STATE AND LOCAL TAX

A Requiem for the Physical Presence Rule: Deconstructing and Refuting *South Dakota v. Wayfair, Inc.*

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Abstract

South Dakota v. Wayfair exemplifies a truism of Supreme Court decisions: they can be overruled, but they cannot be freely undone. No matter how sincere Justice Kennedy's desire was to correct perceived error in *Quill v. North Dakota*'s physical presence rule, and ameliorate its "egregious and harmful" effect on the States since the inception of the online marketplace, there was a toll for reneging. This article suggests that on balance, the harm exceeded the benefits from overruling *Quill*.

The toll was high. *Wayfair* left small online businesses in the lurch to manage compliance with the country's 10,000-plus state and local taxing jurisdictions. *Wayfair* left reliance interests in tatters and implied that private parties ought to anticipate the Court's overrulings and that there are circumstances where reliance upon a square, unabandoned holding of the Supreme Court is not justifiable. Significantly, the Court's credibility was sacrificed in Wayfair, and gave private parties reason not to take the Supreme Court at its word. That sacrifice nudged the Constitution closer to being nothing more than what five justices say it is. Post-*Wayfair*, uncertainty abounds, with a much less than clearly defined economic presence rule supplanting the physical presence rule, making it more onerous for small online businesses to flourish.

The benefit from *Wayfair* is that States, lack of physical presence notwithstanding, can now expect to compel out-of-state retailers to collect

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their sales and use tax. This victory is diminished, however, given that the largest online retailer by many orders of magnitude, Amazon, began collecting in all States in April, 2017, over a year before Wayfair was handed down. Had the Court meaningfully considered Amazon's capitulation and left the physical presence rule intact, it could have emerged as a crucial protection for small online businesses, even while State coffers were substantially replenished.

Wayfair, further, represents an ends-driven analysis that bears significant weaknesses when subject to scrutiny. Justice Kennedy employed an avant-garde standard of review, seemingly cut from whole cloth. His justification for bypassing *stare decisis* was at best wish-washy and at worst calamitous for those who expect the current Court to respect prior Court decisions. Justice Kennedy's reformulation of the relevant Commerce Clause analysis impetuously blends due process and Commerce Clause principles, leaving waters surrounding the question murky and unsettled. This article highlights *Wayfair*'s weaknesses and shortcomings and serves as a roadmap to challenge the decision.

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I. Introduction

You have to give Justice Anthony Kennedy credit: he knows how to make an exit. As the swan song[1] to his tenure as a Supreme Court Justice, he wrote the majority opinion in *South Dakota v. Wayfair, Inc.*, a decision that upended the state and local tax (SALT) world by overruling the physical presence rule which was, up until then, one of the few examples of SALT bright-line law.[2] This did not happen without some orchestration. Justice Kennedy laid the groundwork a few years earlier in a concurring opinion to *Direct Marketing Association v. Brohl*,[3] (a SALT case, but one that did not deal directly with the physical presence rule[4]), in which he called on the "legal system" to find an "appropriate case" for the Court to reexamine the physical presence rule.[5] The South Dakota legislature happily obliged with

[1] Justice Kennedy wrote separately in subsequent opinions, but *Wayfair* was the last time he wrote for a majority of the Court. *See* Pereira v. Sessions, 138 S. Ct. 2105 (2018) (Kennedy, J., concurring); Carpenter v. United States, 138 S. Ct. 2206 (2018) (Kennedy, J., dissenting); Currier v. Virginia, 138 S. Ct. 2144 (2018) (Kennedy, J., concurring in part); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) (Kennedy, J., concurring); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (Kennedy, J., concurring).

[2] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018). The scrutiny applied to the *Wayfair* decision specifically confronts Justice Kennedy. It is nevertheless recognized that Justice Kennedy was writing for the majority and therefore, the Court. The *Wayfair* decision has drawn considerable scholarly attention. *See e.g.*, Dawinder Sidhu, *Interstate Commerce x Due Process*, 106 IOWA L. REV. 1801 (2021); Rifat Azam, *Online Taxation Post Wayfair*, 51 N.M. L. REV. 116 (2021); Frank J. Doti, *Wayfair Has Become Way Unfair on Account of Marketplace Facilitator Expansion by the States* 15 CHARLESTON L. REV. 1 (2020).

[3] 575 U.S. 1, 16 (Kennedy, J., concurring).

[4] At issue in *Direct Marketing* was whether the federal district court lacked jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341, over a lawsuit challenging the State of Colorado's use tax notice and reporting law, on the grounds that the suit asked the federal courts to "enjoin, suspend[,] or restrain the assessment, levy[,] or collection of any tax under [s]tate law." *Id.* at 4 (majority opinion). The Court ultimately reversed an order of the Court of Appeals and remanded the case for further proceedings. *Id.* at 16.

[5] *Id.* at 18–19 (Kennedy, J., concurring).

streamlined legislation[6] that made its way through the South Dakota judicial system at a relatively high rate of speed. The petition for a writ of certiorari from the South Dakota Supreme Court's adverse decision to the State was filed just over two-and-a-half years from the date on which *Direct Marketing* was decided.[7]

Justice Kennedy's majority opinion in *Wayfair* has a redemptive and dramatic quality. Its tone brings to mind a line from the famous Christian hymn, "Was blind, but now I see."[8] After all, though he refers in the third person to the misguided 8-1 majority in *Quill Corp. v. North Dakota*,[9] the 1992 decision that upheld the physical presence rule, he was one of the eight.[10] On this account, it was almost inevitable that the opinion would be prone to hyperbole. After all, it is not every day that the Supreme Court brushes away 51 years of precedent,[11] reaffirmed 26 years earlier,[12] and requires *stare decisis* to give way. The picture had to be painted with the deepest blacks and the cleanest whites to justify the about-face, with hopes that a 5–4 decision would not taint the Supreme Court calling one of its own opinions "unsound and incorrect."[13]

If Justice Kennedy tipped his hand in *Direct Marketing*, all the cards were now face-up on the table in *Wayfair*. His sympathy for the States is

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[6] 2016 S.D. Sess. Laws ch. 70.

[7] *Direct Marketing* was decided on March 3, 2015. *Direct Marketing*, 575 U.S. at 1. The petition for a writ of certiorari was filed on October 2, 2017. *South Dakota v. Wayfair Inc.*, SCOTUSBLOG, last accessed Aug. 23, 2022, https://www.scotusblog.com/case-files/cases/south-dakota-v-wayfair-inc/ [https://perma.cc/CD6N-VMLB]. *See* Petition for Writ of Certiorari, *Wayfair*, 138 S. Ct. 2080 (No. 17-494).

[8] John Newton, *Amazing Grace* (1779).

[9] *See e.g.*, *Wayfair*, 138 S. Ct. at 2092.

[10] Quill Corp. v. North Dakota, 504 U.S. 298, 299 (1992) (eight Justices joining the judgment that the physical presence rule established in *National Bellas Hess, Inc. v. Department of Revenue of Ill.,* 386 U.S. 753 (1967), should not be overruled). Justice Clarence Thomas, who was also one of the eight votes in *Quill*, was more forthright in his concurring opinion to *Wayfair*. He admits to being wrong in *Quill*, and more broadly with respect to his then grudging acceptance of the Court's dormant Commerce Clause jurisprudence. *Wayfair*, 138 S. Ct. at 2100, (Thomas, J., concurring). This was not much of a surprise as Justice Thomas has established himself as the court's resident skeptic to the existence of the dormant Commerce Clause and seems to welcome any opportunity to reiterate his arguments. For example, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, Justice Thomas dissented, "The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." 520 U.S. 564, 610 (1997) (Thomas, J., dissenting). *See* James M. McGoldrick, Jr., *Why Does Justice Thomas Hate the Commerce Clause?*, 65 LOY. L. REV. 329 (2019).

[11] The physical presence rule was first established under *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, which was decided by the Supreme Court on May 8, 1967. *National Bellas Hess*, 386 U.S. at 753.

[12] The physical presence rule was reaffirmed under *Quill*, which was decided by the Supreme Court on May 26, 1992. *Quill*, 504 U.S. at 298, 317–18.

[13] *Wayfair*, 138 S. Ct. at 2099.

conspicuous and bolstered as he tends to lump Amazon, Wayfair, and Overstock into the same throng as a small independent online retailer of fishing tackle: all equally enjoying the shade of *Quill's* "judicially created tax shelter."[14] In all aspects, the physical presence rule imposed "serious inequity"[15] upon the States and the Supreme Court's intervention in the matter was overdue.

The thesis of this Article is three-fold. First, *Wayfair* was not late to correct problems flowing from the physical presence rule's application in the online marketplace,[16] but was premature. The market was already churning towards substantial correction as the largest online retailer by several orders of magnitude, Amazon, had already begun to collect sales and use tax on its online purchases by the time *Wayfair* was decided.[17] If the Supreme Court had let that correction come full tilt, State coffers would have experienced substantial replenishment. The physical presence rule could have then emerged as an important protective cloak for small online retailers, which, in a post-*Wayfair* world, now must shoulder the burden associated with compliance with the Nation's 10,000-plus state and local taxing jurisdictions.[18]

Second, the majority opinion in *Wayfair* represents an ends-driven analysis which bears significant weaknesses when subjected to scrutiny. Justice

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[14] *Id.* at 2094.

[15] *Id.* at 2088.

[16] A large line of literature is dedicated to the proposition of overruling *Quill*. *See e.g.*, Robert D. Plattner, Quill*: Ten Years After*, 25 ST. TAX NOTES: 1017, Sept. 30, 2002; Adam B. Thimmesch, *The Fading Bright Line of Physical Presence*: *Did* KFC Corporation v. Iowa Department of Revenue *Give States the Secret Recipe for Repudiating Quill?*, 100 KY. L.J. 339, 340 (2012); John A. Swain, *Quexit: The Time Has Come*, 81 ST. TAX NOTES: 695, Sept. 12, 2016; Edward A. Zelinsky, The Political Process Argument for the Supreme Court to Overrule Quill, 82 BROOK. L. REV. 1177 (2017); Richard D. Pomp, *Revisiting* Miller Brothers, Bellas Hess, *and* Quill, 65 AM. U.L. Rev. 1115 (2016); Hayes R. Holderness, *Questioning Quill*, 37 VA. TAX. REV. 313 (2018). The physical presence rule has had some scholarly defenders: *see e.g.*, Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 4 (2008); Joseph Henchman, *Why the* Quill *Physical Presence Test Shouldn't Go the Way of Personal Jurisdiction*, 46 ST. TAX NOTES: 387, Nov. 5, 2007.

[17] Amazon began collecting sales and use tax in all sales and use tax imposing states on April 1, 2017. Kelly Phillips Erb, *Tax-Free No More: Amazon To Begin Collecting Sales Tax Nationwide on April 1*, FORBES, Mar. 27, 2017, https://www.forbes.com/sites/kellyphillipserb/2017/03/27/tax-free-no-more-amazon-to-begin-collecting-sales-tax-nationwide-on-april-1/?sh=20ac6c524e59 [https://perma.cc/9PZF-PNQD]. Thus, Amazon had been collecting sales and use tax for over a year when *Wayfair* was decided.

[18] *Wayfair*, 138 S. Ct. at 2103 (Roberts, C.J., dissenting). This is dramatic uptick from the 6,000-plus taxing jurisdictions that Justice Stephens referenced in footnote six of *Quill*. *Quill*, 504 U.S. at 313 n. 6. To be sure, the South Dakota statute in question had some protections built in for smaller online retailers or those doing little business with the State. S.D. CODIFIED LAWS § 10-64-2 (2016). In application, however, as will be discussed *infra*, in Section V, the protections are not as robust as they seem.

Kennedy's majority opinion was high on zeal, but low on substance and is analytically vulnerable on several fronts.

Third, *Wayfair* and its antecedent cases were decided under the dormant Commerce Clause, the "negative" implication of the language of Article 1, Section 8, Clause 3 of the Constitution, under which the Court extrapolated its authority to define the limits of state power to regulate interstate commerce. By constitutional definition, under the "affirmative" Commerce Clause, Congress has the power to correct, revise, or overrule any decision the Supreme Court renders in this area.[19] This constitutional fact renders *Wayfair* a particularly poor candidate for the Court to ignore precedent and disregard the doctrine of *stare decisis*.

Though *Wayfair* was decided in 2018, its implications and reverberations are only beginning to register. In November of 2021, the online retailer, Halstead Bead, Inc., an Arizona-based seller of craft jewelry supplies, filed suit in federal court[20] to challenge Louisiana's decentralized tax system that allows its 64 parishes (each with its own contact point) "to collect sales and use taxes and establish their own rates, definitions, and enforcement protocols."[21] *Quill*'s physical presence rule protected the likes of Halstead Bead prior to *Wayfair*. Now-because in overruling *Quill*, the Court in *Wayfair* did not pronounce a clear replacement standard-the Halstead Bead case represents the first of what will likely be many Commerce Clause challenges to state and local sales and use tax collection laws. This Article, then, timely contributes to the literature and the profession in its demarcation of *Wayfair's* shortcomings, many of which will be the center of analysis in state and federal tribunals for the next several years.

This Article proceeds in four parts. Part II considers the origins of controversy between the out-of-state vendor and the customer's state. *Northwestern States Portland Cement Co. v. Minnesota*[22] and *Scripto, Inc. v. Carson*[23] are analyzed, along with the Report of the Special Subcommittee on State Taxation of Interstate Commerce (more commonly known as the "Willis Committee Report"),[24] which Congress commissioned in response to those decisions. This report was issued in two installments, comprising four volumes in 1964-1965, and is a compendium of several years of congressional

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[19] *Quill*, 504 U.S. at 305. "Congress has plenary power to regulate commerce among the States." *Id.*

[20] Complaint at 1, Halstead Bead, Inc. v. Lewis, 2022 WL 1618880 (E.D. La. 2022) (No. 2:21-cv-02106) (showing that the complaint was filed Nov. 15, 2021).

[21] Michael J. Bologna, *Retailer Sues Louisiana for 'Unconstitutional' Sales Tax System*, BLOOMBERG TAX, Nov. 15, 2021, https://www.bloomberglaw.com/product/tax/bloomberglawnews/daily-tax-report-state/BNA%200000017d2551d4e8afff3ddb21e10001?bna_news_filter=daily-tax-report-state# [https://perma.cc/K228-2VWQ].

[22] 358 U.S. 450 (1959).

[23] 362 U.S. 207 (1960).

[24] H.R. REP. NO. 89-952 (1965) [hereinafter *Willis Commission Report*].

hearings conducted by a special subcommittee on state taxation of interstate commerce. It is relevant for this discussion in that it sets the stage for subsequent case law and provides an informative retrospective view of the entire matter that resembles a famous author's drunkenly "staggering from side to side."[25] It, moreover, frames SALT issues that are still unresolved and challenging state policy-makers today and offers advice, which, if heeded, perhaps could have diverted the sales and use tax question down a less turbulent path.

Part III addresses the antecedent cases to *Wayfair*: *National Bellas Hess, Inc. v. Department of Revenue* and *Quill Corp. v. North Dakota*. *Bellas Hess* established the physical presence rule in connection with the collection of sales and use tax but did not clearly articulate which constitutional provision, the Commerce Clause or the Due Process Clause, required it.[26] *Quill* affirmed the physical presence rule and clarified that it was derived from the Commerce Clause.[27]

Part IV considers the intervening 25-year period between *Quill* and *Wayfair*. The States did not sit idly by in the wake of *Quill*. For example, in 2000, the Streamlined Sales and Use Tax Project was formed with an eye towards simplifying and making uniform the myriad SALT laws.[28] At the same time, members of Congress introduced legislation that would undo *Quill*'s physical presence standard and legislatively compel uniformity and simplicity from the States.[29] Unfortunately, the States' attempt to self-correct went stagnant with only about half of the States ultimately enacting legislation to conform their laws to the Streamlined Sales and Use Tax Agreement reached by the founding group of States.[30] A federal solution breached the surface in 2013 when proposed legislation passed the Senate.[31] Media distortions painting the legislation as a national online sales tax likely

[25] PHILIP YANCEY, GRACE NOTES: DAILY READINGS WITH A FELLOW PILGRIM 145 (Zondervan, 2009) (quoting a personal letter by Leo Tolstoy in which Tolstoy wrote, "If I know the way home and am walking along it drunkenly, is it any less the right way because I am staggering from side to side!"). Though I make a hard-stop to the analogy here and would never suggest that a fairer SALT tax system is in any way comparable to the destination to which Tolstoy alluded.

[26] *See Bellas Hess*, 386 U.S. at 765–66.

[27] *See Quill*, 504 U.S. at 318.

[28] *About Us*, STREAMLINED SALES TAX GOVERNING BOARD, INC., last accessed Aug. 28, 2022, https://www.streamlinedsalestax.org/about-us/about-sstgb [https://perma.cc/4G8H-GKVQ].

[29] *See e.g.*, Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013).

[30] *State Information*, STREAMLINED SALES TAX GOVERNING BOARD, INC., last accessed Aug. 28, 2022, https://www.streamlinedsalestax.org/Shared-Pages/State-Detail [https://perma.cc/8DDF-ZBBD].

[31] Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013). Yea-Nay Vote 69-27. 159 CONG. REC. 6184 (2013).

helped to stymy the bill in the House.[32] Justice Kennedy's intervention on the physical presence rule in his 2015 *Direct Marketing* concurrence, questioning *Quill*'s viability, seemed to curtail any further congressional action.[33]

Part V squarely addresses *Wayfair*. Justice Kennedy correctly perceived disparate treatment of out-of-state online retailers relative to in-state brick-and-mortar retailers, with states bearing the brunt of that inequity, and set out to fix it. Yet, the majority opinion glosses over, ignores, and is otherwise analytically deficient with respect to key aspects of the issue of state taxation of e-commerce. Even more critical, in ignoring precedent and *stare decisis*, Justice Kennedy administered a severe blow to the Court's credibility. *Wayfair's* implications are broad and reach well beyond sales and use tax collection. The opinion suggests strongly that reliance on Supreme Court decisions should be qualified; that private parties have reason not to take the Supreme Court at its word; and that Supreme Court decisions are subject to revision and overruling as the personnel on the Court and personal opinions of the Justices change.[34] This Part of the Article further highlights the inconsistencies and weaknesses in Justice Kennedy's reasoning.

II. *The Willis Commission Report and Case History Leading Up to* National Bellas Hess

A. Northwestern Cement *and the Willis Commission Report*

Justice Kennedy referenced modern-day "economic realities" (those primarily created through the online marketplace) as a critical motivating factor in overruling *Quill*.[35] If changed "economic realities" describes the modern condition of the States relative to out-of-state vendors and their sales and use tax collection, the Willis Commission Report provides an important look into the origins of the issue. Annette Nellen, a professor and tax scholar at San Jose State University, describes the report as "likely the most comprehensive study and report ever done on state and multistate issues

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[32] *See e.g.*, Denise M. Champagne, *U.S. Congress Looks at Collecting Internet Sales Tax*, DAILY REC. OF ROCHESTER, Mar. 19, 2014. In a separate article, I consider some of the due process questions associated with a federal solution. Eric S. Smith, *The PACT Act as Indicium of the Due Process Validity of the Marketplace Fairness Act*, 19 FLA. TAX. REV. 1 (2016).

[33] Federal legislation has not been proposed in Congress since *Wayfair* was handed down.

[34] *Stare decisis* was again at the forefront in the Supreme Court's October term, 2021. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). Arguably, the case for respecting *stare decisis* was even stronger in *Wayfair*, given that Congress could overrule the Supreme Court under the Commerce Clause. Retrospectively, *Wayfair* was a harbinger; if the Supreme Court would ignore *stare decisis* under the dormant Commerce Clause, it could do the same (doctrinally with perhaps even less hesitation) in the area of substantive due process where, indeed, the Supreme Court has the last word.

[35] *Wayfair*, 138 S. Ct. at 2089.

. . . ."[36] Serendipitously, given that similar affirmative congressional action may have been appropriate in the wake of *Quill*, the report represents part of a full-throated congressional response to a misguided Supreme Court decision (at least as to the result, for a majority of Congress) which had the potential to upset the free flow of interstate commerce.

