 *Id.* at 2099. The Streamlined Sales Tax Governing Board filed an amicus brief in the *Wayfair* case that referenced the various ways in which SSUTA helps make state laws uniform. *See generally* Brief for Amicus Curiae Streamlined Sales Tax Governing Board, Inc. In Support of Petitioner, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494). That brief did not make any claim that SSUTA serves to address state tax discrimination—and in fact never mentions "discrimination"—but did state that SSUTA includes "uniform sourcing rules to prevent double taxation." *See id.* at 14.

152 135 S. Ct. 1787, 1801–06 (2015) (pertaining to a state personal income tax).

153 *Wynne*, like *Wayfair*, was a 5-4 decision. *See id.* at 1791. Justice Alito was the author of *Wynne*. *Id.* It was commonly thought after the *Wayfair* hearing that South Dakota had four votes—Justices Kennedy, Thomas, Gorsuch, and Ginsburg—but not necessarily a fifth. *See, e.g.*, Michael Cullers, *Oyez! The Supreme Court Hears Oral Arguments in Wayfair, and Now We Play the Waiting Game*, PUB. FIN. L. BLOG (Apr. 26, 2008), https://www.publicfinancetaxblog.com/2018/04/oyez-the-supreme-court-hears-oral-arguments-in-wayfair-and-now-we-play-the-waiting-game/ [http://perma.cc/3RW4-K4FP]. It seems fair to speculate that the Court's double tax verbiage was what helped to secure Justice Alito's deciding vote.

154 *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 194–95 (1995).

155 *Wayfair*, 138 S. Ct. at 2099 (citing Brief of Amici Curiae Law Professors and Economists in Support of Petitioner, at 7, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (No. 17-494)).

156 *See, e.g.*, Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 170–71 (1983).

157 *See Wayfair*, 138 S. Ct. at 2088; *see also* Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (citing CALIFORNIA STATE BOARD OF EQUALIZATION,

C. Due Process

1. The Nexus Implications of *Wayfair*

Implicitly, when *Wayfair* conceded that the physical presence rule derived from *Bellas Hess* and *Quill* was incorrect, it re-posited that the relevant nexus considerations are based in due process. This is because both *Bellas Hess* and *Quill* recognized that absent the notion of physical presence, the jurisdictional rules are primarily those of due process.[158]

The Court's analysis of Due Process Clause and Commerce Clause nexus in *Bellas Hess* and *Quill* was intertwined such that *Wayfair* felt obliged to overrule both cases in their entirety, but the Court was nonetheless clear that it was only the physical presence rule that it rejected.[159] Moreover, in the absence of *Bellas Hess* and *Quill*, constitutional nexus must be derivative of due process principles, since this was clearly the law prior to *Bellas Hess*, and was generally the law even between those two cases.[160] The majority decision in *Wayfair* heavily relied upon Justice White's dissent in *Quill*.[161] Moreover, Justices Thomas and Gorsuch in their concurrences both specifically aligned themselves

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REVENUE ESTIMATE: ELECTRONIC COMMERCE AND MAIL ORDER SALES, REV. 8/13, at 7 (2013), https://www.boe.ca.gov/legdiv/pdf/e-commerce-08-21-13F.pdf [http://perma.cc/TGR6-QP2L] (estimating the rate of compliance at 4%)).

158 *See supra* notes 53–56 and accompanying text. *See also* Quill Corp. v. North Dakota, 504 U.S. 298, 325–27 (1992) (White, J., concurring in part and dissenting in part) (stating, *inter alia*, that the Court has "never . . . found . . . sufficient contacts for due process purposes but an insufficient nexus under the Commerce Clause" and that *Complete Auto* makes clear that the Court's nexus requirement is traceable to concerns "grounded in the Due Process Clause"); Rothfeld, *supra* note 85, at 488 (noting that the Court's Commerce Clause nexus rule prior to *Quill* was "borrowed wholesale from decisions involving the Due Process Clause").

159 *Wayfair*, 138 S. Ct. at 2093 ("Physical presence is not necessary to create a substantial nexus."); *id.* at 2099 ("[T]he physical presence rule of *Quill* is unsound and incorrect."). Hence, *Wayfair* cites favorably both *Bellas Hess* and *Quill* in its due process analysis. *See id.* at 2093.

160 *Quill*, 504 U.S. at 325–27 (White, J., concurring in part and dissenting in part) (stating, *inter alia*, that when the Court announced its decision in the 1977 case, *Complete Auto*, "the nexus requirement was definitely traceable to concerns grounded in the Due Process Clause"); *see also* Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 373 (1991) (the four tests set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), including the nexus test, "while responsive to Commerce Clause dictates, encompas[s] as well the due process requirement that there be a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise"); *Quill,* 504 U.S. at 314 (acknowledging the Court's retreat between *Bellas Hess* and *Quill* "from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach" (internal citation omitted)).

161 The Court referred favorably to Justice White's dissent four times. *See Wayfair*, 138 S. Ct. at 2092, 2094, 2096–97.

with White's dissent.[162] In that dissent, Justice White specifically stated that nexus is primarily a due process inquiry.[163]

The context in which *Wayfair* was decided also supports the conclusion that the state tax nexus inquiry is now generally a due process test. Subsequent to *Quill*, most state courts that considered the issue eventually concluded that the physical presence rule did not apply to other state taxes, and in particular to the corporate income tax.[164] In that context, these courts generally determined nexus by relying upon due process principles.[165] At the *Wayfair* hearing, the point was made that dispensing with the physical presence rule would not be problematic specifically because there has been little difficulty in applying the nexus analysis in these other state court cases.[166] The *Wayfair* majority seemed to accept that argument.

2. The Substance of the Nexus Test

Although its analysis was brief, *Wayfair* also made clear the substance of the due process inquiry.[167] The Court cited *Bellas Hess* for the proposition that the Commerce Clause "nexus requirement is 'closely related' 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.'"[168] Also, the Court stated that although in the tax area Due Process and Commerce Clause nexus standards "may not be identical or conterminous . . . there are significant parallels."[169]

Quill had noted that the rules that apply for purposes of due process nexus are similar to those that apply for purposes of adjudicative jurisdiction.[170] *Wayfair* is consistent with this conclusion because it cites favorably both *Quill* and *Burger King Corp. v. Rudzewicz*,[171] an adjudicative jurisdiction case, when

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162 *Id.* at 2100 (Thomas, J., concurring); *id.* (Gorsuch, J., concurring).

163 *See Quill*, 504 U.S. 325–27 (White, J., concurring in part and dissenting in part). The four-person *Wayfair* dissent may also have generally accepted the *Quill* reasoning of Justice White, consistent with the analysis in the *Wayfair* majority opinion. *See Wayfair*, 138 S. Ct. at 2010 (Roberts, C.J., dissenting) ("I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court.").

164 *See* Fatale, *supra* note 22, at 583–84 n.106.

165 *See id.* at 583–85.

166 Transcript of Oral Argument, *supra* note 138, at 4–5, 56–57.

167 *Wayfair*, 138 S. Ct. at 2093.

168 *Id.* at 2093 (citing Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753, 756 (1967) and Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954)).

169 *Id.*

170 Quill Corp. v. North Dakota, 504 U.S. 298, 307–08 (1992). *See also id.* at 319 (Scalia, J., concurring) ("It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax.").

171 471 U.S. 462 (1985).

evaluating due process nexus.[172] As stated by *Quill*, the Court has often identified "'notice' or 'fair warning' as the analytic touchstone of due process nexus analysis."[173] This standard is satisfied where a commercial actor's efforts are "purposefully directed" toward the residents of a state.[174] For example, in *Wayfair*, the nexus standard was met where the respondents had sufficient "economic and virtual contacts . . . with the State."[175] Further, the Court's precedents make clear that this standard can be satisfied by either direct or indirect contacts—for example, contacts that are effected through an intermediary.[176] Although physical presence is no longer necessary to establish nexus, it is sufficient to create nexus, whether or not that presence relates to the company's in-state sales.[177]

Wayfair specifically concluded that the Commerce Clause "substantial nexus" requirement is met "when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction."[178] For this proposition, the Court quoted *Polar Tankers, Inc. v. City of Valdez*.[179] But, as *Polar Tankers* makes clear, this standard ultimately derives from the due process analysis in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*.[180] It might seem odd at first blush that the Court's

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172 *See Wayfair*, 138 S. Ct. at 2093 (citing *Quill*, 504 U.S. at 308 and *Burger King Corp.*, 471 U.S. at 476).

173 *Quill*, 504 U.S. at 312 (stating also, "[d]ue process centrally concerns the fundamental fairness of governmental activity").

174 *See id.* at 307–08; *see also* J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 877 (2011).

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

176 *See* Fatale, *supra* note 22, at 619–21 (discussing *J. McIntyre Machinery*, 564 U.S. 873 and Asahi Indus. Co. v. Superior Court of Calif., 480 U.S. 102 (1987)).

177 *See Wayfair*, 138 S. Ct. at 2093 ("Physical presence is *not necessary* to create a substantial nexus.") (emphasis added); *see also Quill*, 504 U.S. at 330 (White, J., concurring in part, dissenting in part) (noting that under the Court's pre-*Quill* precedent, for example, *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 560–62 (1977), mail-order sellers are subject to use tax collection when "they have some presence in the taxing state even if that activity has no relation to the transaction being taxed"). *Nat'l Geographic* was cited favorably by *Wayfair*. *See* 138 S. Ct. at 2098, 2094. *Cf.* Crutchfield Corp. v. Testa, 88 N.E.3d 900, 912–13 (Ohio 2016) (concluding that physical presence is a sufficient but not necessary condition for applying a state corporate gross receipts tax).

178 *Wayfair*, 138 S. Ct. at 2099 (quoting Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)).

179 557 U.S. 1 (2009) (case pertaining to a city's personal property tax imposed upon the value of large ships traveling to and from such city).

180 *Id.* at 11 (citing Mobil Oil Corp. v. Comm'r of Taxes of Vt., 445 U.S. 425, 437 (1980)). The analysis in *Mobil* Oil, in turn, derived from the Court's due process holding in *Wisconsin v. J.C. Penney,* 311 U.S. 435, 444–45 (1940). *See Mobil Oil*, 445 U.S. at 437 (citing to *J.C. Penney Co.*, 311 U.S. 435, 444–45); *J.C. Penney Co.*, 311 U.S. at 444–45 (stating that when evaluating due process as applied to the imposition of a state tax "[t]he simple but controlling question is whether the state has given anything for which it can ask return"); *see also* Holderness, *supra* note 81, at 381–84 (discussing the due process test stated by *J.C. Penney Co.*).

important re-affirmation of the purposeful availment principle relies on language in a somewhat aberrational case focused on one of the Constitution's least-known provisions, the so-called "Tonnage Clause."[181] But the Court obviously sought to cite a post-*Quill* precedent, and it had not taken any nexus cases subsequent to *Quill*.[182]

3. Nexus in Application

Wayfair evaluated how the nexus analysis would apply to facts like those at issue and to the specific facts in question. Specifically, the Court noted that the South Dakota Act only applied to sellers that delivered more than $100,000 of goods or services into South Dakota or engaged in 200 or more separate transactions for the delivery of goods into the state on an annual basis.[183] It stated that "[t]his quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota."[184] The Court allowed for the prospect that in the abstract some remote vendors could have only "*de minimis* contacts" with the state, but the Court's analysis seems to foreclose this possibility in any case where the South Dakota thresholds are met.[185]

More generally, *Wayfair* implicitly concluded that the nexus requirement for use tax collection would be satisfied in any state where a vendor exceeded nexus thresholds substantially identical to those of South Dakota.[186] By way of comparison, in the corporate income tax area, the states have utilized different sales thresholds for asserting "factor presence" economic nexus, and such thresholds are sometimes higher in high-population states.[187] But *Wayfair* does

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181 *See Polar Tankers*, 557 U.S. at 4–5.

182 *See Wayfair*, 138 S. Ct. at 2099 (citing *Polar Tankers* with respect to the rule as to substantial nexus "[i]n the absence of *Quill* and *Bellas Hess*"). *Cf.* MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24–25 (2008) ("The 'broad inquiry' subsumed in [the Commerce Clause and due process] constitutional requirements [in state tax matters] is 'whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state'"—that is, "whether the state has given anything for which it can ask return.") (quoting ASARCO Inc. v. Idaho Tax Comm'n, 458 U.S. 307, 315 (1982), in turn quoting *J.C. Penney Co.,* 311 U.S. at 444).