The case was *Northwestern States Portland Cement Co. v. Minnesota*. It was handed down in 1959, during the post-World War II-era in which the federal tax base was expanding, and states were following suit, developing heavy fiscal reliance on a broad-based net income tax (individual and corporate) and the sales and use tax.[37] At issue in the consolidated case[38] was the constitutionality of two state net income tax laws imposed on out-of-state corporations engaged in interstate business activity.[39] The constitutional provisions in question were (as they still are today) the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.[40] In the post-War era, the question of where a state's power to tax (or compel collection of a sales and use tax) ended and an out-of-stater's right of refusal to pay or collect another state's tax began was unclear. There was, however, a "widely held view that a State could not impose an income tax on a nondomiciliary engaged solely in interstate commerce within that State."[41] *Northwestern Cement* is significant for the Supreme Court's pivot from that presumption in favor of a state's right to tax even an out-of-state business's interstate activities.

In *Northwestern Cement*, an Iowa corporation's sales representatives engaged in a "regular and systematic course of solicitation for orders for the sale of its products."[42] The Iowa corporation maintained a sales office in Minnesota, but its sales representatives lacked authority to approve orders.[43] Rather, orders were sent back to Iowa for "acceptance, filling and delivery."[44] The sales office and associated personnel represented the extent of the Iowa corporation's presence in Minnesota. It had no bank account, owned no real estate, and warehoused no merchandise in Minnesota.[45]

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[36] Annette Nellen, *50th Anniversary of Willis Commission Report*, 21ST CENTURY TAXATION, Sept. 2, 2015, http://21stcenturytaxation.blogspot.com/2015/09/50th-anniversary-of-willis-commission.html [https://perma.cc/42QB-PEDL].

[37] *See* JEROME HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 1.02 (Thomson Reuters/Tax & Accounting, (3rd ed. 2001 & Supp. 2022).

[38] The consolidated cases were: Minnesota v. Northwestern States Portland Cement Co., 84 N.W.2d 373 (Minn. 1957) and Stockham Valves & Fittings, Inc. v. Williams, 101 S.E.2d 197 (Ga. 1957).

[39] *Northwestern Cement*, 358 U.S. at 452.

[40] *Id.*

[41] Willis Commission Report, *supra* note 24, pt. 1, at 7.

[42] *Northwestern Cement*, 358 U.S. at 454.

[43] *Id.*

[44] *Id.*

[45] *Id.*

These facts were likely representative of the actions of interstate businesses in various industries across the country. Consequently, the Court's decision that the Minnesota tax was "unembarrassed by the Constitution"[46] sent a chill down the collective spine of private interstate business actors across the United States. The Commerce Clause aspect of the Court's deferential decision to the states leaned heavily on the question of whether the Minnesota tax on the Iowa corporation was "a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation."[47]

The Court's affirmative response to this question was justified on the apportionment feature of the Minnesota law. It found as a matter of law that "the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs."[48] Thus, apportionment was the cure for any complaint related to discrimination against or undue burden on interstate activities. So long as the formula did not result in egregious[49] "multiple taxation" (as applied, according to the Court, the Minnesota law did not), and did not "place the interstate commerce at a disadvantage relative to local commerce,"[50] the law did not violate the Commerce Clause.

The Court's due process analysis was succinct and to the point, with a similar state-empowering result. For the Court, there was no question that the taxpayer's activities giving rise to net income formed a "sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.'"[51] It took little effort for the Court to find the due process touchstones of "some definite link, some minimum connection."[52]

The congressional response to *Northwestern Cement* was swift, though narrowly tailored. The facts of the case served as a template for an immediate and intended short-term reactive measure to the Court's decision. The Willis Commission Report suggests that the true significance of the case was less the result, which denied exemption to interstate commerce from a state's net income tax, and more the "impetus which it gave to the assertion of

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[46] *Id.* at 465.

[47] *Id.* at 462. The question was reframed later in the *Northwestern Cement* opinion as this: "The controlling question is whether the state has given anything for which it can ask return." *Id.* at 465.

[48] *Id.* at 460. In spite of Public Law 86-272's carve-out for activities equivalent to the sales representatives in *Northwestern Cement*, this aspect of the holding survived in the modern iteration of the Commerce Clause requirements for a state tax to withstand constitutional challenge announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

[49] The Court acknowledged, but brushed aside as not before it on the current facts, the practical reality that the same income could, in fact, be taxed twice: "apportionment formulas being what they are." *Id.* at 462–63.

[50] *Id.* at 462.

[51] *Id.* at 464.

[52] *Id.* at 465.

congressional responsibility."[53] It took no more than six months for Congress to adopt legislation responsive to the decision in *Northwestern Cement* in the form of Public Law 86-272, which was meant to be a "stopgap measure, a minimum jurisdictional standard" for imposing an income tax.[54] Thus, at least in the SALT context, the 86th Congress stands apart and above every Congress since, in that it affirmatively took control of the Commerce Clause question in the wake of a Supreme Court decision that left "much to be desired" and promulgated legislation to address its shortcomings.[55]

Public Law 86-272 also included a congressional directive to undertake a "comprehensive study of all matters pertaining to the taxation of income derived from interstate commerce."[56] That multi-year study gave rise to the Willis Commission Report. Unfortunately, by the time the Willis Commission had completed its work, congressional momentum on the issue had apparently waned. All the work that went into the Willis Commission Report led to no congressional action creating permanent solutions related to the state taxation of interstate commerce. Thus, Public Law 86-272 survives today to create an odd umbrella in the storm of state taxation that follows interstate commerce across the country.

B. *Scripto, Inc. v. Carson*

Following its original mandate, the Willis Commission was directed further to take on a comprehensive study of the sales and use tax question.[57] The expanded scope was in response to the Supreme Court's decision in *Scripto, Inc. v. Carson* in 1960, where the Court found that a state could compel an out-of-state vendor to collect its sales and use tax.[58] The facts were substantially similar to those in *Northwestern Cement* in terms of interstate business activity.

Florida imposed a use tax collection responsibility on a Georgia corporation that manufactured and sold "mechanical writing instruments."[59] The Florida law required the Georgia Corporation to register as a "dealer"

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[53] H.R. REP. NO. 88-1480, pt. 1, at 8 (1965).

[54] *Id.* Though intended as short-term relief, until the Willis Commission completed its work, Public Law 86-272 survives today and, in addition to the Constitution, serves as a primary protection from tax liability for interstate business. Keying heavily off the facts in *Northwestern Cement*, Public Law 86-272 provides relief from net income tax for interstate actors engaged in interstate commerce if their activities are limited to solicitation for orders of tangible personal property, approval or rejection for which are sent outside the state, and the shipment originates outside the state. Interstate Income Act of 1959, 15 U.S.C. § 381.

[55] H.R. REP. NO. 88-1480, pt. 1, at 11 (1965). The Willis Commission Report notes among inherent limitations in the judicial process is the fact that "a court deals in absolutes" and, in the area of state taxation, "an absolute decision in either direction is not likely to be satisfactory." *Id.*

[56] *Id.*, pt. 1, at 8. *See also* Pub. L. 86-272 Title II.

[57] H.R. REP. NO. 88-1480, pt. 1, at 9.

[58] *Scripto*, 362 U.S. at 208.

[59] *Id.* at 207–08.

and collect and remit use tax on sales to Florida residents though it did not own or lease Floridian property nor had any employees or agents in the state.[60] All orders were solicited by commission-based independent sales contractors armed with promotional materials who referred orders back to the Georgia corporate office for acceptance or refusal.[61] Accepted orders' shipments originated and were fulfilled from Georgia.[62]

The Supreme Court's ruling in *Scripto* that an out-of-state business could be compelled to collect use tax elicited congressional response that ultimately failed to generate the same legislative safeguards created under Public Law 86-272. Bills were introduced in both houses of Congress that proposed similar protections from a sales and use tax responsibility as Public Law 86-272 provided for out-of-state businesses engaged in solicitation relative to the income tax.[63] The legislation was tabled in favor of expanding the scope of the study ordered in response to *Northwestern Cement*, to include "all matters pertaining to the taxation of interstate commerce by the States . . . or any political or taxing subdivision . . . ,"[64] ostensibly with an eye towards a future day when the study would enable Congress to enact well-reasoned and considered legislation to address the state taxation of interstate activity.

This, of course, never happened. Public Law 86-272 has held "temporary" status for over 60 years. The Willis Commission Report (with broadened scope) was executed in good faith and provided ample fodder for Congress to consider permanent responsive legislation to *Scripto* and *Northwestern Cement*. It was ultimately all in vain as Congress could never muster a response to the Willis Commission's good work. This congressional ineptitude left the door open for the Supreme Court to reconsider the taxation of interstate activity yet again in *National Bellas Hess v. Department of Revenue*.[65]

Yet it is noteworthy that Public Law 86-272 and the Willis Commission Report now represent the whole of deliberate responsive congressional action to controversial Supreme Court decisions touching on state taxation. They ironically highlight the Supreme Court's "caretaker-role" over the Commerce Clause when congressional power lies dormant and emphasize that, indeed, the Constitution charges the legislative branch under Article I,[66] not the judicial branch, to regulate the flow of interstate commerce.

Consider the juxtaposition of *Northwestern Cement* and *Quill* on the question of congressional response. Nowhere in the majority opinion in *Northwestern Cement* does the Court suggest or acknowledge that ultimately,

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[60] *Id.* at 208–09.
[61] *Id.* at 209.
[62] *Id.*
[63] H.R. REP. NO. 88-1480, pt. 1, at 9.
[64] *Id.*
[65] 386 U.S. 753 (1967).
[66] U.S. CONST. art. I, § 8, cl. 3.

the question of interstate taxation is one for Congress to resolve. Only in Justice Frankfurter's dissent are the Court's limitations noted: that the "Court can only act negatively"[67] with respect to the Commerce Clause; that the Court is incapable of making "detailed inquiry" of "diverse economic burdens" on interstate commerce.[68] No, only Congress is constitutionally endowed with affirmative power to deliberate and effect policy in this area. Congress can methodically consider the "multitudinous and intricate factors"[69] related to the freedoms and limits on the States' power to tax. Only Congress can hold committee hearings and undertake studies into the problem before formulating policy. As a matter of political accountability, that policy will be crafted by the people's representatives. Congress nevertheless and without the Court's prompting, promulgated Public Law 86-272.

In contrast, the opinion in *Quill*, is deferential to and encourages affirmative response from Congress to the physical presence rule.[70] Implied is a reminder to Congress of its response to *Northwestern Cement*, in the form of Public Law 86-272, suggesting that if it has done it once, it ought to be able to do it again. The *Quill* opinion even rationalized upholding the physical presence rule on the comforting prospect that ultimately Congress remained "free to disagree with our conclusions."[71] Though legislation was proposed several times during the interim period between *Quill* and *Wayfair*, Congress failed to accept the Supreme Court's open invitation to legislate.

III. National Bellas Hess *and* Quill

A. *National Bellas Hess v. Department of Revenue*

When the Willis Commission Report was published and delivered to Congress in 1965, it should have been a reminder that Public Law 86-272 was meant to be temporary legislation regulating state income taxation of interstate commerce.[72] The Report's thorough and detailed examination of the issue was now before it and the responsibility was now Congress's to use the knowledge created in the study to enact well-considered legislation. It should have also been a reminder that *Scripto* was the last word on a state's ability to reach out-of-state vendors to compel them to collect their sales and use tax. Even in the 1960s, Congress should have known that interstate commerce would only increase with the advent of technology and innovation, even if from that limited perspective, it was only through the proliferation of mail order catalogs. Congress should have been aware that only responsive

[67] *Northwestern Cement*, 358 U.S. at 476 (Frankfurter, J., dissenting).
[68] *Id*
[69] *Id.*
[70] *See Quill*, 504 U.S. at 318.
[71] *Id.*
[72] H.R. REP. NO. 88-1480, pt. 1, at 8.

legislation could appropriately allocate burdens on interstate commerce related to the sales and use tax question. Yet Congress failed to act.

Perhaps more than some of the blame for that failure, however, rests with the Supreme Court. With the ink still wet on printed copies of the Willis Commission Report, the Supreme Court granted cert in *National Bellas Hess*.[73] The facts in *Bellas Hess* were substantially similar to the facts in *Scripto*.[74] Perhaps members of Congress viewed the prospect of Supreme Court resolution as a promising alternative to the political fallout that could follow legislation responsive to the Willis Committee Report. If nothing else, the Supreme Court taking up *Bellas Hess* when it did seems to have deflated the Report's momentum beyond any redeemable prospect. The Willis Committee Report was reduced to a historical legal curiosity, rather than serving as the basis for affirmative legislation addressing the complex question of setting parameters with respect to how far the States' powers to tax extend, if they don't end at the state's borders.

In *Bellas Hess*, the border in question separated Missouri and Illinois, and it was Illinois compelling a Missouri vendor engaged in interstate commerce to collect and pay its use tax.[75] For Illinois, this was understandable; the State was employing the permission granted in *Scripto* to impose use tax collection obligations, even on out-of-state vendors, if their interstate commerce involved sales to Illinois customers.[76] National Bellas Hess was a mail order catalog based in Kansas City, Missouri, that objected to Illinois's imposition of a collection duty. Its contacts with Illinois were limited to "mail or common carrier."[77] It sent catalogs to previous and current Illinois customers and supplemented with occasional promotional flyers.[78] Orders were submitted through mail and fulfilled either by mail or common carrier.[79] It

[73] The Willis Commission Report was published on September 2, 1965. Willis Commission Report, *supra* note 24, at I. The specific date on which the Supreme Court granted certiorari in *Bellas Hess* is unavailable, but the Court heard the case during the 1966–1967 term, and therefore likely granted cert during the previous term, either right before or within months after the publication of the Willis Commission Report.

[74] In *Scripto,* Florida required a Georgia corporation to collect use tax on the sale of mechanical writing instruments to Floridian customers. *Scripto*, 362 U.S. at 207–08. In *Bellas Hess*, Illinois required a Delaware corporation with its principal place of business in Missouri to collect use tax on sales to Illinois customers. *Bellas Hess*, 386 U.S. at 753–54. In *Scripto,* the Georgia corporation owned no property and deployed no employees or agents in Florida. *Scripto*, 362 U.S. at 209. Sales were consummated through commission-based independent contractors—"wholesalers, jobbers, or salesmen." *Id.* at 211. In *Bellas Hess*, the out-of-state corporation neither owned nor leased property in Illinois and had no employees there. *Bellas Hess*, 386 U.S. at 754. In contrast to *Scripto*, rather than independent contractors representing the out-of-state seller on the ground in Illinois, transactions were made via catalog orders and delivered through common carrier. *Id.* at 755.

[75] *Bellas Hess*, 386 U.S. at 754.

[76] *See Scripto*, 362 U.S. at 212.

[77] *Bellas Hess*, 386 U.S. at 754.

[78] *Id.*

[79] *Id.* at 754–55.

seems likely that National Bellas Hess could see the prospects for a mail order catalog were grim if it was required to collect use tax on sales to customers in any one of Illinois's 102 counties,[80] each potentially imposing a different county-level rate. The more salient point, however, was almost surely that National Bellas Hess stood subject to a fine of up to $5,000 and imprisonment for up to six months for failure to collect, pay, issue a receipt, and keep records as Illinois law required.[81]

Front and center again were the Due Process Clause of the Fourteenth Amendment and the Commerce Clause. Yet, the Court's first point of analysis—that the two clauses are "closely related" and compliance requirements with respect to either are "similar"—set an uncertain tone for the rest of the opinion.[82] Throughout the commingled analysis, the Court never clarifies outright which of the two constitutional provisions is dispositive to the result.

The result, however, was abundantly clear: Illinois was constitutionally impaired from compelling National Bellas Hess to collect its use tax. The Court, however, short of overruling *Scripto*, considered it distinguishable on its facts from *Bellas Hess*, on the basis of physical presence. While the Georgia retailer in *Scripto* had "wholesalers, jobbers, or 'salesmen'[83] conducting continuous local solicitation in Florida," National Bellas Hess had no employees and owned no property in Illinois.[84] Thus, while the Court considered *Scripto* to represent "the furthest constitutional reach to date of a State's power to deputize an out-of-state retailer as its collection agent for a use tax,"[85] it ultimately found it to be as far as that reach should extend. For an out-of-state vendor like National Bellas Hess, "whose only connection with customers in the State is by common carrier or the United States mail,"[86] the Constitution could not support the assertion of taxing jurisdiction.

Bellas Hess then emerged as a counterbalance to *Scripto*: if an out-of-state vendor sent employees into a state or owned real or personal property (*e.g.*, inventory) there, the vendor should be prepared to collect use tax on sales to the state's residents. If, however, the out-of-state vendor's interstate activity was carried on from afar without creating physical presence in the state, it was protected under the Constitution from being subject to a collection duty with respect to the state's sales and use tax. *Bellas Hess* was dissatisfying, however,

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[80] *Illinois Counties*, ILL. ASS'N OF CNTY. BD. MEMBERS, last accessed Sept. 3, 2022, https://ilcounty.org/resources/illinois-counties#:~:text=There%20are%20102%20counties%20in%20the%20State%20of%20Illinois [https://perma.cc/VQP7-CVL3].

[81] *Bellas Hess*, 386 U.S. at 755.

[82] *Id.* at 756.

[83] *Id.* at 757.

[84] *Id.* at 764 (Fortas, J., dissenting).

[85] *Id.* at 757 (majority opinion).

[86] *Id.* at 758.

in that it failed to clarify which or if both, the Due Process Clause and/or the Commerce Clause, drove the result. That uncertainty kept SALT lawyers gainfully employed in state tax controversy work over the next 25 years until the Supreme Court, perhaps seeing an opportunity to brighten the muddy waters, agreed to hear the case of *Quill Corp. v. North Dakota*.

B. *Quill Corp. v. North Dakota*

The term "indistinguishable" is often used hyperbolically in legal arguments to suggest that the outcome in a case should and can only follow a preceding case. In some situations, though, it is the only appropriate term to fairly and accurately portray one case relative to another. With respect to the operative facts in *National Bellas Hess* and *Quill*, the cases are indistinguishable.

Both cases involved mail order houses that relied heavily on the proliferation of catalogs to drive business.[87] Both mail order houses came under fire for failing to collect another state's sales and use tax with which contacts were limited to promotional and fulfillment activities.[88] The mail order houses sent catalogs and other promotional materials to current and potential customers,[89] and when customers placed orders, both mail order houses fulfilled the orders through the United States mail or common carrier.[90] Neither mail order house owned any real or personal property in the states compelling a collection duty.[91] Neither mail order house sent employees to either solicit sales or deliver goods to customers in the taxing state.[92]

The respective state laws differed by degrees but were comparably heavy-handed and far-reaching. In addition to compelling collection of its sales and use tax, in *Bellas Hess*, Illinois imposed record keeping and production requirements on out-of-state vendors like National Bellas Hess and subjected them to audit investigation.[93] Out-of-state vendors that failed to abide by these measures stood subject to a fine of up to $5,000 and imprisonment of six months.[94]

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[87] Quill sold office equipment and supplies, with national sales of around $200 million, $1 million of which was derived from about 3,000 North Dakotan customers. *Quill*, 504 U.S. at 302. National Bellas Hess sold consumer retail goods, but relevant sales figures nationwide and to Illinois customers were not included in the facts of the case.

[88] *See Quill*, 504 U.S. at 303 and *Bellas Hess*, 386 U.S. at 754.

[89] Quill also placed advertisements in national periodicals, some of which were surely read in North Dakota, and made telephone calls to North Dakota residents. *Quill*, 504 U.S. at 302.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Bellas Hess*, 386 U.S. at 755.