183 *Id.* at 2099 (citing S.B. 106 § 1, 2016 Leg., Gen. Sess. (S.D. 2016)).

184 *Id.*

185 *See id.*; *see also id.* at 2098–99 (noting that "[t]he law at issue requires a merchant to collect the tax only if it does a considerable amount of business in the State" and that the law "applies a safe harbor to those who transact only limited business" in the state).

186 *See id.* at 2099. *Cf.* Quill Corp. v. North Dakota, 504 U.S. 296, 308 (1992) (holding that when a corporation engages in "continuous and widespread solicitation of business within a State. . . . [s]uch a corporation clearly has 'fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign'" (citing Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring))).

187 *See, e.g.*, *The State Income Tax Consequences of Wayfair*, BDO (Aug. 2018), https://www.bdo.com/insights/tax/state-and-local-tax/the-state-income-tax-consequences-

not suggest that the jurisdictional thresholds to be used for purposes of the states' use tax collection duties must be based upon a state's population. *Wayfair* concluded that the thresholds used by South Dakota, a small population state, pertained to companies whose business in the state was "substantial"—a concept that the Court evaluated in the abstract.[188] In the case briefs and at oral argument, questions were raised about whether it would be appropriate for a state to assert jurisdiction over a vendor making only a single sale into the state where presumably that sale exceeded the state's $100,000 threshold[189] or, alternatively, over a vendor making 200 sales where each of those individual sales were a very low dollar amount (say $2).[190] But *Wayfair* suggests no constitutional concern with either fact pattern.

As noted, *Quill* stated that the due process tax jurisdiction rules generally track the standards applied to determine adjudicative jurisdiction.[191] In that latter context, there have been cases in recent years questioning whether a single sale made with respect to a state would suffice.[192] But the Court has also stated—as *Wayfair* itself did—that the state tax jurisdiction and adjudicative jurisdiction standards are not identical.[193] To the extent that there are differences, the Court has inferred that it is the adjudicative jurisdiction principles that are more rigorous.[194] Because *Wayfair* expressed no specific concern with the assertion of state tax jurisdiction when a taxpayer makes only a single large-dollar sale into a state—unlike in the Court's recent adjudicative jurisdiction cases—it generally supports that point.

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of-wayfair [http://perma.cc/D9UG-NLX3] (noting factor-presence corporate income tax statutes in New York, Ohio, Michigan, and Washington that originally asserted nexus based on in-state sales of $1,000,000, $500,000, $350,000, and $250,000, respectively).

188 *Wayfair*, 138 S. Ct. at 2099. *See also supra* notes 183–185 and accompanying text. Similarly, a recent congressional bill that would have addressed *Quill*, which passed the Senate but not the House, would have required a remote Internet vendor to collect use tax in every state where such vendor had more than $1 million in total Internet sales—irrespective of its sales volume in any particular state. *See also* Fatale, *supra* note 22, at 633–36 (discussing the Marketplace Fairness Act, S. 336, S. 743, H.R. 684 113th Cong. (2013)).

189 *See* Transcript of Oral Argument, *supra* note 138, at 26–28, 36, 48, 57.

190 *See id.* at 54–55.

191 *See Quill*, 504 U.S. at 308.

192 *See, e.g.*, J. McIntyre Machinery Ltd. v. Nicastro, 131 S. Ct. 2780, 2792 (2011) (Breyer, J., concurring). Justice Breyer, who authored the concurring opinion in *McIntyre* that focused on this point, *see id.,* also explored the issue at the *Wayfair* oral argument. *See* Transcript of Oral Argument, *supra* note 138, at 24.

193 *See Quill*, 504 U.S. at 319–20 (Scalia, J., concurring); *Wayfair*, 138 S. Ct. at 2093.

194 *See* Fatale, *supra* note 22, at 622–25. In general, this is because adjudicative jurisdiction raises difficult questions about choice of law and full faith and credit—questions that do not generally arise in the state tax context. *See id.* Also, in the state tax context, invariably—unlike in many of the adjudicative jurisdiction cases—the commercial actor will have targeted the economic market of the taxing state. *See id.* at 619–22.

Wayfair also commented on the specific in-state contacts of the respondents, large Internet vendors. The Court noted that, given the facts, "nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State."[195] The respondents' economic contacts exceeded the state's statutory nexus thresholds—thresholds which the Court stated each respondent "easily meets."[196] The Court also noted that the respondents were "large, national companies that undoubtedly maintain an extensive virtual presence."[197] Although there were no specific facts in evidence on this point, the Court suggested that a modern vendor engaged in e-commerce likely would have a website that leaves "cookies saved to [its] customers' hard drives" or an app that its customers could download onto their phones.[198] The Court also said that such a vendor might make use of an in-state "virtual showroom."[199]

One other aspect of due process suggested by *Wayfair* pertains to the prospect that a state might seek to apply a use tax collection nexus law like that of South Dakota retroactively. As due process jurisdiction requires notice or fair warning,[200] retroactive taxation can potentially raise due process concerns. This is particularly so in the context of a use tax collection duty, since to perform this collection the vendor needs to have knowledge of the rule at the time of the transaction. *Wayfair* generally discusses the retroactivity issue as suggesting one way a state might engage in discrimination or impose an undue burden on a taxpayer—claims that would arise under the Commerce Clause and not the Due Process Clause.[201]

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195 *Wayfair*, 138 S. Ct. at 2099. *Cf. Quill*, 504 U.S. at 307, 312 (noting that the due process test is "minimum contacts").

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

197 *Id.* at 2099. It also made reference to "the continuous and pervasive virtual presence of retailers" and their "substantial virtual connections." *Id.* at 2095.

198 *Id.* The Court made reference to the fact that two states, Massachusetts and Ohio, had rules that specifically asserted jurisdiction on this basis. *Id.* at 2098–99 (citing 830 MASS. CODE REGS. 64 H.1.7 (2017) and OHIO REV. CODE ANN. § 5741.01(I)(2)(c)(1) (2018)). Similarly, *Quill* had suggested that if a remote vendor owned or otherwise had a property interest in a significant amount of in-state software that ownership interest would confer an in-state physical presence. *See Quill*, 504 U.S. at 315 n.8.