[94] *Id.*

North Dakota's sales and use tax collection statute, at issue in *Quill*, was innocuous on its face (or at least vague enough so as to not blatantly reach any out-of-state business selling tangible personal property to North Dakota residents), but as severe in its application as the Illinois statute. It imposed a sales and use tax collection responsibility on any "'retailer maintaining a place of business in' the State."[95] The statute further defined "retailer" to include "every person who engages in regular or systematic solicitation of a consumer market in the state."[96] State regulations aggressively defined "regular or systematic solicitation" as contacts with the state that barely registered as a blip in the flow of interstate commerce: three or more advertisements within a 12-month period.[97] As little as three ads appearing in a given year in *Newsweek* magazine (which surely had subscribers in North Dakota) would render an out-of-state vendor a "retailer" under the North Dakota statute.[98]

Why, then, would the Court agree to hear *Quill*, when it had already ruled on substantially similar facts in *Bellas Hess*? Part of the answer to that question exists in the procedural history. The North Dakota Supreme Court[99] boldly overruled the trial court's decision in favor of Quill, which found the facts indistinguishable from *Bellas Hess*. The North Dakota Supreme Court considered *Bellas Hess* antiquated and out of step with what the law ought to be given the passage of time. For the state's highest court, wholesale changes to the economy and the law made it inappropriate to follow *Bellas Hess*.[100] Thus, the court cited changes to the economy in the form of "the remarkable growth of the mail order business"[101] to "a goliath"[102] with billions in sales revenue as justification for reversing the lower state court.[103] Given the advancements in computer technology, surely an out-of-state vendor's burden to comply with the "welter of complicated obligations"[104] referenced in *Bellas Hess* would be greatly eased. Moreover, interceding changes in the law had taken place when the Court handed down *Complete Auto Transit, Inc. v. Brady*,[105] which set out the modern-day Commerce Clause analysis for measuring the viability of a state tax law. Apparently, the North Dakota Supreme Court considered *Complete Auto Transit* to be so all-encompassing as to have implicitly overruled *Bellas Hess*—or at least to have eroded completely the foundational basis on which *Bellas Hess* was decided. The

[95] *Quill*, 504 U.S. at 302.
[96] *Id.* at 302–03.
[97] N.D. ADMIN. CODE § 81-04.1-01-03.1 (Supp. 1991).
[98] *Quill*, 504 U.S. at 302–03.
[99] Heitkamp v. Quill Corp., 470 N.W.2d 203 (N.D. 1991).
[100] *Id.* at 213.
[101] *Quill*, 504 U.S. at 303.
[102] *Id.*
[103] *Id.*
[104] *Id.* (citing *Heitkamp*, 470 N.W.2d at 215) (quoting *Bellas Hess*, 386 U.S. at 759–60).
[105] 430 U.S. 274 (1977).

North Dakota Supreme Court apparently concluded it had no other option but to dismiss as outdated controlling Supreme Court precedent in *Bellas Hess* and commandeer the question in favor of the State of its own accord.

The North Dakota Supreme Court's presumptive analysis notwithstanding, the Supreme Court may have otherwise welcomed the opportunity to revisit the facts from *Bellas Hess* with an eye towards clarification. A quarter of a century had passed with state courts struggling to clearly understand the dispositive constitutional provision in *Bellas Hess*. Was it the Commerce Clause, the Due Process Clause, or both that supported the physical presence rule?

1. *The Due Process Clause*

Justice Stevens, writing for the majority in *Quill*, began where *Bellas Hess* did: an acknowledgement that the Due Process Clause and Commerce Clause constraints on a State's power to tax are "closely related."[106] Yet in the same sentence, he quickly dispelled any notion that may have lingered from *Bellas Hess's* commingled analysis that the two clauses are equivalent: to the contrary, they pose "distinct limits on the taxing powers of the States."[107] He expanded on this clarification from *Bellas Hess* to foreshadow the result: that a state's tax law may well be "consistent with the Due Process Clause" yet "may nonetheless violate the Commerce Clause."[108]

With that preface, Justice Stevens turned to an isolated (and 25 years overdue) analysis of due process, free of concurrent Commerce Clause discussion. He began with first principles: "The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'"[109] He implied that the Court's interpretation of this provision in relation to use taxes had not always been clear. Going back to the headwaters of confusion, he highlighted the starkest and most evident distinction between *Scripto* and *Bellas Hess*: physical presence.[110] The out-of-state retailer in *Scripto* had it; National Bellas Hess did not. He further acknowledged that *Bellas Hess* suggested that "such presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary."[111]

In the intervening 25 years between *Bellas Hess* and *Quill*, key aspects of due process were built on the foundation of *International Shoe Co. v. Washington*.[112] The Court's decisions in *Burger King Corp. v. Rudzewicz*[113]

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[106] *Quill*, 504 U.S. at 305.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 306 (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954)).
[110] *Id.* at 306–07.
[111] *Id.* at 307.
[112] 326 U.S. 310 (1945).
[113] 471 U.S. 462 (1985).

and *Shaffer v. Heitner*[114] introduced touchstones, explanations, and elaborations on the question of minimum contacts, and for Justice Stevens, represented a fundamental positive shift in understanding.[115] Key concepts related to how far beyond its jurisdictional borders due process would allow a state to reach were pronounced. A state was now bound not by its geographic limits but by the "traditional notions of fair play and substantial justice."[116] Purposeful availment[117] of the state's market, such that an out-of-stater has "fair warning"[118] that access to the state comes with a jurisdictional price, was now the standard under which a state jurisdictional law would be scrutinized under the Due Process Clause.

For Justice Stevens, through this more polished lens, an out-of-stater could interact deeply enough with a state to purposefully avail itself of the benefits of the state's market and thereby have fair warning of being subject to the state's taxing jurisdiction, all without offending the traditional notions of fair play and substantial justice, without having a physical presence in the state.[119] In a somewhat cursory disavowal of any prior decision of the Court suggesting otherwise, Justice Stevens made clear that an out-of-stater's physical presence was not a prerequisite to due process nexus for purposes of collecting a use tax.[120]

Following *Quill*, some commentators interpreted this important clarifying point to suggest that if the Due Process Clause offers any protection to out-of-state retailers from a use tax collection responsibility, it is cursory, formalistic, and easily satisfied.[121] This deflation of the Due Process Clause fails to separate the clarified law in *Quill* from its application to the facts.

Justice Stephens made clear that even though the Due Process Clause did not require physical presence, the state must nevertheless show that (1) the out-of-state retailer "purposefully directed" its activities to North Dakota, and, critically, (2) "that the magnitude of those contacts"[122] is sufficient to satisfy due process. The magnitude of Quill's contacts with North Dakota was substantial (almost $1 million in sales revenues to 3,000 customers in the state).[123] This was "more than sufficient" for Justice Stevens to find due

[114] 433 U.S. 186 (1977).
[115] *Quill*, 504 U.S. at 307.
[116] *Id.* (quoting *International Shoe*, 326 U.S. at 316).
[117] *Id.*
[118] *Id.* at 308.
[119] *See id.*
[120] *Id.*
[121] *See e.g.*, H. Beau Baez III, *The Rush to the Goblin Market: The Blurring of* Quill's *Two Nexus Tests*, 29 SEATTLE U. L. REV. 581, 608 (2006). *But see* Michael T. Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, 55 SANTA CLARA L. REV. 565 (2015); Hayes R. Holderness, *Taking Tax Due Process Seriously: The Give and Take of State Taxation*, 20 FLA. TAX REV. 371 (2017).
[122] *Quill*, 504 U.S. at 308.
[123] *Id.* at 302.

process satisfied.[124] Yet it is critical to note that this result was only straightforward as applied to the facts in *Quill* and not indicative of a weak due process standard.

What if, rather than selling office supplies, Quill Corp. sold high-end commercial copy machines for office use? In the period in question, suppose Quill Corp. sold four copy machines to North Dakota residents for a total of $25,000 in sales revenue. This magnitude of contacts creates a much cloudier picture under a due process analysis. Are four sales enough to satisfy minimum contacts? Perhaps, but the question would have to be carefully considered. The example illustrates that the Due Process Clause, its easy reconciliation in *Quill* notwithstanding, still has teeth. Moreover, because *Wayfair* dealt only with the Commerce Clause, this element of *Quill* should remain operative good law after 2018 and should continue to represent current due process scrutiny in the sales and use tax context.

2. *The Commerce Clause*

The dormant Commerce Clause is a settled, but not uncontroversial, judicial doctrine. Justice Clarence Thomas, from a textual perspective,[125] denies its existence, yet the Supreme Court has frequently confirmed its force as a doctrine when Congress has not exercised its plenary power to regulate commerce.[126] Even so, the "negative sweep" of the Commerce Clause seems to leave the Court in a never-ending quest to define, justify, and articulate the breadth and scope of the doctrine. The balm that often soothes any lingering apprehension for the Court and eases a path towards comprehensive use of the dormant Commerce Clause is the prospect of absolution: if Congress does not agree with the Court's analysis, it can effect legislation to overrule it.[127]

It was on this exculpatory note that Justice Stephens concluded the majority opinion in *Quill*, with what was tantamount to an invitation to Congress to regulate interstate commerce in the context of use tax collection

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[124] *Id.* at 308.

[125] Bishop-Henchman highlights Justice Thomas's and Justice Scalia's distinct but similarly skeptical dissents to the Court's use of the dormant Commerce Clause to overturn state taxes. Joseph Bishop-Henchman, *The History of Internet Sales Taxes from 1789 to the Present Day*: South Dakota v. Wayfair, 2018 CATO SUP. CT. REV. 269, 278 (2018). He notes that Justice Thomas is on the record classifying the dormant Commerce Clause as an "exercise of judicial power in an area for which there is no textual basis." *Id.* (citing Camps Newfound/Owatanna, Inc. v. Harrison, 520 U.S. 564, 618 (1997) (Thomas, J., dissenting)). Henchman further recognizes Justice Scalia's contention the dormant Commerce Clause as a legal doctrine far afield from "interpreting a legal text, discerning a legal tradition, or even applying a stable body of precedents. It instead requires us to balance the needs of commerce against the needs of state governments. That is a task for legislators, not judges." *Id.* (quoting Comptroller of Treasury of Maryland v. Wynne, 575 U.S. 542, 577 135 (2015) (Scalia, J., dissenting)).

[126] *Quill*, 504 U.S. at 305.

[127] *Id.* at 318.

on remote sales.[128] Yet there was much more to upholding *Bellas Hess's* physical presence rule than maintaining the *status quo* until Congress saw fit to intervene.

The physical presence rule from *Bellas Hess* was justified in *Quill* on: (1) principles of *stare decisis*[129] and (2) the utility of a "bright-line" test, with considerable discussion of the latter.[130] Justice Stevens balanced the costs and benefits of physical presence as a bright-line rule and found the benefits to substantially outweigh the costs.[131] To be sure, a bright-line rule implies inflexible and constrained analysis, "artificial at its edges,"[132] but these costs were "more than offset by the benefits of a clear rule."[133] As benefits, Justice Stevens cited the prospect of a rule that "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes."[134] This seems to have been of particular importance to Justice Stevens, conscious of treading lightly on ground the Constitution apportions to Congress.[135] Firm and clear boundaries, Justice Stevens concluded, would help alleviate the "quagmire"[136] created through judicial intervention. It could then be left to Congress to regulate with deliberate and well-considered policy.

To further the case for the bright-line physical presence rule, Justice Stevens noted the benefit of "settled expectations"[137] in the marketplace. He suggested, moreover, that the growth in the mail order retail industry was likely not directly attributable to the physical presence rule.[138]

This analysis was strengthened by *stare decisis* because the Court had frequently relied on *Bellas Hess*'s physical presence rule without intimating that the decision was in any way "unsound."[139] This, coupled with industry reliance and the "stability and orderly development of the law" prompted the Court to retain the physical presence rule.[140]

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[128] *Id.*

[129] *Id.* at 317.

[130] *Id.*

[131] *Id.* at 315.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] As a general matter, this is probably still the right approach: it is almost certainly better for the Judiciary to deal in absolutes to the extent it can under the dormant Commerce Clause, and let Congress sort out the details and nuance.

[136] *Quill*, 504 U.S. at 315.

[137] *Id.* at 316.

[138] *Id.* Applying this point in a modern context, was it really the lack of sales and use tax that drove the online marketplace's growth during the 2000s and 2010s? In reality, with all but big-ticket items like furniture and electronics, wasn't the lack of use tax a slight bonus at the end of the transaction? Didn't aspects such as competitive pricing, convenience, and quick delivery play the primary role in the proliferation of e-commerce? It is not as if the malls all sprang back to life when *Wayfair* was handed down.

[139] *Id.* at 317.

[140] *Id.* (quoting Runyon v. McCrary, 427 U.S. 160, 190 (1976) (Stevens, J., concurring)).

As noted above, the Court's role as intermediate, but not final, arbiter of this question gave Justice Stevens considerable reassurance. He highlighted the clear and immediate benefit of *Quill's* bifurcated analysis.[141] If Congress did not previously respond to *Bellas Hess* because it was unclear whether the Due Process Clause or the Commerce Clause undergirded the physical presence rule, that question was now resolved under *Quill*. To paraphrase Justice Stevens with some slight liberties: we have done the best we can do with the tools we have. We cannot hold hearings, draft legislation, or flesh out this issue, but Congress, you can! You are free to disagree with and change the conclusions we have reached, and you are much better qualified to do it. With confirmation that whether and, under what circumstances, States could require sales tax collection by remote sellers is a Commerce Clause question, not a due process question, we invite you to now decide how and to what extent states can burden interstate commerce with a use tax collection duty (and we won't second-guess that assessment). This is an area where your judgment, not ours, carries the day and matters most. Now go and do it!

IV. *The Period Between* Quill *and* Wayfair

A. *The States Attempt to Self-Regulate*

Pre-*Wayfair*, footnote six in *Quill*[142] held a certain level of notoriety in the SALT world and garnered some scholarly attention unto itself.[143] It justified the existence of the physical presence rule, its shortcomings notwithstanding, with devastating conciseness. Justice Stevens used North Dakota's statute as an example and projected the result if all states enacted similar legislation. Without the physical presence rule, "a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection duty."[144] If the Nation's (then existing) 6,000-plus taxing jurisdictions enacted similar legislation, the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [a mail order house] in a virtual welter of complicated obligations."[145]

To be sure, state lawmakers were not happy with the result in *Quill*, but Justice Stevens's point was valid: states (and their localities) had shirked interstate uniformity in favor of politically viable and administratively feasible

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[141] *Id.* Antagonistically, Richard Pomp considers *Quill's* bifurcated analysis to be "a political decision, intellectually dishonest, and unworthy of great precedential value." Richard D. Pomp, *Revisiting* Miller Brothers, Bellas Hess, *and* Quill, 65 AM. UNIV. L. REV. 1115, 1121 (2016).

[142] *Quill*, 504 U.S. at 313, n.6.

[143] *See e.g.*, Thimmesch, *supra* note 16, at 363.

[144] *Quill*, 504 U.S. at 313, n.6.

[145] *Id.* (quoting *Bellas Hess*, 386 U.S. at 759–60) (alteration in original).

(from an intrastate perspective) sales and use tax collection laws. The burden this variability imposed on interstate commerce and the constitutional questions it raised seemed to come into focus only retrospectively.

All this should be considered in light of the fact that *Quill* was handed down in 1992, just a few years before the first secure online transaction (1994)[146] and the advent of an online marketplace (1995).[147] Even if States were discontent with the result in *Quill*, only over time did they realize the full effect of the physical presence rule's survival. For much of the late 1990s, states ruminated as transactions were effected with increased frequency and magnitude through the burgeoning online marketplace without corresponding use tax collection.

For some states, footnote six in *Quill*, while spelling out the problem, may also have implied the solution. The narrative was this: the time to wait for Congress to respond to the Supreme Court's invitation in *Quill* to regulate the collection of sales and use tax on Internet transactions was passed. An affirmative state response with the goal of unwinding the "welter of complicated obligations"[148] was necessary. Thus, in 2000, the National Governors Association and the National Conference of State Legislatures created the Streamlined Sales and Use Tax Project.[149]

The Streamlined Sales and Use Tax Project's goal was to "find solutions for the complexity in state sales tax systems."[150] The result of their work was the Streamlined Sales and Use Tax Agreement (SSUTA), whose purpose was to "simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden on tax compliance."[151]

The SSUTA's intent was to improve

> sales and use tax administration systems for all sellers and for all types of commerce through all of the following: [s]tate level administration of sales and use tax collections; [u]niformity in the state and local tax bases; [u]niformity of major tax base definitions; [c]entral, electronic registration system [for all member states]; [s]implification of state and local tax rates; [u]niform sourcing rules for all taxable transactions; [s]implified

[146] *A Brief History of Ecommerce (and a Look at the Future)*, FULFILLMENT LAB, last accessed Sept. 3, 2022, https://www.thefulfillmentlab.com/blog/history-of-ecommerce [https://perma.cc/8SNR-A93K].

[147] *Id.*

[148] *Quill*, 504 U.S. at 313, n.6.

[149] *About Us*, *supra* note 28.

[150] *About Us, supra* note 28.

[151] STREAMLINED SALES AND USE TAX AGREEMENT § 102 (2002) (amended 2021), https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-through-2021-3-5.pdf?sfvrsn=ed0c7978_7 [https://perma.cc/K9ZR-LG52].

> administration of exemptions; [s]implified tax returns; [s]implification of tax remittances; [and p]rotection of consumer privacy.[152]

With uniformity and broad-based simplification among the states, the concerns cited in footnote six would ostensibly fade and online retailers could have no constitutional complaint about burdens associated with collecting another state's use tax.

The SSUTA's prospect of a voluntary self-corrected solution, however, has stagnated. Only twenty-four[153] of the forty-five sales and use tax collecting states have passed conforming legislation, and not a single state has joined since 2014.[154] Even as the online marketplace threatened to subsume local brick-and-mortar businesses, leave malls vacant, and otherwise undermine state and local economies, nearly half of all sales and use tax collecting states—representing well over sixty percent of the population—were unwilling to acquiesce to a system of uniformity and simplification.

B. *A Federal Solution: Its Prospects and Demise*

In their 2005 article providing a history and status report on streamlining among the States, Swain and Hellerstein noted that while the SSUTA was "designed to stand on its own,"[155] there was a general consensus that the SSUTA framework, to whatever extent conformity was achieved, should be "reinforced by federal legislation formally granting states that have conformed to SSUTA the authority to impose a use tax collection obligation on remote sellers."[156] When their paper was published, legislation was pending to this effect in Congress during the 108th congressional session (2003–2004).[157] From that point on, a bill was proposed in each session of Congress with intent to regulate the collection of use tax in interstate commerce, until *Wayfair* was handed down in 2018.[158]

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[152] *Id.*

[153] *State Information*, *supra* note 30. Twenty-three states are full member states and Tennessee is an Associate Member State. *Id.* An Associate Member State is a state that has achieved substantial compliance with the terms of the Agreement, but not necessarily with each provision as required by the SSUTA. *Id.*

[154] Michael J. Bologna, *Large States Remain Cynical About Streamlined Sales Tax Pact*, BLOOMBERG TAX, Jan. 18, 2019, https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report-state/X2V5KUHK000000?bna_news_filter=daily-tax-report-state#jcite [https://perma.cc/XUY2-5HVA].

[155] John A. Swain & Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, 58 NAT'L TAX J. 605, 612 (2005).

[156] *Id.*

[157] Streamlined Sales and Use Tax Act, H.R. 3184 (S.1736), 108th Cong. (2003).

[158] Sales Tax Fairness and Simplification Act, S. 2152, 109th Cong. (2005); Sales Tax Fairness and Simplification Act, S. 34 (H.R. 3396), 110th Cong. (2007); Main Street Fairness Act, H.R.

Of all the proposed bills, the Marketplace Fairness Act of 2013 came the closest to becoming law. It passed the Democrat-controlled Senate with a bipartisan supermajority on May 6, 2013.[159] From there, the press and anti-any-tax political pundits did their best to obfuscate and mislead with respect to the true nature of the legislation. Phrases like "internet sales tax"[160] and "expansion of state tax authority"[161] misled many to believe this was a new tax cut out of whole cloth rather than an enforcement mechanism to collect a tax that was already due. Ultimately, the Marketplace Fairness Act was introduced in the Republican-controlled House, was assigned to committee,[162] and died.

Fifteen months after the conclusion of the 2013 congressional session, with the Marketplace Fairness Act of 2015[163] introduced in the Senate and the comparable, though distinct,[164] Remote Transactions Parity Act of 2015[165] pending in the House, Justice Kennedy intervened. Though the state law at issue in *Direct Marketing Ass'n v. Brohl* sought to promote, albeit indirectly, sales and use tax collection on remote sales, the question before the

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5660, 111th Cong. (2010); Marketplace Fairness Act, S. 1832 (H.R. 2701), 112th Cong. (2011); Marketplace Fairness Act of 2013, S. 743 (H.R. 684), 113th Cong. (2013); Marketplace Fairness and Internet Tax Fairness Act, S. 2609, 113th Cong. (2013); Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015); Remote Transactions Parity Act of 2015, H.R. 2775, 115th Cong. (2015); Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017).

[159] Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013). Yea-Nay Vote 69-27. 159 CONG. REC. 6184 (2013).

[160] *See e.g.*, Champagne, *supra* note 32.

[161] *See e.g.*, *CEI Slams Senate Vote on Marketplace Fairness Act*, STATES NEWS SERVICE, May 6, 2013, *available at* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:58C2-D6G1-DYTH-G2F4-00000-00&context=1516831 [https://perma.cc/WFC7-7FKT].

[162] *Actions-S.743-113th Congress (2013-2014): Marketplace Fairness Act of 2013*, last accessed Sept. 4, 2022, https://www.congress.gov/bill/113th-congress/senate-bill/743/all-actions?q=%7B%22search%22%3A%5B%22marketplace+fairness%22%5D%7D&s=5&r=4&overview=closed#tabs [https://perma.cc/MMX4-7JJ5] (showing that on June 14, 2013, S. 743 was "Referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law.")

[163] Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015).

[164] The Marketplace Fairness Act of 2015 and the Remote Transactions Parity Act of 2015 were complementary bills with substantially similar goals of federally compelled simplification and uniformity among the states with respect to use tax collection. Both bills compelled states that had not signed on to the Streamlined Sales and Use Tax Agreement to adhere to a basic system of simplification and unifying measures. The primary distinction between the two bills existed in divergent small seller protections. The small seller exception was triggered indefinitely for remote sellers with less than $1 million annual sales under the Marketplace Fairness Act, the Remote Transactions Parity Act phased in the exemption from $10 million in the first year, to $5 million in the second year, and $1 million in the third year. *See* Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2(c) (2015); Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. § 2(c)(1) (2015). In the fourth year and after, the small seller exception ceased. For broader discussion, *see* Smith, *supra* note 32, at 4, n.12.

[165] Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. (2015).

Supreme Court was one of federal court jurisdiction: whether a trade association's suit against Colorado challenging the State's notice and reporting statute[166] was permissible in federal court under the Tax Injunction Act.[167] The Supreme Court ultimately found that the suit was properly filed in federal district court, but made abundantly clear that the merits of the Colorado notice and reporting law were not at issue, much less *Quill's* physical presence rule.[168]

As discussed above, this was no deterrent to Justice Kennedy, whose concurring opinion went well beyond anything to do with the Tax Injunction Act. As an initial matter, Justice Kennedy's concurring opinion must stand in sparse company as a jurisprudential historical anomaly. The instances must be few in which a sitting justice invites reconsideration of a case, labeling it "questionable even when decided," where the Justice issuing the invitation sided with the majority in the decision called into question. As noted in the introduction to this paper, Justice Kennedy was one of the eight Justices that decided to uphold *Quill*.

Justice Kennedy attempted to differentiate himself as a reluctant participant, however, and quickly pointed out that he joined Justice Scalia's concurring opinion in *Quill*, claiming only to have voted to uphold *Bellas Hess* "based on *stare decisis* alone."[169] As will be discussed at length below, this statement sells short Justice Scalia's rationale for upholding the physical presence rule in *Quill* and represents the first of multiple instances between his concurring opinion in *Direct Marketing* and his majority opinion in *Wayfair,* in which Justice Kennedy glosses over critical facts in an attempt to either exculpate himself for his vote in *Quill* or justify the abandonment of the physical presence rule.

To be sure, Justice Scalia couched his concurring opinion in *Quill* in *stare decisis,* but not as the doctrine of precedent in the abstract, but rather its particular application where Congress has final say over the question and

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[166] Colorado's notice and reporting law sets three requirements of out-of-state sellers who do not collect sales and use tax on transactions with Colorado residents. (1) They must give notice, on a transaction-by-transaction basis, to Colorado residents, that sales and use tax is due; (2) They must provide an annual notice to Colorado customers, summarizing purchases for the preceding calendar year; and (3) They must file a report with the Colorado Department of Revenue providing details of each purchase, the Colorado customer's contact information, and the total dollar amount of the purchases. COLO. REV. STAT. § 39-21-112(3.5)(d)(I)-(II) (2021). A regulatory safe harbor exists for out-of-state sellers with relatively low levels of Colorado business activity. If the out-of-state vendor's total gross sales in Colorado are less than $100,000 in the prior calendar year, and the retailer reasonably expects total gross sales in the current year to be less than $100,000, then the retailer is exempt from the notice and reporting rules. COLO. CODE REGS. § 39-26-102(3)(3) (2020).

[167] *Direct Marketing*, 575 U.S. at 7.

[168] *Id.* at 16.

[169] *Id.* at 17 (Kennedy, J., concurring).

substantial "reliance interests" are involved.[170] *Bellas Hess*'s rule was at all times subject to Congress's prerogative based on its plenary power to regulate commerce—it could change the rule "by simply saying so."[171] Thus, for Justice Scalia, *stare decisis* carried "special force"[172] beyond even its usual high level of deference. This, combined with the substantial reliance interests involved among actors in interstate commerce, set the demands of the doctrine of *stare decisis* "at their acme" under the facts of *Quill*.[173]

Justice Kennedy's suggestion that joining Justice Scalia's concurring opinion amounted to a qualified and less willing acceptance of the result in *Quill* is misleading. For Justice Scalia, *Quill* was easier than for the rest of the majority, and his decision concurring in the judgment even more forthright. He would not have revisited the facts of *Bellas Hess* through *Quill* from a Commerce Clause perspective and did not join in that section of the opinion because[174] he was perfectly content to let *Bellas Hess* survive on the doctrine of *stare decisis* alone. He had real concerns about the Court's credibility; that the public should be able to take the Supreme Court at its word.[175] He also considered it perfectly unreasonable to expect private parties to anticipate the Court's overrulings.[176] In the context of a "square, unabandoned holding of the Supreme Court" there should be no measuring of whether reliance on the existing doctrine was justified under the circumstances—it always is.[177] Thus, Justice Kennedy's attempt to absolve himself from his vote with the majority in *Quill* aligns him with Justice Scalia's position that the Supreme Court should have nothing more to say with respect to *Bellas Hess's* physical presence requirement and should let Congress exercise its constitutional power to regulate commerce. This is ironic given the rest of Justice Kennedy's concurring opinion, which concludes with a call to the "legal system" [read: the States] to "find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[178] That call willfully disregards the constitutional text that makes this ultimately Congress's issue to rectify, not the Court's.

Justice Kennedy's invitation was prefaced by the basic tenets of the states' argument against *Quill* since inception, though their force seemed stronger spilling from the pen of a Supreme Court Justice, even if in a concurrence (where their airing had no direct significance to the decision, given how far removed Justice Kennedy was from the actual question before the court in *Direct Marketing*). In addition to his suggestion that *stare decisis* primarily

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[170] Quill, 504 U.S. at 320 (Scalia, J., concurring).
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.* at 321.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Direct Marketing*, 575 U.S. at 18-19 (Kennedy, J., concurring).

drove the outcome in *Quill*, Justice Kennedy framed his call around two aspects of the modern marketplace: (1) technology had caused "far-reaching systemic and structural changes in the economy"[179] precipitated by the online marketplace's growth well beyond what could have been expected in 1992, and (2) technology had developed with such rapidity that surely it could not be overly burdensome for out-of-state retailers to comply with a use tax collection obligation.[180] For Justice Kennedy, these factors, considered alongside substantial foregone State revenues, made it clear that it was "unwise to delay any longer a reconsideration of the Court's holding in *Quill* [and *Bellas Hess*]."[181]

Taken as a whole, Justice Kennedy's concurring opinion in *Direct Marketing* was more an editorial on the state of the law related to use tax collection in interstate commerce than a separate rationale for the result. Much more significantly, it was notice to the States and Congress that they were both potentially off the hook. Congress need not worry about pending legislation that would regulate use tax collection and compel basic levels of uniformity and simplification among the states, because Justice Kennedy was mounting an effort to judicially remove the physical presence rule. Similarly, states need not worry about voluntary simplification and uniformity through the SSUTA because Justice Kennedy might remove the handcuffs without sacrifice and without compromise. What had only been a wish for so many years—having the best of both worlds: compelling use tax collection on interstate commerce and maintaining disjointed and burdensome use tax collection laws—might just come true.

V. South Dakota v. Wayfair, Inc.

A. *Echoes of* Heitkamp v. Quill

The only person happier than state officials with the result in *Wayfair* may have been Justice Gerald W. VandeWalle, who at 89 years old, is the oldest and longest sitting Justice on the North Dakota Supreme Court.[182] In 1991, Justice VandeWalle wrote for a unanimous North Dakota Supreme Court in *Heitkamp v. Quill Corp.*,[183] the case giving rise to *Quill v. North Dakota*, which (it has to be said, somewhat brazenly) announced the demise of *Bellas Hess*'s physical presence rule, only to have the ruling overturned 8–1 by the Supreme Court. Yet, *Wayfair* delivered vindication to Justice VandeWalle and marked him as perhaps the only member of an exclusive club of state

[179] *Id.* at 18.
[180] *Id.*
[181] *Id.*
[182] *Gerald W. VandeWalle*, STATE OF NORTH DAKOTA COURTS, last accessed Sept. 4, 2022, https://www.ndcourts.gov/supreme-court/justices/geraldwvandewalle [https://perma.cc/8MXQ-ZFEJ].
[183] 470 N.W.2d 203 (N.D. 1991).

supreme court justices who have lived long enough to see a decision they authored reversed by the U.S. Supreme Court and subsequently effectively reinstated decades later.

It is not overstating the point to say that Justice Kennedy's opinion in *Wayfair*, though novel in some respects, repeated many of the same arguments that Justice VandeWalle made in his opinion in 1991. Indeed, it is difficult to determine whether various passages from each opinion appeared in *Wayfair* in 2018 or *Heitkamp v. Quill* in 1991.[184]

From his position on a state supreme court in 1991, Justice VandeWalde was obliged, in order to justify effectively ignoring Supreme Court precedent, to build an argument of implied overruling. His raw material was over a decade's worth of Commerce Clause jurisprudence, beginning with *Complete Auto Transit, Inc. v. Brady*,[185] the 1977 Supreme Court decision that indeed reformulated the Commerce Clause analysis in the context of state taxation. There, as noted above, the Court espoused a four-pronged test for measuring whether a state tax is permissible under the Commerce Clause, including a

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[184] Compare the following passages from *Heitkamp* and *Wayfair*, using the term "physical presence" in place of relevant case names and obfuscating period give-away terms such as "mail-order," "Internet," "online retailer," or "online marketplace." "[Physical presence] in effect asks us to accept the notion that the United States Supreme Court will abandon common sense and experience at the courthouse door and ignore the tremendous social, economic, commercial, and legal innovations since 1967, and blindly apply an obsolescent precedent." *Heitkamp*, 470 N.W.2d at 208.

> The economic, social, and commercial landscape upon which [physical presence] was premised no longer exists, save perhaps in the fertile imaginations of attorneys representing [mail-order/online] interests. In the quarter-century which has passed in the interim, ["mail order"/"the online marketplace"] has grown from a relatively inconsequential market niche into a goliath . . . .[B]urgeoning technological advances . . . have created revolutionary communications abilities and marketing methods which were undreamed of in [earlier years]."

Id.

> [The] physical presence rule intrudes on States' reasonable choices in enacting their tax systems. And that it allows remote sellers to escape an obligation to remit a lawful state tax is unfair and unjust. It is unfair and unjust to those competitors, both local and out of State, who must remit the tax; to the consumers who pay the tax; and to the States that seek fair enforcement of the sales tax, a tax many States for many years have considered an indispensable source for raising revenue.

Wayfair, 138 S. Ct. at 2095–96.

> The Commerce Clause must not prefer interstate commerce only to the point where a merchant physically crosses state borders. Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents. This Court should not prevent States from collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or a building in the State.

Id. at 2094.

[185] 430 U.S. 274 (1977).

requirement that the tax be "applied to an activity with a substantial nexus with the taxing State."[186] But *Complete Auto* in no way explicitly overruled *Bellas Hess*'s physical presence rule. This left Justice VandeWalle to infer from rulings subsequent to *Complete Auto* that it was the Court's unstated intent to nevertheless overrule *Bellas Hess*.

For example, in *National Geographic Society v. California Board of Equalization*,[187] it was of upmost significance to Justice VandeWalle that the Court focused on the out-of-state seller's relationship to the state rather than the out-of-state seller's activities in the state. For him, this allowed the court to "expand[] the concept of nexus"[188] and suggest that a "lesser showing of nexus may suffice in such cases."[189] This, notwithstanding the fact that National Geographic had two offices and employees in California.[190]

As additional evidence of the Court's implied abandonment of the physical presence rule, Justice VandeWalle highlighted that in *D.H. Holmes Co. v. McNamara*,[191] where the retailer in question was an in-state retailer with 13 stores and 5,000 employees, the Court's initial focus was not the retailer's physical presence in the State but rather the retailer's "significant economic presence in Louisiana."[192] For Justice VandeWalle, this sent a signal that the Court's post-*Complete Auto*-analysis would key off of economic presence, even in the case of extensive physical presence.

Justice VandeWalle went on to cite other cases that were less on point, but, for him, still relevant to the question of *Bellas Hess*'s survival. He also commingled the question of due process (for which he could hardly be blamed since *Bellas Hess* did the same thing) to eventually conclude that in light of the "wholesale changes in the social, economic, commercial, and legal arenas,"[193] the North Dakota Supreme Court was "required to apply *Bellas Hess* in a contemporary context as we believe the Supreme Court would apply that decision."[194] It would be difficult to find a bolder statement of jurisprudential self-licensure: a state court assuming the mantel of the Supreme Court and speculating how it might rule if, it too, decided to ignore precedent.

Justice VandeWalle proceeded to develop a Commerce Clause for the '90s, at least in the context of interstate mail order transactions. His fundamental point in 1991 was substantially similar to Justice Kennedy's in 2018: with all the advancements in technology since 1967, out-of-state retailers could no

[186] *Id.* at 279.
[187] 430 U.S. 551 (1977).
[188] *Heitkamp*, 470 N.W.2d at 210.
[189] *Id.* at 211.
[190] *Nat'l Geographic*, 430 U.S. at 552, 556.
[191] 486 U.S. 24 (1988).
[192] *Heitkamp*, 470 N.W.2d at 211.
[193] *Id.* at 213.
[194] *Id.*

longer complain of a use tax collection duty. "[The] basis for [the physical presence rule] has also been seriously eroded by the technological advances of the past quarter-century. The almost universal usage of automated accounting systems, and corresponding advancements in computer technology, have greatly alleviated the administrative burdens created by such a collection duty."[195] Though, as with Justice Kennedy in *Wayfair*, discussed below, Justice VandeWalle was long on the rhetoric but short on the details.

Justice VandeWalle and Justice Kennedy alike seem to have fallen prey to the logical fallacy that if certain people can do something momentous, even though once perceived as impossible, then it only stands to reason that others should be able to do something perceived as less difficult, though entirely unrelated. This fallacious reasoning has been described as "Appeal to the Moon."[196] Using the argument that "If we can put a man on the moon, we can [insert seemingly much easier thing to accomplish here]."

Justice VandeWalle's broad inference that advancements in technology generally could only mean advancements in technology with respect to use tax collection lent itself to the notion that the Supreme Court not only recognized technological advancement but also accepted the proposition that it "may require corresponding changes in legal doctrine."[197] This, combined with the perceived fundamental shift in Commerce Clause analysis post-*Complete Auto*, allowed Justice VandeWalle to conclude that it was his court's responsibility to "rethink" previous legal doctrines "to account for societal changes" and "the vast technological explosion of recent years."[198] On this basis, Justice VandeWalle endorsed and applied a new standard of nexus: that a company's "significant economic presence" in North Dakota generated a "constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax."[199]

B. *The Lead-up to Wayfair*

Justice Kennedy effectively revived Justice VandeWalle's reasoning 23 years later in his concurring opinion in *Direct Marketing* with a call to the legal system to "find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[200] The pronouncement went off like a starting gun. Lawmakers and tax officials in several states (probably euphorically) went to work. Alabama was early out of the gates. By regulatory means—a convenient approach as it did not require waiting until the state legislative session

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[195] *Id.* at 215.

[196] *Appeal to the Moon,* LOGICALLY FALLACIOUS, last accessed Sept. 4, 2022, https://www.logicallyfallacious.com/logicalfallacies/Appeal-to-the-Moon [https://perma.cc/H3R4-PW6U].

[197] *Heitkamp*, 470 N.W.2d at 213.

[198] *Id.*

[199] *Id.* at 219.

[200] *Direct Marketing*, 575 U.S. at 18–19.

convened—Alabama issued an administrative rule reframing the obligations of out-of-state retailers making "significant sales into Alabama."[201] Perhaps because it was first into the pool of *Quill*-busting laws, Alabama state tax officials eased in with some timidity. The new regulation imposed use tax collection responsibility on out-of-state retailers with more than $250,000 of sales to Alabama residents in the previous year—this was bold (as it was facially unconstitutional) in the "substantial nexus" reframing, but fairly measured as a first attempt to create a threshold for economic presence.[202]

South Dakota was next in line but perceived the benefit in legislatively responding to Justice Kennedy's request. Its economic nexus statute was alternatively transactional and monetary: if an out-of-state retailer engaged in more than 200 transactions with, or tallied more than $100,000 gross receipts from, South Dakota residents, a use tax collection obligation would follow.[203]

The law was clearly unconstitutional under *Quill* and litigating its merits through the usual tax assessment and appeal process (with fact gathering and administrative appeals) would seriously delay the law's true purpose. So, South Dakota state legislators thought tactically; this law was destined for the U.S. Supreme Court (invited by one of its Justices, no less), and the substantive opinions of state court judges along the way would be unwelcome detours. Thus, in order to fast track the law through the South Dakota state judicial system, the South Dakota legislature adopted special statutory provisions to preempt drawn out litigation. For example, the legislation granted the State tax authority to bring a declaratory judgment action against "any person the state believes meets the criteria" under the statute.[204] Unfortunately, for the state, in February 2017, the largest online retailer of merchandise, Amazon, began collecting South Dakota use tax,[205] less than a year after South Dakota's governor signed the economic nexus law.[206] In 2017, Walmart.com was the next largest national online retailer,[207] but due to its physical presence in the state, it was already collecting use tax in South Dakota. So, the State went after the next tier of online retailers not collecting use tax: Wayfair, Overstock, and Newegg.[208]

The South Dakota economic nexus law also lubricated potential friction points in the courts by directing any South Dakota trial court, before which

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[201] ALA. ADMIN. CODE r. 810-6-2-.90.03 (2015 & Supp. 2018).

[202] ALA. ADMIN. CODE r. 810-6-2-.90.03(1) (2015 & Supp. 2018).

[203] S.D. CODIFIED LAWS § 10-64-2 (2016).

[204] S.D. CODIFIED LAWS § 10-64-3 (2016 & Supp. 2018).

[205] Dana Ferguson & Joe Sneve, *Amazon to Collect, Remit, South Dakota Sales Tax*, ARGUS LEADER, Jan. 10, 2017, https://www.argusleader.com/story/news/politics/2017/01/10/live-1-governors-state-state-address/96387152/ [https://perma.cc/78LF-ZBU7].

[206] S.B. 106, 2016 Leg. Assemb. Reg. Sess. (S.D. 2016).