199 *Wayfair*, 138 S. Ct. at 2094–95. Some persons have noted that the "substantial virtual connections" of an out-of-state vendor like those at issue in the case, *id.* at 2095, could have the effect of causing the vendor to lose the state corporate income tax protection that might otherwise be conferred by the federal statute, commonly referred to as Public Law 86-272. *See* Act of Sep. 14, 1959, Pub.L. No. 86-272, § 101, 73 Stat. 555). *See, e.g.,* Jaye Calhoun & William J. Kolarik II, *Implications of the Supreme Court's Historic Decision in Wayfair*, TAX NOTES (July 23, 2018), https://www.taxnotes.com/state-tax-today/sales-and-use-taxation/implications-supreme-courts-historic-decision-wayfair/2018/07/23/2866l [http://perma.cc/W4KV-JJ2L].

200 *See Quill,* 504 U.S. at 308, 312.

201 *See Wayfair*, 138 S. Ct. at 2099 ("South Dakota's tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce. . . . [including that] the Act ensures that no obligation to remit the sales tax may be applied retroactively."); *see also supra* note 145 and accompanying text.

But that may be because *Wayfair* involved primarily a Commerce Clause and not a due process claim. *Wayfair* generally acknowledged that other non-Commerce Clause arguments might also be available to prospective claimants and suggested that due process would be a basis for one such argument.[202]

D. Undue Burden

1. Background and Derivation

The most confusing aspect of *Wayfair* is the undue burden analysis. Both *Bellas Hess* and *Quill* made reference to the burdens that could be faced by vendors seeking to comply with the states' use tax collection duties, though neither holding was justified primarily on that basis. *Bellas Hess* was primarily premised on the notion that mail-order sales are intrinsically interstate transactions, and therefore could not be subject to state tax under the Court's pre-existing Commerce Clause doctrine.[203] That notion was later rejected by the Supreme Court in *Complete Auto*.[204] *Quill* was primarily justified on the theory that mail-order vendors had relied upon *Bellas Hess* for twenty-five years and that the Court should therefore respect this reliance interest.[205] *Quill* recognized that the legal underpinnings for *Bellas Hess* had been removed, and so sought to buttress its decision on some other Commerce Clause basis.[206] Also, the Court considered the matter one that could best be resolved by Congress.[207] Identifying an independent Commerce Clause rationale allowed the Court to bifurcate *Quill*'s Commerce Clause and Due Process Clause analyses, and thereby specifically suggest re-consideration by Congress.[208]

Quill implicitly distinguished between the imposition of a use tax collection duty and the levy of a state tax. *Quill* analogized the former duty to a state's regulation of a commercial actor, as opposed to the levy of a state tax, and, in so doing, referenced the dormant Commerce Clause balancing

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202 *Wayfair*, 138 S. Ct. at 2099 ("[I]f some small businesses with only *de minimis contacts* seek relief from collection systems thought to be a burden, those entities may still do so under other theories.") (emphasis added). *See Quill*, 504 U.S. at 305 ("If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes 'undue.'") (quoting International Harvester Co. v. Department of Treasury, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)).

203 Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753, 759–760 (1967).

204 *See Wayfair*, 138 S. Ct. at 2091; *see also supra* notes 40–42 and accompanying text.

205 *See supra* notes 62–63 and accompanying text.

206 *See supra* note 85 and accompanying text.

207 Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992).

208 *Id.*; *see also supra* note 85 and accompanying text.

test from *Pike v. Bruce Church, Inc.*[209] Under *Pike*'s "undue burden" test, "[s]tate laws that '*regulat[e]* even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'"[210] But *Quill* did not engage in any balancing or set forth a test that would require balancing—it merely utilized the notion of an undue burden as the basis for the creation of the Court's "bright-line physical presence" rule.[211] The Court's theory was that application of the physical presence rule would police against undue burdens resulting from the imposition of a use tax collection duty.[212] Also, the Court's physical presence rule would protect the mail-order reliance interests created by *Bellas Hess*, because the physical presence rule subsumed the holding of that earlier case. But the *Quill* Court's overriding rationale seemed to be that, however faulty its case logic, Congress would soon act to address the mail-order use tax issue—which of course it never did.[213] Three of the eight Justices in *Quill*—including Justices Kennedy and Thomas, both of whom were in the *Wayfair* majority—disagreed with *Quill*'s Commerce Clause reasoning and said that they would support the holding only on the basis of stare decisis.[214]

In *Wayfair*, the undue burden test was first considered in the context of the Court's rejection of the argument that stare decisis would require retention of the physical presence rule.[215] *Wayfair* revisited the question in *Quill* whether retention of the rule could be justified solely on the basis of stare decisis.[216] The Court concluded that it could not be, because physical presence is not a "clear or easily applicable standard."[217] Also, the Court noted that "*stare decisis* accommodates only 'legitimate reliance interest[s]'" and, contrary to such reliance, some Internet vendors had been aggressively using the physical presence rule to avoid tax and to obtain a market advantage.[218] The Court stated that

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209 *See supra* notes 67–69 and accompanying text.

210 *See* South Dakota v. Wayfair Inc., 138 S. Ct. 2080, 2091 (2018) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)) (emphasis added).

211 *Quill*, 504 U.S. at 314–15, 317.

212 *Id. See Wayfair*, 138 S. Ct. at 2092 (noting "the *Quill* majority concluded that the physical presence rule was necessary to prevent undue burdens on interstate commerce").

213 *See supra* note 85 and accompanying text.

214 *See Wayfair*, 138 S. Ct. at 2092 (citing *Quill*, 504 U.S. at 320) (noting the concurring opinion in *Quill* of Justice Scalia, which was joined by Justices Kennedy and Thomas).

215 *Id.* at 2096–98.

216 *Id.*

217 *Id.* at 2098. The dissent split with the majority on this issue. *See id.* at 2101–02 (Roberts, C.J., dissenting).

218 *Id.* at 2096, 2098 (emphasis in original) (internal citation omitted).