[207] *Market Share of Leading Mass Merchant e-retailers in the United States in 2017*, STATISTA, last accesseed Sept. 9, 2022, https://www.statista.com/statistics/293268/mass-merchant-us-e-retailers-market-share/ [https://perma.cc/SG88-FQZR].

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

the matter might come, to "act as expeditiously as possible" and to "proceed with priority over any other action presenting the same question in any other venue."[209] Procedurally, South Dakota's legislature statutorily directed the state trial courts to assume that the "matter may be fully resolved through a motion to dismiss or a motion for summary judgment,"[210] rather than get bogged down in potential factual disputes. The South Dakota legislature's true purpose could only have been more obvious if they filed the motion on behalf of the litigants. Finally, as a jurisdictional matter, always with focus on accelerating the process, the statute granted exclusive appellate jurisdiction to the South Dakota Supreme Court and directed the court to hear the appeal as expeditiously as possible.[211]

All of these features combined to allow the State of South Dakota to file a petition for writ of certiorari from the state supreme court's decision that the South Dakota statute was unconstitutional on October 2, 2017,[212] a mere 18 months after the governor signed the bill into law—a dizzyingly fast pace relative to the life of a typical state tax controversy timeline. The Supreme Court granted the State's petition on January 12, 2018.[213]

C. *The Majority Opinion*

1. *The Issue Statement*

Justice Kennedy's opinion begins with a framing of the issue: whether an out-of-state online retailer "can be required to collect and remit" a state's sales and use tax.[214] As a matter of law, he asserts that the question "turns on proper interpretation of the Commerce Clause."[215] This statement, as it relates to the case at hand is technically correct, but it fails to recognize the big picture interplay between the Due Process Clause and the Commerce Clause.

As noted above, *Bellas Hess* dealt with the questions of due process and Commerce Clause viability concurrently, without clearly articulating which doctrine compelled the onset of the physical presence rule. *Quill* separated the two clauses and clarified that the driving force behind physical presence was the Commerce Clause.[216] At the same time, it further noted that the two clauses are analytically distinct and differ fundamentally in several ways.[217]

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[209] S.D. CODIFIED LAWS § 10-64-3 (2016 & Supp. 2018).
[210] S.D. CODIFIED LAWS § 10-64-3 (2016 & Supp. 2018).
[211] S.D. CODIFIED LAWS § 10-64-5 (2016).
[212] State v. Wayfair, Inc., 901 N.W.2d 754 (S.D. 2017), *petition for cert. filed*, (U.S. Oct. 2, 2017) (No. 17-494).
[213] State v. Wayfair, Inc., 901 N.W.2d 754 (S.D. 2017), *cert. granted*, (U.S. Jan. 12, 2018) (No. 17-494).
[214] *Wayfair*, 138 S. Ct. at 2087.
[215] *Id.*
[216] *See Quill*, 504 U.S. at 312.
[217] *Id.*

On this foundation, the *Quill* court engaged in substantive and separate due process analysis, reiterating application of the due process touchstones of "some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax"[218] creating "fair warning"[219] that an out-of-state actor's activity "may subject [it] to the jurisdiction of a foreign sovereign."[220]

In *Quill*, the out-of-state retailer had 3,000 customers in North Dakota, combining to yield gross receipts of over $1,000,000.[221] This magnitude of contacts was "more than sufficient for due process purposes."[222] Thus, *Quill* focused the question of due process through the lens of minimum contacts and found the requirements satisfied. Similarly, in *Wayfair*, Wayfair, Overstock, and Newegg, given their status as massive online retailers, surely had customers and gross receipts of sufficient magnitude for due process to be easily satisfied in all sales-and-use-tax-imposing states. But it would be short-sighted folly to suggest the same result must apply to all online retailers. Moreover, it would misread *Quill* (and *Wayfair*) to suggest that the Commerce Clause subsumes the Due Process Clause (if the former is met, so must be the latter).

In reality, accepting the way that Justice Kennedy framed the issue at face value, *Wayfair* only addresses the Commerce Clause aspects of interstate use tax collection obligations.[223] *Quill's* due process analysis was not at issue in *Wayfair* and must survive as good law—perhaps not relevant for the likes of Wayfair, but surely meaningful for the small online retailer.

2. *The Facts and Rebuttal*

Justice Kennedy's recitation of the facts bears an editorial feel and glosses over the absence of any meaningful record from the lower courts (which granted summary judgment on a barebones record to fast track the case

[218] *Id.* at 306.
[219] *Id.* at 308.
[220] *Id.*
[221] *Id.* at 302.
[222] *Id.* at 308.
[223] The conclusion of part IV of the majority opinion is readily acknowledged here. *Wayfair*, 138 S. Ct. at 2099. Justice Kennedy concludes that "[f]or these reasons, the Court concludes that the physical presence rule of *Quill* is unsound and incorrect. The Court's decisions in *Quill v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, should be, and now are, overruled." *Id.* These statements must be taken in the context of the *Wayfair* opinion which dealt exclusively with the Commerce Clause. *Quill's* due process analysis, which springs from fundamental principles of due process that go well beyond the scope of use tax collection, must remain intact. To assume otherwise—that *Wayfair* was so all-encompassing as to overrule *Quill's* due process analysis—is to suggest that due process touchstones of personal jurisdiction, including "minimum contacts" such that maintenance of a suit would not offend "traditional notions of fair play and substantial justice," and "purposeful availment," would give way in the wake of a Commerce Clause case dealing with the taxation of interstate commerce.

through the state system).[224] The South Dakota economic nexus law and the associated facts and circumstances surrounding it are Justice Kennedy's case-in-point for the broader question related to the physical presence rule's defects. He notes that the physical presence rule collectively causes the States to lose between $8 and $33 billion every year.[225] (That is quite a range!) He also highlights the severity of South Dakota's plight because of its substantial reliance on the state sales and use tax "for the revenue necessary to fund essential services"[226] since it has no state income tax.

Later in the opinion, Justice Kennedy casts the sales and use tax as nothing more than an example of the "[S]tates' reasonable choices in enacting their tax systems."[227] Moreover, he condemns *Quill* for infringing on "a tax many states for many years have considered an indispensable source for raising revenue"[228] and enabling online customers "to escape payment of sales taxes—taxes that are essential to create and secure"[229] active markets with goods and services.

It is worth taking a moment to think carefully about these statements. Justice Kennedy asserts that the Supreme Court's interpretation of the Constitution's Commerce Clause in *Quill* causes the States to lose billions per year in uncollected use tax revenues. "Assuming blame for the states' revenue shortfall, based on the Supreme Court's interpretation of the Constitution, casts the States as innocent victims —a status they do not deserve. Their role in revenue shortfalls, due to the advent of the online marketplace, is largely self-inflicted. After all, unlike the chicken and the egg causality dilemma, it is very clear which came first, the Constitution or the sales and use tax.[230]

Before the Great Depression, state and local governments generally relied on property taxes for revenues.[231] During the Great Depression, property tax revenue streams dried up as property tax assessments fell.[232] Most states turned to a consumption tax—the sales tax and a companion use tax—as a

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[224] State v. Wayfair Inc., 901 N.W.2d 754 (S. Dakota 2017).

[225] *Wayfair*, 138 S. Ct. at 2088.

[226] *Id.*

[227] *Id.* at 2095.

[228] *Id.* at 2096.

[229] *Id.*

[230] As a counterpoint to this discussion, the legal and economics literature highlight the positive aspects of a consumption tax. *See e.g.*, Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 STAN. L. REV. 1413 (2006). *But see*, Adam B. Thimmesch, *Taxing Honesty*, 118 W. VA. L. REV. 147 (2015) for a discussion on the regressive nature of consumption taxes.

[231] In 1927, two-thirds of state and local revenues came from property taxes. Ronald Snell, *State Finance in the Great Depression*, NATIONAL CONFERENCE OF STATE LEGISLATURES 3, March 2009, https://www.ncsl.org/print/fiscal/statefinancegreatdepression.pdf [https://perma.cc/E9XE-STCD].

[232] *Id.*

stopgap, a mode of white-knuckled government survival in response to growing demands for public assistance.[233] The sales tax's charms, however, were beguiling. By 1947, the sales and use tax was the largest single source of state tax revenue.[234]

The sales tax turned out to be a state lawmaker's dream. Its collection was completely outsourced to third parties, who could be held liable themselves if they failed to properly collect. The tax's incidence on the populace was death by a thousand cuts, with taxpayer awareness of actually paying the tax descending almost to the subconscious.

Consumer unawareness of the sales tax was proved almost conclusively when three leading economists, Raj Chetty, Adam Looney, and Kory Kroft, ran an experiment to measure consumer behavior in reaction to the sales tax.[235] They posted tags showing the sales tax-inclusive price below the original pretax price tags in a grocery store.[236] They then surveyed customers and asked them to estimate the total price of a basket of goods to measure their awareness of the sales tax when not included in the posted price.[237] They found that without the tax-inclusive tags "nearly all survey respondents ignored taxes when calculating the total price of a basket of goods, whereas with the tags, the vast majority computed the total tax-inclusive price correctly."[238] This finding allowed them to conclude that consumers underreact to taxes that are not included in the posted price.[239]

The Chetty/Looney/Croft study considered the salience of the sales tax. Salience is a heuristic[240] that measures awareness in decision making—in this case, awareness of the sales tax's incidence in purchasing decisions. Salience can be measured through an economic lens or a political lens. Economic salience "refers to how tax presentation affects market decisions and economic

[233] *See id.* at 5.

[234] Vivien Lee & David Wessel, *The History and Future of the Retail Sales Tax*, BROOKINGS, Jul. 16, 2018, https://www.brookings.edu/blog/up-front/2018/07/16/the-history-and-future-of-the-retail-sales-tax/#:~:text=The%20retail%20sales%20tax%20was,than%2032%20percent%20in%201970 [https://perma.cc/9ZLQ-ZNCH].

[235] Raj Chetty et al., *Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145 (2009).

[236] *Id.* at 1146.

[237] *Id.*

[238] *Id.*

[239] *Id.* at 1163.

[240] Deborah Schenk, *Exploiting the Salience Bias*, 28 YALE J. ON REG. 253, 254 (2011).

activity."[241] "Political salience refers to how tax presentation affects voting behavior and political outcomes."[242]

The sales tax has remarkably low economic and political salience. This is a concern if, as a matter of tax policy, taxpayers should be aware of their tax incidence such that they properly account for them in their economic and political decisions.[243] And yet, a robust line in the tax literature considers the merits of hidden taxes and considers them a viable legislative stratagem for wealth redistribution.[244] That argument, however, butts up against timeworn guiding principles of tax policy; principally that a tax should be transparent and visible. As a general rule, "[T]axpayers should know that a tax exists, and how and when it is imposed on them and others. Taxpayers should be able to easily determine the true cost of transactions and when a tax is being assessed or paid, and on whom."[245]

The sales and use tax fails in almost all respects when measured against this standard of transparency and visibility. Yet, state lawmakers made an affirmative choice to dismiss saliency in favor of the sales tax's steady and strong revenues, even in the face of economic uncertainty or downturns. That legislative choice, however, was a deal with the devil, bound up in reliance on third parties, who over time may or may not be within a given state's jurisdictional reach. Moreover, blatant disregard for a guiding principle of tax design should influence the amount of sympathy accorded to states when the tax becomes imperiled because of its low-salience character. Chetty, Looney, and Kroft's findings suggest that consumers almost completely ignore the sales tax when making buying decisions.[246] Moreover, as taxpayers ignore how

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[241] Darien Shanske & David Gamage, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX. L. REV. 19, 20 (2011). In this article, Darien Shanske and David Gamage use the term "market salience" to describe the same phenomenon that Deborah Schenk describes as "economic salience"—the term preferred for this discussion. *Id.*

[242] *Id.* at 20.

[243] In her article on exploiting the salience bias in certain tax designs, Schenk recognizes the near consensus around the "assumption that increased salience is preferred" with respect to low-salience taxes, and that the "intentional use of low-salience taxes by the government is undesirable." Schenk, *supra* note 240 at 255. The thesis of her article is that there are some circumstances where the normative argument against low-salience taxes is vulnerable; that an argument can be made "about the desirability of low-salience taxation from a democratic-theory perspective. *Id.* This carve-out, however, does not override the general argument in favor of higher salience taxes as a general proposition.

[244] *See e.g.*, Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861 (1994); Brian Galle, *Hidden Taxes*, 87 WASH. UNIV. L. REV. 59 (2009); Schenk, *supra* note 240; Lilian v. Faulhaber, *The Hidden Limits of the Charitable Contribution Deduction: An Introduction to Hypersalience*, 92 B.U. L. REV. 1307 (2012); Eric S. Smith, *Exploiting the Charitable Contribution Deduction's Hypersalience*, 20 UTAH L. REV. 419 (2020).

[245] Nick Fiore, *Guiding Principles of Good Tax Policy*, J. OF ACCOUNTANCY, Jan. 31, 2002, https://www.journalofaccountancy.com/issues/2002/feb/guidingprinciplesofgoodtaxpolicy.html [https://perma.cc/AVB4-SAC8].

[246] Chetty et al., *supra* note 235, at 1146.

much sales tax they pay on a transaction-by-transaction basis, they are even less aware of its annual incidence. It borders on petulance for states to be surprised and complain when their residents fail to notice the absence of a low-salience tax (*e.g.*, in connection with an online transaction) and fail to self-report it when the low-salience feature of the tax was exactly the reason for its legislative popularity.

The plight of the States, as framed by Justice Kennedy, further wains when considering the way the sales tax plays off of human cognitive weakness. Brian Galle defines a hidden tax as "a tax design, in which the behavioral effects of the tax are less than predicted by classic economic theory."[247] Chetty, Looney, and Kroft's conclusion that individuals underreact to the sales tax illustrates this. Economic theory suggests that rational actors in the marketplace will consider the sales tax in their consumer decisions; that before buying a product, they will take in information relevant to their decision, including tax information.[248] Amos Tversky and Daniel Kahneman have shown, however, that human beings are not the rational actors—what they call "Econs"—that economic theory presumes.[249] Rather, humans tend to be irrational actors, especially when called upon to gain information beyond their immediate and current cognitive perception.[250] It will take work to calculate the sales tax before making a buying decision (though perhaps somewhat less now given that most smartphones come equipped with a calculator and access to the Internet to look up sales tax rates), yet the human brain's cognitive tendency is away from making that effort. That tendency is reinforced millions of times each day as taxpayers *en masse* make purchases and give no thought to the sales tax's incidence. Thus, the low economic salience of the sales tax exploits human cognitive bias and relies on the behavioral tendency to avoid slower and analytical thinking.

The sales tax's low economic salience, to some extent, engenders low political salience: after all, how can voters hold a politician politically accountable for a decision related to a tax whose incidence they ignore? This allows state legislators latitude to adjust rates without anywhere close to the political repercussion that would follow, for example, a very politically salient

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[247] Galle, *supra* note 244, at 62.

[248] *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 413 (2011). In making a distinction between Humans and "Econs," Kahneman notes that "[r]ational agents are assumed to make important decisions carefully, and to use all the information that is provided to them. An Econ will read and understand the fine print of a contract before signing it, but Humans usually do not." *Id.*

[249] *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 269–72 (2011).

[250] *Id.* at 20-21. In his book, Kahneman describes two modes of thinking: System 1 and System 2. System 1 "operates automatically and quickly, with little or no effort and no sense of voluntary control. *Id.* at 20. System 2 is deliberate and mentally strenuous. It "allocates attention to the effortful mental activities that demand it, including complex computations." *Id.* at 21. Kahneman finds that System 2 is lazy and will "endorse intuitive [incorrect] answers that it could have rejected with a small investment of effort." *Id.* at 44.

increase in the income tax rates. Is it any wonder that the sales tax took a permanent seat at the table of state and local public finance? When compared with the salient individual income tax, and the even more salient property tax, the other primary sources of state and local tax revenues,[251] state legislators couldn't help themselves.

From a state lawmaker's perspective, the sales tax's only downfall was its complement: the use tax. When consumers make purchases from outside their state of residence, and no sales tax is collected, they are required to remit use tax to their home state. Not only does the use tax have a dramatically high rate of noncompliance on an individual level,[252] but most taxpayers, at least anecdotally, are largely unaware that it exists.[253] In early days, the two decades following the Great Depression, use tax noncompliance was ostensibly a minor problem as the resulting revenue losses were likely small with consumers carrying on most of their business locally or at most, intrastate. The advent of mail order catalogs and the associated uptick in interstate commerce, however, almost certainly disrupted the states' anticipated streams of sales tax revenue and use tax noncompliance was more keenly felt. Reactively, with aggressive upswing,[254] states started to reach beyond their borders to compel out-of-state mail order companies to collect use tax at the point of transaction. These efforts were stifled on constitutional grounds in *Bellas Hess* and *Quill*.

During the last two decades, the online marketplace has completely upended the system and left states clamoring for relief through either judicial or legislative intervention. But for the states to complain about this is a wonderful example of both eating cake and lamenting that there is none left. Many states have eaten their cake as they have enjoyed the many benefits of the sales tax, discussed above, for nearly a century. They overhauled their systems of public finance, hitching their proverbial wagons to the sales tax with full awareness of the unenforceability of the use tax on an individual level. This reliance was built upon a tax with outsourced third-party collection responsibility.

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[251] Sarah Andersen et al., *State Government Tax Collections Summary Report: 2019*, U.S. DEPT. OF COMMERCE, May 1, 2020, https://www.census.gov/content/dam/Census/library/publications/2019/econ/g19-stc_summary.pdf [https://perma.cc/D35D-UBUQ].

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

[253] Use tax compliance and enforcement is so low that Adam Thimmesch describes it as effectively a "de facto tax on honesty—a tax with which only our most principled, risk-averse, or perhaps foolish even attempt to comply." Thimmesch, *supra* note 230, at 148.

[254] The state statute at issue in *National Bellas Hess* provides a ready period example. The State of Illinois defined a "retailer maintaining a place of business in the State" expansively to include any retailer "[e]ngaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." ILL. REV. STAT. c. 120, § 439.2 (1965) (current version at 35 ILL. COMP. STAT. 105/2 (2019)).

Are the states completely absolved of responsibility for failure to have enough foresight to see that someday, their third-party collection agents may not be within their jurisdictional reach? Are the states exculpated for creating a tax that is unenforceable without those third-party collectors? Why does the Constitution give way for indirect remote use tax collection through out-of-state retailers without requiring states do more to create public awareness of use tax in their own state or even attempt to collect it in good faith? Why does South Dakota, in particular, enjoy Justice Kennedy's highest sympathy for choosing to rely so heavily on the sales and use tax to fund state coffers to the complete exclusion of any personal income tax?

These questions are particularly poignant in light of information discovered and reported by news outlets in October 2021. The Pandora Papers, a "trove of more than 11.9 million confidential documents" shared with news organizations, revealed South Dakota's role as an "offshore financial center."[255] In addition to being a tax haven for "foreign wealth, including that derived from international drug smuggling and exploitative labor practices," the Pandora Papers revealed that South Dakota allows "[h]igh-net worth Americans" to shift "billions to South Dakota . . . , shortchanging federal and home state tax collectors in the process."[256] Highlighted, in particular, was South Dakota's allowance for perpetual "dynasty trusts" which "induced many of the richest American families to locate their trusts in South Dakota."[257] Dynasty trusts allow wealth to transfer from one generation to another and "escape estate tax indefinitely."[258]

These points are significant in at least two ways which are related to the current discussion. One, they undermine Justice Kennedy's narrative of state victimhood, and more precisely South Dakota as an object of sympathy. Should the Supreme Court be so worried about South Dakota's economic viability related to its reliance on the sales and use tax when it is involved in and enabling nefarious conduct such as that described in the Pandora Papers report? Second, by implication, the circumstances of South Dakota's public finance crisis may not have been as dire as Justice Kennedy perceived if the State can promulgate policy and forego tax revenues in connection with the dynasty trusts described in the report. Or, perhaps worse, they were as severe as Justice Kennedy perceived, but *Wayfair* provided the lifeline necessary to continue South Dakota's dynasty trust rules.

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[255] Daniel Hemel, *South Dakota's Tax Avoidance Schemes Represent Federalism at Its Worst*, WASH. POST, Oct. 7, 2021, https://www.washingtonpost.com/outlook/2021/10/07/tax-shelters-states-pandora/ [https://perma.cc/P9PB-RQ2Y]. *See also Offshore Havens and Hidden Riches of World Leaders and Billionaires Exposed in Unprecedented Leak*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/ [https://perma.cc/W3B4-2L6V].

[256] *Hemel*, *supra* note 255.

[257] *Id.*

[258] *Id.*

Overall, if states perceive a sales and use tax compliance gap and are unwilling to deploy resources to fix it, is it not incumbent upon the states to look for other ways to collect revenue? Is there something apart from political inopportunity that prevents South Dakota's legislature from creating a personal income tax?

All this is to suggest that Justice Kennedy's claim that *Quill* imposes "serious inequity"[259] on the states ignores historical and political realities. In truth, the Supreme Court's interpretation of the dormant Commerce Clause has not caused states to lose any revenues. Any serious inequity endured by the states has been self-inflicted through unreasonable reliance on a tax that they cannot enforce without third parties, which exploits the cognitive biases of their own residents, and on which state legislators have become insatiably dependent.

3. *The Physical Presence Rule*

In *Wayfair*, Justice Kennedy found the physical presence rule "flawed on its own terms," and an "incorrect interpretation of the Commerce Clause."[260] He supports this conclusion on three separate grounds: (1) the physical presence rule "is not a necessary interpretation" of the *Complete Auto* test which requires that a state tax must be "applied to an activity with a substantial nexus with the taxing State;" (2) the physical presence rule "creates rather than resolves market distortions;" and (3) the physical presence rule "imposes an arbitrary, formalistic distinction" that modern Commerce Clause precedents "disavow."[261] The following discussion addresses each of these arguments in turn.

a. *Not a Necessary Interpretation: Changing the Standard of Review.* Justice Kennedy begins his Commerce Clause analysis on the premise that the "Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels."[262] As noted above, Quill is not only significant for reaffirming a bright-line rule in the form of the physical presence rule; it also clarified that the Commerce Clause and Due Process Clause, while closely related, "pose distinct limits on the taxing powers of the States."[263] The Court in Quill noted further that the "Due Process Clause and the Commerce Clause are analytically distinct."[264] Justice Kennedy's beginning premise seems apt to walk back these clarifying statements to a less precise distinction between the two—perhaps approaching a reversion to Bellas Hess.

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[259] *Wayfair*, 138 S. Ct. at 2088.
[260] *Id.* at 2092.
[261] *Id.*
[262] *Id.* at 2093.
[263] *Quill*, 504 U.S. at 305.
[264] *Id.*

Kennedy's attempt to analytically coalesce but not commingle the two doctrines was tactically important to his argument because it allowed him to leverage *Quill's* conclusion that due process may be satisfied "irrespective of a corporation's lack of physical presence in the taxing State," but the maneuver was lacking in well-reasoned support.[265] Without detailed explanation, Justice Kennedy blithely concluded that "[t]he reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes."[266]

This is a curious assertion given that the due process reasoning in *Quill* keyed off of due process touchstones of fair warning, purposeful availment, and minimum contacts.[267] The *Quill* Court recited that "the relevant inquiry under [due process minimum contacts] is whether 'the state has provided some protection, opportunities, or benefit for which it can expect a return.'"[268] It went on: when a corporation purposefully avails itself of a state's economic market, it clearly has "fair warning that its activity may subject [it] to the jurisdiction of the foreign sovereign."[269] Thus, whether in the context of personal jurisdiction or a state's imposition of a duty to collect use tax, when an out-of-state party purposefully avails itself of the laws and protections of a state, it should expect judicial and tax jurisdiction under the Due Process Clause to follow. For the out-of-state retailer in *Quill*, purposeful availment was measured by the magnitude of the contacts with North Dakota: from a "deluge of catalogs" sprang over $1,000,000 in sales from about 3,000 customers—a magnitude of contacts "more than sufficient for due process purposes."[270]

But how, as Justice Kennedy asserts, do these reasons for due process validity parallel the relevant analysis under the dormant Commerce Clause? *Complete Auto's* four-part test concerns itself with questions of burdens on, and discrimination against, interstate commerce. *Quill* applied those tests in 1992 and *Wayfair* did in 2018. Both cases focused on the first of the tests: whether "the tax is applied to an activity with a substantial nexus with the taxing State."[271] It is unclear, and Justice Kennedy does not identify or elaborate how the due process rationale applied in *Quill* supports his Commerce Clause analysis in *Wayfair*.

It seems the true distinction between *Quill* and *Wayfair* is the framing of the standard of review for the physical presence rule. *Quill* upheld *Bellas Hess's* physical presence rule because it was "not inconsistent with *Complete*

[265] *Id.* at 308.
[266] *Wayfair*, 138 S. Ct. at 2093.
[267] *Quill*, 504 U.S. at 306–07.
[268] *Id.* at 304.
[269] *Id.* at 308.
[270] *Id.*
[271] *Complete Auto*, 430 U.S. at 279.

Auto."[272] *Wayfair* overruled the physical presence rule because, at least in part, it was "not a necessary interpretation of"[273] *Complete Auto's* substantial nexus test. Which of these standards is more consistent with principles of *stare decisis* relative to the initial holding in *Bellas Hess*? Which of these standards suggests an appropriate level of judicial restraint?

Quill reviewed *Bellas Hess's* 1967 physical presence rule to determine whether its findings were consistent with subsequently developed law related to the Commerce Clause in *Complete Auto* in 1977. In other words, intervening developments in the law triggered review. *Quill* balanced the strengths and weaknesses of a bright-line rule but made no representation that physical presence was a perfect standard for measuring substantial nexus. It readily acknowledged the physical presence rule's artificiality "at its edges" but considered that weakness "more than offset by the benefits of a clear rule."[274]

Wayfair reviewed *Quill's* physical presence rule *without* any intervening changes in the law—*Complete Auto* was and still is the standard. Without a change in the law, Justice Kennedy moved the goalposts and changed the standard of review: the physical presence rule would be upheld only if it was a "necessary interpretation" of the Commerce Clause.

In no other case has the Supreme Court adopted a "not a necessary interpretation" standard of review. It seems cut out of whole cloth to suit Justice Kennedy's ends-driven analysis. Moreover, in a common law system where precedent carries the weight of law, the standard seems particularly out of place. Implied is that precedent will be upheld only if it can clear the high bar of being a necessary interpretation of the Constitution. This is a different and a substantially more onerous standard of review than "validity," "reasonableness," or "soundness." Moreover, it empowers the current Court to the detriment of prior courts such that precedent may be ignored or overturned if is not a necessary interpretation of the Constitution.

The substantive contention that the physical presence rule was not a necessary interpretation of the substantial nexus test under *Complete Auto* was not news and did not meaningfully enhance Justice Kennedy's argument. *Quill* acknowledged the physical presence rule's shortcomings and did not suggest that the physical presence rule necessarily followed from the substantial nexus test of *Complete Auto*. Rather, *Quill*, with appropriate deference to *stare decisis*, left a beacon in the "quagmire"[275] of dormant Commerce Clause jurisprudence to provide a clear definition of substantial nexus. It did so with full acknowledgement that the physical presence rule was not ideal (or a necessary interpretation of the Commerce Clause), but Congress was better qualified and constitutionally empowered to resolve the

[272] *Quill*, 504 U.S. at 311.
[273] *Wayfair*, 138 S. Ct. at 2092.
[274] *Quill*, 504 U.S. at 315.
[275] *Id.*

matter. *Quill*, in and of itself, is tantamount to an invitation to Congress to intervene and resolve.

If Justice Kennedy's "not a necessary interpretation" standard is taken to its logical conclusion, he should have concluded the opinion there and overruled the whole of the Court's line of dormant Commerce Clause decisions. After all, in the dormant Commerce Clause, the Supreme Court is dealing with implied power that, according to one current member of the Court, Justice Clarence Thomas, does not exist. The Commerce Clause is an affirmative grant of power to Congress under Article I to regulate interstate commerce. On the purported negative sweep of the Commerce Clause, the Supreme Court has taken it upon itself to adjudicate state laws that affect interstate commerce in areas where Congress has not affirmatively regulated. Congress may undo, amend, or uphold anything the Court decides under the dormant Commerce Clause. Given that the Supreme Court is borrowing power from Congress up to and until Congress decides to exercise it, are any of its interpretations a "necessary interpretation" of the Commerce Clause?

Justice Kennedy concludes his "not a necessary interpretation" argument with the first of several "appeals to the moon." Surely, "the administrative costs of compliance, especially in the modern economy with its Internet technology, are largely unrelated to whether a company happens to have a physical presence in a State."[276] Exactly how the "Internet technology" is supposed to ease the costs of compliance Justice Kennedy does not say.

b. *Market Distortions.* Justice Kennedy frames the physical presence rule as an antiquated doctrine that, "each year . . . becomes further removed from economic reality,"[277] suggesting a trajectory away from compliance, rather than a regression back towards it. Unfortunately, Justice Kennedy's forecast more appropriately fit conditions in early 2015, when he wrote his concurring opinion in Direct Marketing, rather than in July 2018 when the Wayfair decision was handed down. In the interim, significant developments took place in the context of use tax collection in e-commerce. Amazon, the online marketplace vendor hogging the most shade under the physical presence rule's so-called "tax shelter," began collecting use tax in all states with a sales tax on April 1, 2017.[278] Up to that point, Amazon had been strategically entering into agreements with states to collect their use tax,

[276] *Wayfair*, 138 S. Ct. at 2093.

[277] *Id.* at 2092.

[278] Kelly Phillips Erb, *Tax-Free No More: Amazon to Begin Collecting Sales Tax Nationwide on April 1*, FORBES, Mar. 27, 2017, https://www.forbes.com/sites/kellyphillipserb/2017/03/27/tax-free-no-more-amazon-to-begin-collecting-sales-tax-nationwide-on-april-1/?sh=3036787d4e59 [https://perma.cc/6KN6-TPMV].

usually with special concessions,[279] but it abandoned that approach in 2017 and started collecting everywhere.[280]

Amazon's shift to collect sales and use tax in all states had nothing to do with an awakening towards dutiful corporate citizenship or any sort of sympathy for the states—it was strategic and market driven. At the time, Amazon Prime, Amazon's paid subscription service, was in the process of rolling out its same-day delivery service.[281] Such a herculean task as that required "fulfillment centers" or warehouses around the country.[282] It also would require Amazon to deploy its own delivery drivers and a massive fleet of delivery trucks.[283] All this is to say that Amazon started collecting use tax on purchases in 2017 because its business strategy would eventually create physical presence in every state. Thus, market forces compelled Amazon towards voluntarily collecting use tax.

Justice Kennedy ignores this critical fact in his opinion, but it was not lost on Chief Justice John Roberts, who notes as much in his dissenting opinion and suggests that if the "online behemoth Amazon"[284] made such a shift, then "[to] the extent the physical-presence rule is harming States, the harm is apparently receding with time."[285] The term "behemoth" here is one of the few characterizations that approaches a fair description of Amazon relative to other exclusively online retailers. Amazon is the largest e-commerce retailer in the world,[286] and, by some margin, it is the largest e-commerce retailer in the United States. In 2018, when *Wayfair* was handed down, Amazon's gross

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[279] *See e.g.*, Lisa Riley Roche, *Amazon.com Entitled to Keep 18 Percent of Sales Tax Collected in Utah*, DESERET NEWS, Dec. 8, 2016, https://www.deseret.com/2016/12/8/20602119/amazon-com-entitled-to-keep-18-percent-of-sales-taxes-collected-in-utah#ethan-allen-co-owner-of-allens-camera-talks-about-his-reaction-to-the-news-that-amazon-com-will-have-to-start-collecting-sales-tax-in-utah-at-his-holladay-store-location-on-thursday-dec-8-2016-he-said-it-will-help-level-the-playing-field-between-the-internet-sales-behemoth-and-his-four-camera-stores [https://perma.cc/2RSH-M6CG]. Amazon's approach was to enter into deals with states whereby they would create a facility (and jobs) in the State and thus concede physical presence but would not have to collect or remit for a certain number of years. *See id.*

[280] Phillips Erb, *supra* note 278.

[281] *Prime Free Same-Day Delivery Expands to 11 New Metro Areas*, BUSINESSWIRE, Apr. 6, 2016, https://www.businesswire.com/news/home/20160406005382/en/ [https://perma.cc/G9U6-AUVA].

[282] *See id.*

[283] Today, in at least some parts of the country, Amazon delivery trucks are as or more prevalent than UPS and FedEx delivery trucks. Annie Palmer, *Amazon is Spending Big to Take on UPS and FedEx*, CNBC, Apr. 30, 2021, https://www.cnbc.com/2021/04/30/amazon-is-spending-big-to-take-on-ups-and-fedex.html [https://perma.cc/GM8U-AV7A].

[284] *Wayfair*, 138 S. Ct. at 2103 (Roberts, J., dissenting).

[285] *Id.*

[286] Nina Angelovska, *Top 5 Online Retailers: 'Electronics and Media' Is the Star of E-Commerce Worldwide*, FORBES, May 20, 2019, https://www.forbes.com/sites/ninaangelovska/2019/05/20/top-5-online-retailers-electronics-and-media-is-the-star-of-e-commerce-worldwide/?sh=1bae8ce71cd9 [https://perma.cc/9E47-PKQJ].

sales were $232 billion.[287] In 2020, its gross U.S. sales exceeded $386 billion.[288] To put the 2020 number in perspective and highlight the magnitude of disparity, the combined gross sales of the remaining top-10 e-commerce retailers in the aggregate is $241 billion,[289] more than $100 billion less than Amazon's gross sales alone. By way of comparison in 2018, Wayfair's gross sales revenue was $6.78 billion.[290] Newegg's gross sales were $2.022 billion.[291] Overstock's revenues were $1.822 billion.[292] The human mind does not easily comprehend such large numbers, but visualization is helpful. For example, there are about 331 million people in the United States. Taking Amazon's gross sales for 2018[293] of $232 billion over the 331 million U.S. population, it amounts to about $700 of sales per person. Run the same calculation for Wayfair, Newegg, and Overstock, and the numbers rounded to the nearest dollar are $20, $6, and $6, respectively, per person.

This is all to suggest that if the sales and use tax collection crisis were a war between online retailers and the states, and Justice Kennedy the cavalry, by the time he arrived on the scene, the war was effectively over. Amazon, by far the largest of the enemy's ranks, had defected and was on the side of the states, dutifully compliant. Other online retailers were still engaged in skirmishes, but surely even the states knew that when Amazon conceded, their coffers would be substantially replenished, and victory could be declared.

If the largest of the online retailers had already shifted to voluntarily collecting use tax, is it too much to suggest that the "market distortions"[294] Justice Kennedy uses to justify overruling *Quill* may have already been on their way towards market resolution? Justice Kennedy fails to account for

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[287] *Amazon Income Statement 2009-2022*, MACROTRENDS, last accessed Sept. 9, 2022, https://www.macrotrends.net/stocks/charts/AMZN/amazon/income-statement [https://perma.cc/K8M8-E2X5].

[288] *Id. See also* Shelley E. Kohan, *Amazon's Net Profit Soars 84% With Sales Hitting $386 Billion*, FORBES, Feb. 2, 2021, https://www.forbes.com/sites/shelleykohan/2021/02/02/amazons-net-profit-soars-84-with-sales-hitting-386-billion/?sh=4933a34d1334 [https://perma.cc/M69D-JV67].

[289] Blake Droesch, *Here are the Top 10 US Ecommerce Companies for 2021—Plus 6 Key Takeaways from our Latest Forecast*, EMARKETER, Mar. 24, 2021, https://www.emarketer.com/content/top-10-us-ecommerce-companies-2021-plus-6-key-takeaways-our-latest-forecast [https://perma.cc/4YGE-XWU8].

[290] *Wayfair Inc.*, WSJ MARKETS, last accessed Sept. 9, 2022, https://www.wsj.com/market-data/quotes/W/financials/annual/income-statement [https://perma.cc/FZ2V-WVBV].

[291] *Newegg Commerce Inc.*, WSJ MARKETS, last accessed Sept. 9, 2022, https://www.wsj.com/market-data/quotes/NEGG/financials/annual/income-statement [https://perma.cc/6JB5-BGCG].

[292] *Overstock.com Inc.*, WSJ MARKETS, last accessed Sept. 9, 2022, https://www.wsj.com/market-data/quotes/OSTK/financials/annual/income-statement [https://perma.cc/5BZH-2VFY].

[293] *Amazon.com Inc.*, WSJ MARKETS, last accessed Sept. 9, 2022, https://www.wsj.com/market-data/quotes/AMZN/financials/annual/income-statement [https://perma.cc/TKP8-XFSE].

[294] *Wayfair*, 138 S. Ct. at 2085.

contemporaneous circumstances. Had he considered Amazon's affirmative collection compliance, the physical presence rule could have emerged as a meaningful protection for small online retailers as market forces may have compelled the other large online retailers to follow Amazon's path in order to compete for market share. After all, Amazon sells furniture and competes directly with Wayfair and Overstock. Amazon sells electronics and related devices and competes directly with Newegg. At some point those three retailers (and the myriad of others that compete with Amazon) would have had to react to the market and come up with a way to deliver products in the way that competes with Amazon Prime.

c. *Arbitrary Outcomes*. Justice Kennedy's final point with respect to Quill's flaws and ripeness for being overruled revisits Quill's determination that a bright-line test, its shortcomings notwithstanding, was on balance a useful tool for "demarcation of a discrete realm of commercial activity that is free from interstate taxation."[295] For Justice Kennedy, Commerce Clause questions must "eschew" formal bright-line rules in favor of "case-by-case analysis of purposes and effects."[296] Quill acknowledged that formalistic views were "renounced" in Complete Auto but held that formal distinctions between "taxes on the 'privilege of doing business' and all other taxes,"[297] which serve no Commerce Clause purpose, were plainly different from a "formalistic" but "clear rule" that "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use tax."[298]

Justice Kennedy's argument, of course, is correct in its literal application: the physical presence rule "treats economically identical actors differently"[299] largely because of its formalistic approach. He provides a hypothetical to this effect and argues that *Quill's* distinction between a small online retailer that maintains inventory in South Dakota and a large online retailer with a sophisticated virtual showroom accessible in every state, with inventory on the Nebraska side of the South Dakota-Nebraska border, "simply makes no sense."[300]

This hypothetical reveals more than Justice Kennedy probably intended. Indeed, perhaps the small online retailer that maintains a few items of inventory stored in a warehouse in South Dakota begrudges the use tax collection obligation that the inventory's physical presence creates in the State. Yet, that retailer made the decision to store goods in South Dakota with awareness that such action would carry with it a sales and use tax collection obligation. Pre-*Wayfair*, at least anecdotally, many retailers, online

[295] *Quill*, 504 U.S. at 315.
[296] *Wayfair*, 138 S. Ct. at 2094.
[297] *Quill*, 504 U.S. at 314.
[298] *Id.* at 315.
[299] *Wayfair*, 138 S. Ct. at 2085.
[300] *Id.* at 2094.

or otherwise, were aware of the physical presence rule and its salience allowed them to plan and understand the consequences of business decisions.

An interview with the hypothetical small online retailer post-*Wayfair* could be revealing. Without the physical presence bright-line rule and Justice Kennedy's endorsement of a case-by-case analysis with South Dakota's economic nexus statute acting as a guidepost, uncertainty abounds. States have not uniformly followed South Dakota's statute. Though some have followed South Dakota's 200 transactions or $100,000 in gross sales threshold,[301] several have eliminated the transactions requirement and installed a sheer gross sales threshold.[302] Moreover, the gross sales threshold is not consistent among the states. Many states use a $100,000 threshold, like South Dakota.[303] In contrast, Alabama[304] and Mississippi[305] have set the operative gross sales amount at $250,000; California,[306] New York,[307] and Texas[308] at $500,000. All sales and use tax-imposing states have promulgated their own *Wayfair*-inspired, yet inconsistent, laws.