"constitutional right[s]" do not logically follow from "practical opportunities [to engage in] tax avoidance."[219]

Wayfair nonetheless remained sympathetic to the burdens that the states' use tax collection duties could impose upon smaller remote vendors selling over the Internet. The Court said that "the daunting complexity and business-development obstacles of nationwide sales tax collection" will result in burdens that "may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States."[220] *Wayfair* referred sympathetically to such smaller vendors nine times.[221] It was in response to these concerns that the Court noted the potential prospect of such vendors bringing a claim using the *Pike* undue burden standard.[222]

The *Wayfair* Court's references to the undue burden test seem intended to encourage the states to be fair in their implementation of that decision and to otherwise simplify their use tax collection laws, if appropriate. When evaluating this general issue *Wayfair* referenced the fact that South Dakota law already "affords small merchants a reasonable degree of protection."[223] Specifically, the Court referred to: (1) South Dakota's high statutory nexus thresholds, as discussed above; (2) the fact that the South Dakota statute was not retroactive; and (3) the fact that South Dakota was "one of more than [twenty] States that have adopted the Streamlined Sales and Use Tax Agreement. . . . [which] standardizes taxes to reduce administrative and compliance costs . . ."[224] Hence, the Court encouraged—though did not require—other states to adopt similar measures. As noted earlier, however, the first two legal protections—reasonably high nexus thresholds and prospective

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219 *Id.* at 2098 (internal citation omitted). The Court cited one case for its statement concerning legitimate reliance interests and through that citation, intentionally or not, analogized the large Internet vendors who had exploited the physical presence rule to wrongdoers. *See id.* (citing *United States v. Ross*, 456 U.S. 798, 824, which concluded that narcotics smugglers had no "legitimate reliance interest" with respect to the Court's prior Fourth Amendment search and seizure precedent because these persons had used that precedent to structure their unlawful businesses). *See also Ross*, 456 U.S. at 824 & n.3.

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

221 *See id.* at 2093, 2098–99.

222 *Id.* at 2098–99. Given the Court's longstanding, general notion that it should refrain from restricting state sovereignty under the dormant Commerce Clause other than in instances of state discrimination, *see supra* notes 95 and 146 and accompanying text, it seems fair to question the Court's emphasis on protecting small out-of-state vendors. The Commerce Clause was not intended to protect any particular class of vendors, *see generally* U.S. CONST. art I. § 8, cl. 3., and the Court's emphasis on singling out small vendors for protection seems to be nothing more than a policy determination that is legislative in its nature.

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

224 *Id.* at 2099–100.

enforcement—may be otherwise generally necessary as a matter of due process.[225]

2. Problems with the Standard

The Court's attempt to prod the states to simplify their sales tax systems for smaller vendors seems laudable. Perhaps it was even necessary to get the Court to a majority of five votes, as concern about the potential tax collection burden to be imposed upon smaller vendors was certainly an important issue for the Justices at oral argument.[226] But the Court's references to the undue burden standard were half-hearted, vague, not clearly supported by all five Justices in the majority, and make little conceptual or practical sense.

The *Wayfair* majority invoked the undue burden standard in a peculiar way. The Court stated that "the United States argues that *tax-collection requirements* should be analyzed under the balancing framework of *Pike v. Bruce Church, Inc*."[227] The United States did in fact argue in favor of applying the undue burden test to the states' use tax collection laws in both its *Wayfair* amicus brief and at oral argument.[228] But the Court's lukewarm endorsement of this point—attributing it not to its own legal conclusions but to the thoughts of one of the amici—suggests ambivalence. This is not surprising since the Court has been retreating from the *Pike* undue burden test for several decades, even in the regulatory context from which that standard derives.[229]

More specifically, *Wayfair*'s reference to the *Pike* undue burden standard is inconsistent with the overruling of *Quill*. That overruling was intended to eliminate preferential treatment of remote vendors and to dispense with artificial taxpayer

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225 *See supra* notes 186–188 and 200–202 and accompanying text*; see also* John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 345 (2003) ("[A]nyone making taxable sales within the taxing jurisdiction should have a collection obligation, subject to a de minimis threshold below which the cost of collection exceeds the benefit."); *see also* Adam B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 FLA. TAX REV. 157, 199 (2012) ("[A] state need only set its threshold amounts high enough to effectively eliminate any unreasonable risk that taxpayers will exceed them without having expended constitutionally significant efforts to exploit the market.").

226 *See generally* Transcript of Oral Argument, *supra* note 138.

227 *Wayfair*, 138 S. Ct. at 2099 (emphasis added).

228 *See* Transcript of Oral Argument, *supra* note 138 at 26–27; Brief for the United States as Amicus Curiae Supporting Petitioner at 13, 17–23, South Dakota v. Wayfair, Inc., 138 S. Ct. 2084 (2018) (No. 17-494).

229 *See* Fatale, *supra* note 81, at 60–62 (describing the Court's general concerns with *Pike* balancing dating back to the time of *Quill*); *see also* Rothfeld, *supra* note 85, at 489 ("[G]iven the (largely justified) criticism of the *Pike* approach as a standardless and subjective means of applying the Commerce Clause, it is more than a little surprising that the Court chose to expand *Pike* balancing in the tax area." (footnote omitted)).

distinctions.[230] Instead, by suggesting that an undue burden can be claimed by small remote vendors but not small out-of-state vendors that have an in-state physical presence, the Court served to perpetuate—at least in part—similar distinctions.[231] Clearly, physically present vendors can be in all other respects identical to remote vendors, and therefore face identical compliance burdens—and yet they are not the vendors *Wayfair* sought to protect. Therefore, unlike their remote vendor competitors, small multistate vendors that have in-state physical presence would apparently not be able to maintain an undue burden claim. This follows because *Wayfair* did not alter pre-existing jurisdictional principles; it merely sought to eliminate the physical presence rule, and to explain the effect of that elimination on vendors that were formerly protected.[232]

The undue burden standard was introduced into the state tax area by *Quill*—specifically to prop up the Court's newly-posited physical presence rule.[233] The application of the undue burden standard in the state tax area was unclear, but on the other hand, as posited in *Quill*, did not need to be put to the test, because the standard was merely one predicate that the Court used to adopt its "bright-line" physical presence rule.[234] It was physical presence—and the three other prongs of the pre-existing *Complete Auto* test—that were to address "undue burdens."[235] This meant that the mechanics of specifically evaluating undue burden in the state tax area was, if anything, just a conceptual idea lurking in the background.

Justice Kennedy, who wrote the *Wayfair* decision, did not join the section in *Quill* that referenced undue burden making his seeming, even if lukewarm, endorsement of that standard in *Wayfair* more mystifying. When *Wayfair* cites criticism of the physical presence rule—something it says has "been the target of criticism over many years from many quarters"—it cites only a

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230 *See Wayfair*, 138 S. Ct. at 2092–94.

231 *Cf.* Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 364 (1941) (noting that once the state has extended to a mail-order vendor the privilege to do business in the state, the state may exact "this burden [of tax collection] as a price of enjoying the full benefits flowing from its [in-state] business"). *See also* Rothfeld, *supra* note 85, at 490 (questioning *Quill*'s concern with the burdens imposed upon remote vendors when the burden for comparable vendors with physical presence is identical).

232 *See supra* notes 158–166 and 177 and accompanying text.

233 *See* Rothfeld, *supra* note 85, at 488 (noting that prior to *Quill* the Court had not applied *Pike* balancing in a tax case); *see also supra* notes 82–85 and accompanying text.

234 *See supra* notes 86–87 and accompanying text.

235 Quill Corp. v. North Dakota, 504 U.S. 298, 312–15 (1992)*; see also* Fatale, *supra* note 22, at 592–93.

single article.[236] And that article, immediately after the page cited, criticizes the invocation of undue burden analysis in the context of the use tax collection duty, stating that it "cannot be reconciled with prior decisions of the Court."[237] That same article also states that the undue burden analysis, as so invoked, "suffer[s] from serious logical flaws."[238]

In general, state tax cases since the time of *Quill* do not rely on or even evaluate the application of the undue burden test. This is because, as noted, *Quill* made clear that in the state tax context the undue burden analysis is not a stand-alone test, but rather merely a concern that is addressed by the four prongs of *Complete Auto*, including the nexus requirement.[239] The Court has stated, in *Japan Line, Ltd. v. County of Los Angeles*[240] that, when those four prongs are met, "no impermissible burden on interstate commerce will be found . . . ."[241] When *Wayfair* stated its rule pertaining to state tax nexus, it cited to language in *Polar Tankers, Inc. v. City of Valdez*,[242] and those cited pages in turn referenced the analysis in *Japan Line* that included this statement.[243] Also, since the time of *Quill* no case has found that a state tax imposed an undue burden on interstate commerce, apart from consideration of the *Complete Auto* standards.[244]

Further, the two concurring Justices in *Wayfair*, Justices Thomas and Gorsuch, both limited their approval of the majority's decision to the holding—the eradication of the physical presence rule.[245] Both Justices criticized the Court's dormant Commerce Clause jurisprudence more generally[246]—and *Pike* balancing is one prominent component of that jurisprudence.[247] Justice Thomas previously joined Justice Scalia's dissent in a state case decided three years before *Wayfair* that critiqued the dormant Commerce Clause as "a judge-invented rule under which judges may set aside state laws that they think impose too much of a burden upon

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236 *Wayfair*, 138 S.Ct. at 2092 (quoting Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring) (citing Rothfeld, *supra* note 85)).

237 Rothfeld, *supra* note 85, at 489.

238 *Id.*

239 *See supra* note 235 and accompanying text.

240 441 U.S. 434 (1979).

241 *Id.* at 444–45.

242 *Wayfair*, 138 S. Ct. at 2099 (citing Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)).

243 *Polar Tankers, Inc.*, 557 U.S. at 11 (citing Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 441–45 (1979)).

244 Fatale, *supra* note 22, at 593–94, 594 n.157.

245 *Wayfair*, 138 S. Ct. at 2100 (Thomas, J., concurring); *id.* at 2100–01 (Gorsuch, J., concurring).

246 *Id.* at 2100 (Thomas, J., concurring); *id.* at 2100–01 (Gorsuch, J., concurring).

247 *See* Fatale, *supra* note 81, at 60–62.

interstate commerce."[248] Justice Gorsuch in his *Wayfair* concurrence favorably cited that same Scalia dissent.[249]

3. Practical Application

Given the above analysis, it seems unlikely that the Court itself would actually apply the undue burden standard to a use tax collection duty. So, why then mention it? As noted, the Court seemed to be encouraging the states to be fair in their administration of *Wayfair*. Suggesting that there is some legal standard that could sit in judgment of the states' actions—however unlikely or unclear that standard may be—arguably tends to serve that purpose, if only because state personnel, like most persons, tend to fear the unknown. Also, the Court is not likely to be the adjudicator of later undue burden claims, should they manifest. That test would relate to the determination of state tax nexus, and before *Wayfair* the Court had not taken a nexus case in twenty-five years—despite repeated certiorari petitions in state tax cases.[250] The Court's calculus seemed to be to relegate questions concerning undue burden to the state courts, and then assume that those courts will police these burdens—presumably understanding the problem, and knowing the solution, in the context of specific cases.[251]

What an undue burden litigation claim might look like and who would bring one (including in what state) is an open question. *Pike* itself suggests the dilemma, as in that case the Court struck down an order issued pursuant to a statute enacted by the state of Arizona that would require persons that grew cantaloupes in the state to pack the cantaloupes in-state and to identify that the cantaloupes were from an Arizona packer.[252] The difficulty for the grower was that it did not pack its cantaloupes in Arizona, but rather shipped them to its packing facility in California, where they were not labeled as packed in

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248 *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1807–08 (2015) (Scalia, J., dissenting).

249 *See Wayfair*, 138 S. Ct. at 2101 (Gorsuch, J., concurring) (citing *Wynne*, 135 S. Ct. at 1807 (2015) (Scalia, J., dissenting)).

250 *See* Fatale, *supra* note 22, at 583–84 n.106.

251 *See* Darien Shanske, Wayfair *as Federalism Decision*, MEDIUM (June 4, 2018), https://medium.com/whatever-source-derived/wayfair-as-federalism-decision-16577e592a6b [http://perma.cc/2TNF-8T24] ("The Court in *Wayfair* does not explicitly shift to a kind of balancing test (in particular, *Pike* balancing), but its retention of a 'substantial nexus' standard without much further guidance seems to invite the states to engage in balancing."); Maria Koklanaris, *4 Constitutional Questions To Ponder In A Post-Quill World*, LAW360 (June 29, 2018, 8:11 PM), https://www.law360.com/articles/1058921/4-constitutional-questions-to-ponder-in-a-post-quill-world (citing tax practitioner opinions for the view that *Wayfair* embodies "a nudge to states not to impose undue burdens lest they be checked").