It is now left to the small online retailer in South Dakota with inventory stored in Nebraska's lot to manage each state's unique laws related to use tax collection in the online marketplace. This is to say nothing of then, after determining in which states she is required to collect, discovering the rates for each of the municipalities in which her customers live and filing sales tax returns in each of those states (and any self-administered municipalities), along with remitting amounts due. In the end, the retailer will do what many tax practitioners have resignedly advised clients to do: simply collect use tax on all transactions, bypassing the threshold test, even though creating a compliance obligation that is onerous to bear for any small business, online or otherwise. Justice Kennedy intended the small online retailer in his hypothetical to be an object of sympathy on account of *Quill's* physical presence rule. She is indeed an object of sympathy, but only since *Wayfair* was handed down.

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[301] *See e.g.*, ARK. CODE. ANN. § 26-52-111 (2019), IND. CODE § 6-2.5-2-1 (2017), KY. REV. STAT. ANN. § 139.340 (2018), UTAH CODE ANN. § 59-12-107(2)(c) (2018 & Supp. 2019).

[302] *See e.g.*, ALA. ADMIN. CODE r. 810-6-2-.90.03 (2015 & Supp. 2018) (Gross sales threshold of $250,000 and no transaction threshold); CAL. REV. & TAX. CODE § 6203(c) (2019) (Gross sales threshold of $500,000 and no transaction threshold); IDAHO CODE § 63-3611(3) (2019) (Gross sales threshold of $100,000 and no transaction threshold); 34 TEX. ADMIN. CODE § 3.286(b)(2) (2018) (Gross sales threshold of $500,000 and no transaction threshold).

[303] *See e.g.*, ARK. CODE ANN. § 26-52-111(a) (2019); N.C. GEN. STAT. § 105-164.8(b)(9) (2019); UTAH CODE ANN. § 59-12-107(2)(c) (2018 & Supp. 2019).

[304] ALA. ADMIN. CODE r. 810-6-2-.90.03 (2015 & Supp. 2018).

[305] MISS. CODE. ANN. § 27-67-3(j) (2020).

[306] CAL. REV. & TAX. CODE § 6203(c) (2019).

[307] N.Y. TAX LAW, § 1101(b)(8)(iv) (2019).

[308] 34 TEX. ADMIN. CODE § 3.286(b)(2) (2018).

4. *Stare Decisis*

a. *Stare Decisis Giving Way.* Justice Lewis Powell said, "[T]he elimination of constitutional stare decisis would represent an explicit endorsement of the ideal that the Constitution is nothing more than what five justices say it is."[309] Surely, this is not to say that all Supreme Court decisions are infallible and beyond reproach. Some of the Court's decisions[310] stand as historical relics and deserve their status as examples of the Court's mistakes. Correction through overruling in those circumstances was only too appropriate. Yet Justice Powell's admonition resonates. The Court's credibility exists because its word is the law of the land. Stare decisis helps maintain that lofty status, instilling predictability in the law, with respect for and consistency with prior decisions.

Justice Louis Brandeis suggested that "*[s]tare decisis* is usually a wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right."[311] He acknowledged, however, that the Court has "often overruled its prior decisions" "in cases involving the Federal Constitution, where correction through legislative action is practically impossible."[312] All this is to suggest that Justice Kennedy's quest to overturn precedent standing for over fifty years was formidable. Whether he did so with sufficient persuasiveness to match the circumstances Justice Brandeis contemplated without nudging the Constitution towards "nothing more than what five justices say it is" deserves serious inquiry.

At the outset, *Quill's* physical presence rule seems to be less than the ideal candidate for overruling. Justice Brandeis's point that settled status in the law many times supersedes its correct application seems to be especially relevant in the context of sales and use tax collection in the online marketplace. All the shortcomings of the physical presence rule notwithstanding, it was a bright-line rule in an area of the law where little black-letter law exists. The rule allowed economic actors to make decisions with something approaching full understanding of their consequences. *Wayfair* substantially disrupted settled law to reach what Justice Kennedy and the majority perceived to be a correct application of the law. That application, however, as explored above, resolved much of what was already on its way to resolution in the market and left real questions about what the state of the law is moving forward.

Justice Brandeis's comment that the case for revisiting constitutional questions is especially strong in cases where "correction through legislative

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[309] Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990).

[310] *See e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857) (denying slaves standing in Federal courts for lack of citizenship); Plessy v. Ferguson, 163 U.S. 537 (1896) (permitting racial segregation in primary and secondary schools).

[311] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–408 (1932) (Brandeis, J., dissenting).

[312] *Id.*

action is practically impossible" seems particularly at odds with Justice Kennedy's approach. Preeminent among cases in which correction by Congress is not only possible, but invited, are the Court's dormant Commerce Clause cases. *Quill* urged Congress to correct the physical presence rule as it saw fit.[313] Proposed federal legislation—with the Marketplace Fairness Act of 2013[314] striking closest to the target with passage in the Senate—had been frequently introduced but was curtailed when Justice Kennedy intervened with his concurring opinion in *Direct Marketing*.[315] Taking Justice Brandeis's admonition at face value, dormant Commerce Clause cases must fall near the bottom of the list of Supreme Court decisions that are ripe for judicial reconsideration, as legislative action is anything but impossible.[316] All this considered, *Quill*, does not seem the model for Supreme Court precedent that should be overruled.

Undeterred, however, Justice Kennedy's fundamental thesis for invalidating *Quill* and subverting *stare decisis* is two-pronged. First, *stare decisis*, though worthy of utmost caution, "is not an inexorable command;"[317] and second, given that *Bellas Hess* and *Quill* represent "the Court's prohibition of a valid exercise of the States' sovereign power,"[318] the physical presence rule could no longer persist.

The first prong does little more than suggest what is already implied in *stare decisis* and substantially confirmed in the Court's history: in substantially all cases within a common law system, precedent creates law on which government and private actors alike rely and therefore deserves the highest deference. Implicitly within the framework of *stare decisis* are escape valves and room for permutation. Unfortunately, as a Congressional Research Service (CRS) report concluded based on a survey of Supreme Court decisions shortly after *Wayfair* was handed down, it is difficult to predict "when the Court will overrule a prior decision."[319] Even more confounding,

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[313] *Quill*, 504 U.S. at 318.

[314] Marketplace Fairness Act of 2013, S. 743 (H.R. 684), 113th Cong. (2013).

[315] Federal legislation has not been proposed since Justice Kennedy issued his concurring opinion in *Direct Marketing v. Brohl*.

[316] Congress has regulated in this area before. Public Law 86-272 and the Internet Tax Freedom Act are two examples. *See* 15 U.S.C §§ 381–384; 47 U.S.C. § 151. As already noted, bills that would have directly regulated remote use tax collection were proposed but ultimately failed in Congress. The speed (or lack thereof) with respect to Congress's response to Supreme Court decisions rendered under the dormant Commerce Clause should not bear on the Supreme Court's respect for *stare decisis*. More precisely, the Supreme Court putting a clock on Congress's response to a dormant Commerce Clause ruling seems inconsistent with the Court's deferential tone when ruling in this area and illogical given that ultimately commerce is Congress's to regulate under Article I of the Constitution.

[317] *Wayfair*, 138 S. Ct. at 2096.

[318] *Id.*

[319] BRANDON J. MURRILL, CONG. RSCH. SERV. R45319 THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT SUMMARY (2018).

"the Court has not provided an exhaustive list of the factors it uses to determine whether a decision should be overruled or how it weighs them."[320]

Undertaking a monumental task to distill the historical instances in which the Supreme Court has overruled its prior decisions, the CRS report identifies five "prudential and pragmatic" factors that the court balances against the "costs and benefits to society of reaffirming a prior holding": (1) quality of reasoning, (2) workability, (3) inconsistency with related decisions, (4) changed understanding of relevant facts, and (5) reliance.[321]

Justice Kennedy alludes to each of these factors to some degree throughout the opinion. He suggests the reasoning in *Quill* is "flawed on its own terms."[322] He cites scholars and practitioners to argue that *Quill* is "riddled with internal inconsistencies."[323] He dismisses reliance interests as unfounded as he measures *Quill* to no longer create "a clear or easily applicable standard."[324] Yet with all this, Justice Kennedy's substantive analysis for bypassing *stare decisis* depends critically upon (1) a changed understanding of relevant facts precipitated by the advent of the Internet or "Cyber Age"[325] and (2) the notion that *Quill* represented an intrusion on State sovereignty as it prohibited "a valid exercise of the States' sovereign power."[326]

Taking the second of these two arguments first, Justice Kennedy's reasoning seems circular and oversimplifying. As reason for ignoring precedent, he claims that the physical presence rule represents the Court's "prohibition of a valid exercise of the States' sovereign power."[327] The sovereign power referenced here seems to be the States' tax authority generally, up to and including the States' authority to impose a consumption tax in the form of a sales and use tax on its residents. To lump, however, within the bounds of "valid exercise of the States' sovereign power" each relevant state's desire to compel remote sellers to collect its sales and use tax in the online marketplace is conclusory. Flatly claiming that imposition of a sales and use tax collection duty on a remote seller fits neatly within the "valid exercise" of the States' sovereign power to tax ignores the last seventy years of jurisprudential history on the matter. The physical presence rule did not impede any valid exercise of state power; it defined that power precisely (even if unsatisfactorily to the states) and set parameters around the very unclear jurisdictional authority of states to compel out-of-state actors to collect their use tax. To lump that question under the well-settled umbrella of whether

[320] *Id.*
[321] *Id.*
[322] *Wayfair*, 138 S. Ct. at 2092.
[323] *Id.*
[324] *Id.* at 2086.
[325] *Id.* at 2097.
[326] *Id.* at 2096.
[327] *Id.*

states can impose a sales and use tax on their own residents or on transactions occurring within their own borders is analytically deficient.

As to the first point of changed understanding with respect to the relevant facts, Justice Kennedy quotes his own concurring opinion in *Direct Marketing* to reiterate the "far-reaching systemic and structural changes in the economy" and "many other societal dimensions caused by the Cyber Age."[328] Thus, the relevant changed fact that warrants disregard of *stare decisis* is the "Internet revolution,"[329] which for Justice Kennedy made *Quill's* error "more egregious and harmful."[330] Yet for all of Justice Kennedy's churning over the "realities of the interstate marketplace,"[331] with the proliferation of Internet access to Americans and Amazon's usurpation of Walmart as the top retailer in the world, he ignores, as explored above, the most recent and relevant of changed facts: when *Wayfair* was handed down, Amazon had already begun collecting use tax. So, as Justice Kennedy laments the states' revenue shortfalls precipitated by the Internet revolution, he makes no mention of how Amazon's collection of use tax will ameliorate those shortfalls.

Extending the workability rationale from a different perspective, Justice Kennedy notes that the physical presence rule is unworkable in the online marketplace as states have struggled to determine whether the likes of apps on phones and cookies in browsers constitute physical presence.[332] He argues that these nuanced and difficult questions will "embroil courts in technical and arbitrary disputes about what counts as physical presence."[333] This logic seems to stretch the notion of unworkable to beyond reason. To be sure, state responses to the physical presence rule have been the subject of controversy, but if the Supreme Court ignored precedent for every decision that did not spell out all the permutations and implications of a specific holding, *stare decisis* would be meaningless and could be disregarded in any circumstance where future litigation seemed likely.

Furthermore, there is no small irony here in Justice Kennedy's claim that the physical presence rule was unworkable for the courts, when *Wayfair* has left the question of the extent to which a state can reach an out-of-state retailer murkier than ever. The South Dakota statute is the implied template for economic nexus, but states have varied in their conformity to it without clear guidance from the Supreme Court with respect to what elements of the statute are constitutionally required. As partially explored above, those elements can be broken into two elements: (1) the threshold tests and (2) membership in the SSUTA.

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[328] *Id.* at 2097.
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] *See id.*
[333] *Id.* at 2098.

All states with a sales and use tax have now adopted some form of *Wayfair*-type legislation, yet only a minority of those states can claim full conformity to the South Dakota economic nexus law,[334] with identical thresholds and membership in the SSUTA.[335] Most states have strayed from or altered the threshold tests and are not members of the SSUTA. Justice Kennedy cited both the thresholds and South Dakota's membership in the SSUTA as aspects of the South Dakota law that would provide small merchants "a reasonable degree of protection."[336] Unfortunately, Justice Kennedy stopped short of declaring those elements constitutionally required. The fallout is that states have substantially ignored those key elements of protection, leaving the small online merchant in the lurch. In all, the unworkability of *Wayfair* will likely exceed by leaps and bounds the physical presence rule's unworkability. The issue of what is a constitutionally valid economic nexus law will, in all probability, bounce among the state courts for years to come and will likely require the Supreme Court to eventually clarify the law due to *Wayfair's* unworkability.

Justice Kennedy must have realized that the strongest argument for retaining *Quill* as matter of precedent was the substantial reliance interests involved. Rather than confront the issue head-on, however, he leveraged the workability argument into a work-around. On the unworkability rationale and the question of whether apps on residents' cell phones and cookies in browsers create physical presence, Justice Kennedy declared the physical presence rule unworkable.[337] This unworkability—now measured by Justice Kennedy's conclusion that the physical presence rule was "no longer a clear or easily applicable standard"[338]—allowed Justice Kennedy to announce that any arguments based on reliance are "misplaced."[339] Thus, apparently, the entire online marketplace in the United States—and the commercial actors

[334] The following states completely replicate South Dakota as members of the Streamlined Sales and Use Tax Agreement and dual-threshold tests of $100,000 sales or 200 transactions: Arkansas (ARK. CODE. ANN. § 26-52-111 (2019)); Indiana (IND. CODE § 6-2.5-2-1 (2017)); Kentucky (Ky. Rev. Stat. Ann. § 139.340 (2018)); Michigan (MICH. COMP. LAWS § 205.52c (2019)); Minnesota (MINN. STAT. § 297A.66(c) (2017)); Nevada (NEV. REV. STAT. § 372.751 (2019)); New Jersey (N.J. STAT. ANN. § 54:32B-3.5 (2018)); North Carolina (N.C. GEN. STAT. § 105-164.8 (2019)), Ohio (OHIO REV. CODE ANN. § 5741.01(I) (2017)); Rhode Island (R.I. GEN. LAWS § 44-18.2-3 (2017 & Supp. 2019)); South Dakota (S.D. CODIFIED LAWS § 10-64-2 (2016)); Utah (UTAH CODE ANN. § 59-12-107 (2018 & Supp. 2019)); Vermont (VT. STAT. ANN. tit. 32, § 9701(9)(F) and (14) (2017)); West Virginia (W. VA. CODE § 11-15A-6B(e) (2019)).

[335] For full list of member states, *see State Information*, *supra* note 30.

[336] *Wayfair*, 138 S. Ct. at 2098.

[337] *Id.* at 2097.

[338] *Id.* at 2098.

[339] *Id.*

giving rise to over $468 billion in revenue in 2018[340] when *Wayfair* was decided—should have been able to anticipate that five out of nine Supreme Court Justices would vote to overrule 50 years of precedent on the grounds that the physical presence rule was "no longer a clear or easily applicable standard."[341] It might be difficult to find such a concise statement that so thoroughly undermines the Court's credibility.

b. *Stare Decisis and Justice Personnel Changes.* In his concurrence in Quill, Justice Scalia warned against visiting "economic hardship upon those who took us at our word."[342] He went on, "[i]t is strangely incompatible . . . to demand that private parties anticipate our overrulings."[343] For Justice Scalia "reliance upon a square, unabandoned holding of the Supreme Court is always justifiable reliance . . . ."[344] In many ways, this comes back to Justice Brandeis's argument in favor stare decisis as a protection for the Constitution. Arguably, Wayfair nudged the Constitution closer to being "nothing more than what five justices say it is."[345]

To the point of continuity along the Court's lines of opinions, Justice Scalia's concurring opinion in *Quill* provides an opportunity for academic conjecture. It is a sneak-peak into an alternative universe in which Justice Scalia did not pass away. Given Justice Scalia's adamancy in *Quill*, and his reputation for inflexibility, it is reasonable to assume that his concurring opinion represents how he would have voted in *Wayfair*.

At the outset, it is noteworthy that Justice Scalia was implicitly unconcerned about the plight of States. That the primary channel of commerce in the *Wayfair*-era had switched from mail order to e-commerce would have likely been a non-issue for him. He, moreover, mentions nothing about the prospect that at some point, technology would surely ease whatever burdens on interstate commerce physical presence was meant to prevent. In a nutshell, his concurring opinion in *Quill* conveys an air of nonchalance. He seems very comfortable in the resolution that this is Congress's matter to resolve and not the Court's.[346]

So the hypothetical: what if Justice Scalia had not passed away in 2016? What would have been the result in *Wayfair* (decided in 2018)? For the

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[340] *Retail E-commerce Revenue in the United States from 2017 to 2022, with Forecasts from 2023 to 2025*, STATISTA, last accessed Sept. 8, 2023, https://www.statista.com/statistics/272391/us-retail-e-commerce-sales-forecast/ [https://perma.cc/DF3Y-FC4T].

[341] *Id.*

[342] *Quill*, 504 U.S. at 321 (Scalia, J., concurring).

[343] *Id.*

[344] *Id.*

[345] Powell, *supra* note 309, at 288.

[346] Justice Scalia emphasized in his concurring opinion that "Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so." *Quill*, 504 U.S. at 320 (Scalia, J., concurring). He further noted: "We have long recognized that the doctrine of *stare decisis* has 'special force' where 'Congress remains free to alter what we have done.'" *Id.*

reasons suggested above, Justice Scalia likely would have sided with the four dissenting justices. This is noteworthy given that Justice Scalia's replacement on the court was Justice Neil Gorsuch.

Prior to his nomination to the Supreme Court, Justice Gorsuch was a judge on the Tenth Circuit Court of Appeals. Coincidentally, he was also one of the panel of three judges that decided *Direct Marketing*,[347] both before and after it was remanded for consideration on the merits. On remand, the Tenth Circuit found that the Colorado notice and reporting statute was not in violation of *Quill's* physical presence rule.[348] This conclusion may have been inspired, in part, by Justice Kennedy's concurring opinion. The Tenth Circuit applied *Quill* narrowly to use tax collection, and not beyond it. According to the court, while the Colorado statute required notice to Colorado customers of a use tax payment responsibility and a report to be filed with the Colorado state tax authority providing a summary of Colorado residents' transactions, it required no use tax collection of out-of-state third parties.[349] On this basis, there was no violation of *Quill*, and the Colorado statute was upheld.

Perhaps animated by the Supreme Court Justice for whom he clerked (Kennedy), then-Judge Gorsuch wrote separately to concur in the judgment and "acknowledge a few additional points that influenced"[350] his thinking in the case. In many ways, his concurrence, at least insofar as it addressed *Quill*, was a declarative statement on the merits of the physical presence rule and precedent.

His initial posture with respect to precedent is one of substantial deference. He defends it as the mechanism through which "judges distinguish themselves from politicians . . . to apply the law as it is, not to reshape the law as they wish it to be."[351] He further notes that a justice system's ability to interpret the law properly depends upon respect for precedent.[352]

As applied to the dormant Commerce Clause generally, and to *Quill* particularly, Judge Gorsuch acknowledges the obligation for lower courts "to follow *Quill* out of fidelity to our system of precedent whether or not we profess confidence in the decision itself."[353] Yet this is the measured assessment of a Tenth Circuit Judge who notes his court could "never usurp the power to overrule a decision of the Supreme Court."[354] The negative implication of this statement leaves open the possibility that at least for then-Judge Gorsuch, the Supreme Court may overrule its own decisions.