252 Pike v. Bruce Church, 397 U.S. 137, 138–40, 146 (1970).

Arizona.[253] The Court concluded that the Arizona statute was too burdensome as applied to the grower, where the grower would have had to expend an extra $200,000 to pack a $700,000 crop.[254]

In the context of the use tax collection duty, *Pike* would seem to suggest that one is to compare the taxpayer's costs of compliance with the revenue benefits to the state from the collected tax.[255] But that is an apples and oranges comparison that would seem to turn on entirely subjective considerations as to what value one attributes to the tax.[256] The subjectivity that is inherent in the *Pike* balancing test as applied in the regulatory context is the very essence of why the Court has retreated from the test in recent years.[257] Also, if one is to apply the test to the use tax collection duty, it is hard to see how, in light of *Wayfair,* a state that adopts South Dakota-like thresholds could fail. In *Pike*, the Court recognized the state's interest in its cantaloupe statute as being "legitimate," but not "compelling."[258] In contrast, *Wayfair* emphasized the critical importance of the states' tax collection function.[259]

Pike also suggests that a state law could fail its test if there is a less onerous state way to achieve the same result.[260] But the

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253 *Id.* at 139.

254 *Id.* at 140, 145–46.

255 Justice Breyer—who did not join the *Wayfair* majority opinion—suggested as much at the oral argument, commenting that the inquiry would seemingly be to determine whether "the benefits of state revenue do not outweigh the compliance costs associated with the tax collection obligations that the state has imposed." *See* Transcript of Oral Argument, *supra* note 138, at 57. Justice Breyer recognized such an inquiry could unleash significant litigation. *See id.*

256 *Cf.* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 355 (2008) ("What is most significant about these [*Pike*] cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all."); *id.* at 355–56 ("Courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes.") (quoting Fulton Corp. v. Faulkner, 516 U.S. 325, 342 (1996)).

257 *See* Fatale, *supra* note 81, at 60–62. It is for similar reasons that the Court backed away from its early twentieth century dormant Commerce Clause doctrine that considered whether a taxpayer's in-state activity was interstate or intrastate. *See supra* notes 23–25 and accompanying text.

258 *See Pike*, 397 U.S. at 143–46 (stating that the "regulatory scheme could perhaps be tolerated if a more compelling state interest were involved" but that "the State's interest is minimal at best—certainly less substantial than a State's interest in securing employment for its people").

259 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2088, 2095 (2018); *see also* Fatale, *supra* note 81, at 42 n.3 (citing cases).

260 *See Pike*, 397 U.S. at 142 ("If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.").

difficulty with this logic, as transposed to the state tax context, is that it will probably always be the case that a tax system could be made simpler with modest reductions in revenue. Yet, this alone would seem to be insufficient grounds for striking down an entire "tax system."[261] That result certainly seems inconsistent with *Wayfair*'s pro-state sovereignty analysis.[262]

Wayfair implied that the only vendors that could logically bring an undue burden claim would be small remote vendors, as they would have the greatest difficulty with the tax implications resulting from the case.[263] It is not inconceivable, for example, that—at least hypothetically—a smaller vendor would have to incur what for it could be significant costs to pay a tax to a specific state that would be, in dollar terms, less significant. But if the state's nexus thresholds were to at least mirror that of South Dakota, it is hard to see how—at least applying *Wayfair*'s analysis—so small a vendor could ever become subject to the state's law.[264] Larger vendors—the vendors that *Wayfair* accused of using *Quill* to unfairly avoid tax collection[265]—would more likely be the persons seeking to enjoin a state's law. But *Wayfair* suggested that because larger vendors have greater means to comply, they would be less likely to have an undue burden claim.[266]

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261 *See Wayfair*, 138 S. Ct. at 2099.

262 *See supra* notes 133–137 and accompanying text. *Wayfair* referenced only one other burdens-type case, S. Pac. Co. v. Arizona, 325 U.S. 761 (1945), which preceded *Pike*. *See Wayfair*, 138 S. Ct. at 2091. *Southern Pacific* makes even less sense as applied in the state tax context. *See supra* notes 71–81 and accompanying text.

263 The majority made nine references to small businesses. *See Wayfair*, 138 S. Ct. at 2093, 2098–99. The dissent expressed sympathy for small businesses as well. *See id.* at 2104. (Roberts, C.J., dissenting). In contrast, the majority viewed larger vendors as bad actors that had attempted to manipulate the *Quill* physical presence rule. *See id.* at 2098 ("Some remote retailers go so far as to advertise sales as tax free. A business 'is in no position to found a constitutional right on the practical opportunities for tax avoidance.'" (internal citations omitted) (quoting Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 366 (1941))). *See also supra* notes 218–219 and accompanying text. The Court's citation for this proposition was to the brief of the petitioner, South Dakota, which quoted the respondent Wayfair's website. *See id.* (citing Petitioner's Brief, *supra* note 138, at 55). *See also id.* at 2099 ("[R]espondents are large, national companies that undoubtedly maintain an extensive virtual presence."); *see also id.* (acknowledging that there could be legal questions about state implementation of its decision but concluding that prospect "cannot justify retaining [an] anachronistic rule that deprives States of vast revenues from major businesses").

264 *See id.* at 2098 (noting that "the law at issue requires a merchant to collect the tax only if it does a considerable amount of business in the State" and that the law "applies a safe harbor to those who transact only limited business in [the state]").

265 *See id.* at 2093, 2098–99, 2104. *See also supra* note 263 and accompanying text.