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[347] Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016).
[348] *Id.* at 1147.
[349] *Id.* at 1139.
[350] *Id.* at 1147 (Gorsuch, J., concurring).
[351] *Id.*
[352] *See id.* at 1147–48.
[353] *Id.* at 1148.
[354] *Id.*

Judge Gorsuch goes on to justify the Tenth Circuit's reasoning in upholding Colorado's notice and reporting law on the narrowness of *Quill's* rationale, bending heavily under the weight of *stare decisis* and respect for *Bellas Hess*.[355] He analogizes *Bellas Hess* to baseball's judicially created immunity from antitrust law created in 1922 in *Federal Baseball Club v. National League of Professional Baseball Clubs*.[356] There the Supreme Court exempted baseball from antitrust law on the (what now seems absurd) conclusion that the exhibition of professional baseball teams crossing state lines does not involve "commerce among the states."[357] The Supreme Court subsequently corrected course and found other exhibitions crossing state lines to be engaged in interstate commerce but never explicitly overruled *Federal Baseball*.[358] Judge Gorsuch attributes this persistence to "respect for the reliance interests . . . the decision engendered in that particular industry."[359] He further notes that later Congress legislatively endorsed baseball's exemption from antitrust law.[360]

Justice Gorsuch's analogy to *Federal Baseball* might be synthesized to this: the reliance interests created by precedent are so powerful, particularly in cases involving the dormant Commerce Clause, that it is appropriate for the Supreme Court to retain holdings that directly contradict subsequent decisions until Congress exercises its constitutional power to correct or confirm those decisions. If this line of reasoning is applied to *Wayfair*, it is a curiosity that Justice Gorsuch joined the majority. His analogy seems to square more with Chief Justice Roberts's dissenting opinion. So what changed? Are the reliance interests of the baseball industry more important or more valid than the reliance interests of the entire online marketplace? (If baseball was the nation's pastime in 1922, isn't it fair to say that online shopping was the nation's pastime in 2018?) Why was it appropriate in the name of precedent to maintain the incongruity of a one-off grant of immunity to baseball, while all other exhibitions enjoyed no such exemption, until Congress corrected or confirmed the exemption, but it was not appropriate to wait any longer in *Wayfair* for Congress to similarly respond?

Part of the answer to this question may be found in the conclusion to Judge Gorsuch's concurring opinion on remand in *Direct Marketing*. In response to the question of whether Colorado's notice and reporting statute, and the Tenth Circuit's positive ruling with respect to it, would dilute the competitive advantage held by online vendors, Judge Gorsuch suggested it would and such a result would be "entirely consistent with the demands of

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[355] *Id.* at 1149.

[356] *Id.* at 1150. *See* Fed. Baseball Club v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922).

[357] *Direct Mktg. Ass'n*, 814 F.3d at 1150.

[358] *Id.*

[359] *Id.*

[360] *Id.*

precedent."[361] For Judge Gorsuch, *Quill's* qualified endorsement of *Bellas Hess*'s physical presence test, while acknowledging its "formalistic" and "artificial" limitations, invited states to create legislative contortions subverting and working around the physical presence rule.[362] He extrapolated on this thought to suggest that *Quill's* narrow rationale set "a sort of expiration date for mail order and internet vendors' reliance interests on *Bellas Hess*'s rule . . . ," which would "never expand but . . ., if anything, [would] wash away with the tides of time."[363]

Judge Gorsuch's poetic imagery describing the gradual erosion of *Quill* and any associated legitimate reliance interests do not clearly explain Justice Gorsuch's joining the majority opinion in *Wayfair*. Judge Gorsuch considered Colorado's notice and reporting statute to be an omen of things to come: that states would see Colorado's success and implement similar policy in their own states. *Wayfair*—far from ebbing with the tides of time—was an earthquake in the SALT world, leaving reliance interests and precedent as rubble.

Regardless of how Justice Gorsuch reached this conclusion, he occupied the seat in which Justice Scalia sat. This change in the make-up of the court flipped a likely vote for upholding *Quill* to a vote for overturning *Quill* and represented the difference in this case. This, perhaps, illustrates the strongest case for precedent: should the state of the law hang in the balance and be subject to change based on personnel changes among the Supreme Court Justices? No. This is why *stare decisis* matters. The result in *Wayfair* serves notice that Supreme Court decisions are malleable, subject to overruling, as the personnel on the Court and the personal opinions of the Justices change. This inference has broader societal implications well beyond the collection of sales and use tax in the online marketplace.

5. *Small Online Businesses and a Final Appeal to the Moon*

To some extent, Wayfair, Overstock, and Newegg, must have considered themselves proxy litigants for the entire online marketplace. As such, part of their argument for the physical presence rule's survival had no application in their own interests. They argued that the physical presence rule served as a meaningful protection for "start-up and small businesses" using the Internet "as a means to grow their companies and access a national market, without exposing themselves to the daunting complexity and business-development obstacles of nationwide sales tax collection."[364] The response to this point to a large extent (even if downplayed by Justice Kennedy in *Wayfair*) was the

[361] *Id.* at 1151.
[362] *Id.*
[363] *Id.*
[364] *Wayfair*, 138 S. Ct. at 2098.

driving rationale behind *Quill*. This is footnote six in *Quill*[365] speaking to the "welter of complicated obligations" with which a mail order catalog (or a small online retailer) will have to grapple without the bright-line physical presence rule.

Justice Kennedy's response to this argument was acknowledgement, without sympathy or acquiescence, and a final iterative appeal to the moon. He concedes that burdens on small businesses "may pose legitimate concerns" as "State taxes differ, not only in the rate imposed but also in the categories of goods that are taxed . . . ."[366] But for Justice Kennedy, these concerns would be tempered if not completely ameliorated, as "[e]ventually software that is available at a reasonable cost may make it easier for small businesses to cope with these problems."[367] By whom the software would be developed, how the cost would be reasonable, whether the states or private industry would confirm effectiveness, and who would be liable if the software malfunctions, Justice Kennedy does not say. He does, however, presume (without basis for doing so, beyond wishful thinking) that with the overruling of the physical presence rule, it may well be within a "short period of time"[368] that such software becomes available.

Justice Kennedy must have sensed the inadequacy with which his response actually addressed the concerns relating to small online businesses. Not without some irony, he employed the same dormant Commerce Clause absolution tactic employed in *Quill*: "And in all events, Congress may legislate to address these problems if it deems it necessary and fit to do so."[369] Thus, the luxury of deflection available to the Court when dealing with assumed Article I power: we will tinker with things as we care to do so, and Congress will fix whatever we get wrong.

It strains credulity for Justice Kennedy to employ this tactic when he was unwilling to let the legislative process playout so that Congress could address *Quill*. Moreover, this approach is a jurisprudential pretext for avoiding the reality of the SALT setting: the states have become more divergent in their sales and use tax laws, not less so, since *Quill*. There were over 10,000 separate taxing jurisdictions in place in 2018,[370] more than one-and-a-half times as many as when *Quill* was handed down. Half the states have refused to voluntarily simplify their laws, thereby reducing burdens on and

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[365] *Quill*, 504 U.S. at 313, n.6.
[366] *Wayfair*, 138 S. Ct. at 2098.
[367] *Id.*
[368] *Id.*
[369] *Id.*
[370] Katherine Loughead, *Growing Number of State Sales Tax Jurisdictions Makes* South Dakota v. Wayfair *That Much More Imperative*, TAX FOUND., Apr. 17, 2018, https://taxfoundation.org/growing-number-state-sales-tax-jurisdictions-makes-south-dakota-v-wayfair-much-imperative/ [https://perma.cc/BAL9-EGEJ]. Loughead identifies at least 10,814 separate taxing jurisdictions in the United States. *Id.*

discrimination against interstate commerce, despite the opportunity to do so through the SSUTA.

Justice Kennedy references these simplification efforts in a final effort to placate. "Concerns that complex state tax systems could be a burden on small business are answered in part by noting that . . . there are various plans already in place to simplify collection . . . ."[371] In making this point, however, Justice Kennedy ignores the direct consequence of the opinion he is writing: the only motivation States had to simplify and facilitate the sales and use tax collection process was in response to *Quill*. Thus, Justice Kennedy notes the prospect of simplification in one line and removes any incentive for it in the next.

6. *The New Standard?*

Justice Kennedy's analysis concludes that *Quill* is "unsound and incorrect" and therefore must be overruled.[372] It would be reasonable for States, out-of-state retailers, and residents alike to collectively ask: "OK, now what?"[373] Justice Kennedy's response to that question begins with first principles announced under the *Complete Auto* test's first prong: that under the Commerce Clause a tax must apply to an activity with substantial nexus with the taxing state.[374] He then curiously cites *Polar Tankers, Inc. v. City of Valdez*[375] for the proposition that "nexus is established when the taxpayer [or collector] avails itself of the substantial privilege of carrying on business in that jurisdiction."[376]

This is an odd preliminary reference on at least two fronts. First, *Valdez* is not a Commerce Clause case. The matter was completely resolved by the Supreme Court's determination that the City of Valdez's personal property tax on large ships traveling to and from the city was unconstitutional under the Tonnage Clause.[377] The *Valdez* Court's reference to the Commerce Clause in relation to the city's property tax ordinance was in passing, in response to a point made in the dissent, and was not dispositive to the case.

Second, and more disconcerting, the quote from *Valdez*—perhaps because it was only offering the analysis as a side note—incorrectly blends due process

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[371] *Wayfair*, 138 S. Ct. at 2099.

[372] *Id.*

[373] Scholars have proposed several alternatives to physical presence if Justice Kennedy had been looking for insights on the question. *See e.g.*, Adam B. Thimmesch, *A Unifying Approach to Nexus Under the Dormant Commerce Clause*, MICH. L. REV. ONLINE (2018); Richard D. Pomp, *supra* note 141, at 1121; John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319 (2003); John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 361-64 (2003).

[374] *Wayfair*, 138 S. Ct. at 2098.

[375] 557 U.S. 1 (2009).

[376] *Id.* at 11.

[377] *Id.* at 6. Alternative arguments were made invoking the Commerce and Due Process Clauses, but the Court never reached them. *Id.*

nexus and Commerce Clause nexus into a single, albeit brief, analysis. *Valdez* first noted that "a nondomiciliary jurisdiction may constitutionally tax property when the property has a 'substantial nexus' with that jurisdiction."[378] Under *Complete Auto*, "substantial nexus" is a Commerce Clause determination, whereas due process requires mere "nexus" with the jurisdiction. The Court then, in the same sentence, added that "such a nexus is established when the taxpayer 'avails itself of the substantial privilege of carrying on business' in that jurisdiction."[379] That is a direct quote from *Mobil Oil Corp v. Commissioner of Taxes,*[380] which comes from a part of the opinion in which the Court is discussing the two requirements imposed on States to tax income under the Due Process Clause of the Fourteenth Amendment: (1) there must be "a 'minimal connection' between the interstate activities and the taxing state," and (2) there must be "a rational relationship between the income attributed to the State and the intrastate values of the enterprise."[381] The Court in *Mobil Oil* went on to explain that the "requisite [due process] 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the State."[382] Thus, the availment cited in *Valdez* was in reference to due process nexus (as purposeful availment always tends to be), not Commerce Clause nexus.

In *Valdez*, the inappropriate blending of the two analyses was of little consequence in the case because neither clause was relevant to its disposition. Justice Kennedy's misincorporation of due process principles, however, in rearticulating what Commerce Clause "substantial nexus" would now require in a post-*Quill* world, is disappointing. *Bellas Hess*'s blending of due process nexus and Commerce Clause nexus led to more than two decades of uncertainty with respect to which clause actually supported the physical presence rule. Reverting to a similar commingled analysis seems misguided. Unfortunately, Justice Kennedy's befuddling overture to framing a new Commerce Clause "substantial nexus" standard for sales and use tax was appropriate foreshadowing for what was to come.

Justice Kennedy's inaccurate and incomplete framing of Commerce Clause substantial nexus was followed by an equally unsatisfying analysis. Concurrently, he clumsily pieced together an "economic presence" standard to replace physical presence, while he applied the very same standard, still in its inception, to Wayfair, Overstock, and Newegg—the proverbial building the airplane while in flight.

Justice Kennedy's economic presence standard was misguided from the beginning, largely based on improper framing from *Valdez*. He found the *Wayfair* respondents nexus to be "clearly sufficient based on both the

[378] *Id.* at 11.
[379] *Id.*
[380] 445 U.S. 425 (1980).
[381] *Id.* at 436–37.
[382] *Id.* at 437.

economic and virtual contacts respondents have with [South Dakota]."[383] Measuring contacts between a state and an out-of-state vendor, virtual, economic, or otherwise, supports a due process analysis that calls for minimum contacts with the State. Historically, "substantial nexus" called for more than a mere measure of contacts.[384] Unfettered by precedent, however, and apparently emboldened by describing a new standard derived from the misapplied *Valdez* dicta, Justice Kennedy was content to leave the question of substantial nexus at that.

He then turns to the South Dakota statute, first in the abstract, then as applied to the three large online retailers. In the abstract, he considers the alternative thresholds of "more than $100,000 of goods or services" sold into South Dakota, or "200 or more separate transactions" in South Dakota as a "quantity of business" that "could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota."[385] Again, Justice Kennedy applies due process principles to a Commerce Clause determination. The Court's Commerce Clause determinations that go well beyond *Quill* do not measure purposeful availment. Purposeful availment, in tandem with minimum contacts, is the spine of due process analysis. Having dispensed with *Quill*, Justice Kennedy must have perceived an empty canvas on which to paint new Commerce Clause nexus. This perception, however, was valid only insofar as consistent with the Court's still valid Commerce Clause jurisprudence. Unfortunately, Justice Kennedy misappropriated notions of due process for Commerce Clause leaving the question of economic nexus a disjointed and unclear mess.

Perhaps in an attempt to gloss over the legalistic substitution of X for Y, Justice Kennedy turned to the application of the new economic presence standard to the parties at hand, without recognizing the much broader implications of the decision. The litigants could be classified as nothing other than "large, national companies that undoubtedly maintain an extensive virtual presence."[386] "Thus, the substantial nexus requirement of *Complete Auto* [was] satisfied in this case."[387]

Justice Kennedy must have known that such a pithy analysis provided little substance, apart from the South Dakota statute as a template, for states to craft policy and for out-of-state vendors to make business decisions. In an attempt to stake guideposts, he elaborated without clearly identifying one

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[383] *Wayfair*, 138 S. Ct. at 2099.

[384] *Complete Auto* does not use the term "contacts" in its explanation of the modern-day Commerce Clause analysis in the context of state taxes. *Complete Auto*, 430 U.S. 274.

[385] *Wayfair*, 138 S. Ct. at 2099. I argue in a separate article that the South Dakota statute would have been on firmer due process ground if it had used "and" instead of "or" in its threshold tests. *See* Eric S. Smith, *Due Process Implications Related to State Notice an Economic Nexus Laws*, 70 TAX LAW. 833 (2017).

[386] *Wayfair*, 138 S. Ct. at 2099.

[387] *Id.*

aspect as more important than another. He first highlighted the transaction and gross sales thresholds and classified them as safe harbors that protect from a sales and use tax collection obligation those "who transact only limited business in South Dakota."[388]

This assertion ironically fails to consider what the Commerce Clause is meant to prevent: undue burdens on interstate commerce. While a small online retailer may not ultimately have to collect sales and use tax in South Dakota, it will only arrive at this determination after making the potentially resource-intensive determination of whether the safe harbor applies. To be sure, Wayfair and Overstock can likely call up gross sales and transactions in South Dakota at a moment's notice, but every possibility exists that a small online retailer may not have the wherewithal to do so as easily. This is to say nothing of the natural consequence of *Wayfair*: that all states that impose a sales and use tax have promulgated similar, but not identical legislation. Now a small online retailer must make the safe harbor determination on an annual basis with respect to up to 45 different states and the District of Columbia. Thus, even if for Justice Kennedy, South Dakota's safe harbor provided protection for those out-of-state vendors with scant sales in South Dakota, the determination of whether the safe harbor applies could well be considered an unconstitutional burden on interstate commerce under *Complete Auto's* third prong.

Justice Kennedy went on to point out that South Dakota is one of the more than 20 States that have adopted the SSUTA. He recognized the significance of this fact, as the agreement "standardizes taxes to reduce administrative and compliance costs" as it "requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules."[389] He further notes that the agreement requires states to provide software "paid for by the state" and carries with it immunity from audit liability.[390]

Justice Kennedy's recognition of the SSUTA and its crucial safeguards and facilitating measures for out-of-staters was a squandered opportunity to provide meaningful guidance on post-*Wayfair* economic presence. Justice Kennedy stopped short of declaring SSUTA or substantially similar legislation as constitutionally required. This, even though congressional proposals towards a federal solution would effectively have done just that.

Instead, Justice Kennedy abruptly curtailed the analysis after lauding the SSUTA's redeeming features and declared that "[a]ny remaining claims regarding the application of the Commerce Clause in the absence of *Quill* and *Bellas Hess*" would "be addressed in the first instance on remand."[391] In sum, Justice Kennedy punted. The South Dakota statute is the tentative

[388] *Id.*
[389] *Id.* at 2100.
[390] *Id.*
[391] *Id.*

guidepost, but Justice Kennedy's wishy-washy analysis left even that cairn in the fog. Some states have abided by South Dakota's transaction/gross receipts thresholds, others have eliminated the transaction threshold, and others still have established their own gross receipts thresholds.

Despite Justice Kennedy's laudatory but ultimately toothless endorsement, no state has enacted SSUTA legislation since *Wayfair*. Indeed, why should they? The incentivizing appeal of the SSUTA was that when all states had promulgated uniform legislation, they could collectively respond to *Quill* with a declaration that Commerce Clause burdens have been affirmatively mitigated. *Wayfair* annihilates that incentivizing effect. The States already have what they hoped to achieve through the SSUTA without paying the price of uniformity. In sum, Justice Kennedy delivered everything the States wanted, without price, without qualification, and without regard for small online retailers left to trudge through the post-*Wayfair* landscape.

VI. Conclusion

Wayfair exemplifies a truism of Supreme Court decisions: they can be overruled, but they cannot be freely undone. No matter how sincere Justice Kennedy's desire was to correct perceived error in *Quill*'s physical presence rule and ameliorate its growing "egregious and harmful"[392] effect since the inception of the online marketplace, there was a toll for reneging. This Article suggests that on balance, the harm exceeded the benefits from overruling *Quill*.

The toll was high. *Wayfair* left small online businesses in the lurch to manage compliance with the country's 10,000-plus state and local taxing jurisdictions. *Wayfair* left reliance interests in tatters. It implied that private parties ought to anticipate the Court's overrulings and that there are circumstances "where reliance upon a square, unabandoned holding of the Supreme Court"[393] is not justifiable. Significantly, the Court's credibility was sacrificed in *Wayfair*. This gives private parties reason not to take the Supreme Court "at [its] word."[394] That sacrifice nudged the Constitution closer to being "nothing more than what five justices say it is."[395] Post-*Wayfair*, uncertainty abounds, with a much less than clearly defined economic presence rule supplanting the physical presence rule, making it more onerous for small online businesses to prosper. On a broader level, with implications well beyond sales and use tax, *Wayfair* served notice that Supreme Court decisions are malleable, subject to revision and overruling, as the personnel and personal opinions of Supreme Court Justices change.

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[392] *Id.* at 2097.
[393] *Quill*, 504 U.S. at 321 (Scalia, J., concurring).
[394] *Id.*
[395] Powell, *supra* note 309, at 288.

The perceived benefit from *Wayfair* is that the States, regardless of physical presence, can now expect to compel out-of-state retailers to collect their sales and use tax. This victory is diminished, however, given that the largest online retailer by many orders of magnitude, Amazon, began collecting in all states that impose a sales tax in April 2017, over a year before *Wayfair* was handed down. Had the Court meaningfully considered Amazon's capitulation and left the physical presence rule intact, it could have emerged as a crucial protection for small online businesses, even while State coffers were substantially replenished.

The decision in *Wayfair* represents an ends-driven analysis and bears significant weaknesses when subject to scrutiny. Justice Kennedy employed an avant-garde standard of review, seemingly cut from whole cloth. His justification for bypassing *stare decisis* was at best wish-washy and at worst calamitous for those who expect the current Court to respect prior Court decisions. Justice Kennedy's reformulation of the relevant Commerce Clause analysis impetuously blends due process and Commerce Clause principles, leaving waters surrounding the question murky and unsettled. On this account, the remnants of *Quill*—its due process analysis, which as discussed above, should remain intact as good law—may yet be important for clarifying the constitutional confusion that *Wayfair* created. This Article highlights *Wayfair's* weaknesses and shortcomings and serves as a roadmap to challenge the decision.