266 *See id.* at 2098–99. *See* Walter Hellerstein and Andrew Appleby, *Substantive and Enforcement Jurisdiction in a Post-Wayfair World*, Tax Analysts, STATE TAX TODAY (Oct. 22, 2018) ("It may be difficult for large, sophisticated remote sellers to avoid a sales and use tax collection obligation under the *Pike* balancing test. The Court has recognized that imposing such obligations on sellers is a 'familiar and sanctioned device,' and that the 'sole burden imposed upon the out-of-state seller . . . is the administrative one of collecting

The nature of sales tax is such that a larger vendor with the means to comply with a state's law would almost certainly have to comply with that law or could be ultimately responsible for paying the tax that it failed to collect from consumers out of its own pocket. On the other hand, a vendor in full compliance with a state's use tax collection law would seemingly face a difficult hurdle in attempting to claim that this collection activity was nonetheless unduly burdensome. That same general issue would apparently lurk also if the vendor was collecting use tax in most states but not the state in question. In that case, the vendor would have to justify its disparate approach in the latter state.

In any lawsuit claiming that a state tax is unconstitutional, there is a question as to whether the claim is that the statute is "facially" unconstitutional, i.e., is not valid on any conceivable set of facts, or unconstitutional "as applied" to the taxpayer.[267] *Wayfair* vaguely suggested that an undue burden challenge could result in the invalidity of a state statute[268]—a potential result that could apparently occur only in the context of a facial challenge. But conversely the essence of an undue burden challenge would necessarily seem to be a "case-by-case evaluation."[269] Certainly, the repeated statements in *Wayfair* to the effect that only smaller vendors could logically maintain an undue burden claim indicates that a successful facial challenge would be unlikely; a small vendor could have a reasonable as applied claim, but the state law would presumably remain valid as to larger vendors.

One other issue that arises when considering a potential undue burden claim pertains to the desired outcome. In the past, vendor litigation concerning the physical presence standard was intended to broaden the states' interpretation of that standard because, once broadened, all taxpayers—including the litigant—would benefit from that expanded interpretation on a going forward basis. But a determination that a state tax system is too burdensome in a particular respect—e.g., because the nexus thresholds are too low—would presumably provide a road map to the state as to how

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[the tax].'") (quoting Gen. Trading Co. v. State Tax Comm'n, 322 U.S. 335, 338 (1944) and Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551, 558 (1977)).

267 *See* Overstock.com, Inc. v. N.Y. State Dept. of Taxation & Fin., 987 N.E.2d 621, 624 (N.Y. 2013).

268 *Wayfair*, 138 S. Ct. at 2099 ("The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act.").

269 *See* Quill Corp. v. North Dakota, 504 U.S. 313, 314–15 (1992). *Pike* itself resulted in only a specific case determination as to the litigant. *See* Pike v. Bruce Church, 397 U.S. 137, 140, 145–46 (1970); *see also Wayfair,* 138 S. Ct. at 2094 ("The Court's Commerce Clause jurisprudence has 'eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.'" (citing West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994))).

to fix the problem. The upshot is that most non-claimant taxpayers subject to the law would likely be unaffected by such a ruling because it would likely be an as applied determination. And, because the state would probably act to amend its law in response to the decision, even a victorious taxpayer could end up collecting the tax in short order anyway.

The above analysis suggests that there may not be much undue burden litigation in the aftermath of *Wayfair*. But that could be wishful thinking. For example, *Quill* clearly suggested that the physical presence rule was limited to the states' use tax collection duty, but that did not prevent twenty-five years' worth of litigation addressing whether the standard had broader application.[270] It would of course be ironic if *Wayfair* unleashed a quarter-century of cases on a question that seems specious because *Quill* did the same thing, and one of *Wayfair*'s purposes was to reject the calamitous after-effects of *Quill*.

V. CONCLUSION

Wayfair eradicated the nonsensical physical presence nexus requirement that the Court had created in *Bellas Hess* and *Quill*. The Court thereby effectively completed, more than one-half century later, a trend in its dormant Commerce Clause cases that commenced in the mid-part of the Twentieth Century—reversing the conclusion that free trade considerations impose limitations on the state tax jurisdiction rules that apply to multi-state companies engaged in business in a state.

Though it dispensed with the idea that certain large companies doing business across state lines are sometimes entitled to state tax immunity, *Wayfair* expressed concern with the compliance costs of the use tax collection duty as applied to smaller multi-state businesses. To address these concerns, the Court repeated the error of *Bellas Hess* and *Quill* and posited a vague new legal test, pertaining to "undue burden," that has no basis in the Court's prior state tax cases. Ironically, the notion of transposing the undue burden concept to the state tax context traces entirely to the analysis in *Quill* that *Wayfair* otherwise rejected. Further, because the undue burden test has never been actually applied to state tax cases, it is not apparent how it could apply. Hence the concept has the prospect of unleashing the same type of confusion and litigation that followed in the aftermath of *Quill*.

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270 *See* Fatale, *supra* note 22, at 583–84 n.106; *see also generally* Capital One Auto Fin., Inc. v. Dep't of Revenue, 22 Or. Tax 326 (2016), *affirmed*, 363 Or. 441 (2018).

Wayfair noted correctly that "[t]he physical presence rule is a poor proxy for the compliance costs faced by companies that do business in multiple States."[271] It also stated that "[o]ther aspects of the Court's doctrine can better and more accurately address any potential burdens on interstate commerce, whether or not *Quill*'s physical presence rule is satisfied."[272] But the Court did not need to posit a new, poorly-considered state tax test to help to accomplish these goals. The elimination of the physical presence rule means that the primary nexus standard to be applied when evaluating state tax jurisdiction is due process, which adequately addresses the state tax burdens to be faced by smaller—as well as all other—multistate businesses. Due process requires that a state tax be adequately noticed, otherwise fair, and applied to remote vendors engaged in significant in-state market exploitation. When these standards are met, there is no issue as to undue burden. The Court's robust anti-discrimination principle addresses all other constitutional concerns.[273]

Wayfair stated that "[i]f it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error."[274] It seems patent that the Court did not issue *Wayfair* with the intent to actively evaluate future state tax nexus claims.[275] Also, due process considerations are sufficient to evaluate such claims. Nonetheless, the Court should remain vigilant to one day revisit *Wayfair* and thereby correct its erroneous undue burden test.

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271 *Wayfair*, 138 S. Ct. at 2093.
272 *Id.*
273 *See supra* notes 95 and 146 and accompanying text.
274 *Wayfair*, 138 S. Ct. at 2096.
275 *See supra* notes 250–251 and accompanying text.