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Physical Presence Is in No Wayfair!: Addressing the Supreme Court's Removal of the Physical Presence Rule and the Need for Congressional Action

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Physical Presence Is in No Wayfair!: Addressing the Supreme Court's Removal of the Physical Presence Rule and the Need for Congressional Action

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Abstract

The Commerce Clause of Article I grants Congress the power to regulate commerce. In the past, an entity had to have a physical presence in a state for that state to impose taxes on the entity. Due to the changing landscape of online businesses, the U.S. Supreme Court decided in South Dakota v. Wayfair in June 2018 to remove the physical presence rule as it applied to the Commerce Clause analysis of state taxation. The Wayfair decision's ramification is that states can now impose taxes on businesses conducting sales online without having any physical presence in those states. While the Court's decision is a step in the right direction, the removal of physical presence makes businesses susceptible to multiple tax burdens.

The Wayfair ruling created concern that small businesses would suffer because states could now tax online retailers regardless of the business's location. Under the current law, following Wayfair, states' tax thresholds can be low enough to place a significant burden on companies that cannot handle such taxes' implications. Further, localities may now have the ability to impose their own tax burdens, increasing small businesses' hardship even more.

This Comment argues that Congress must impose limits in response to the Court's ruling in Wayfair. Removing the rule largely takes away the unfair advantage that out-of-state corpora-

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tions had over the small businesses located in the state; however, removing the rule runs the risk of imposing disastrous burdens on small companies conducting online business in other states. Limiting the state taxing power in the online space will be crucial for these businesses' survival. This Comment first gives the background of the physical presence rule. Second, this Comment discusses legislation that Congress has overlooked and legislation that Congress has the opportunity to pass. Finally, this Comment suggests that Congress should adopt a form of the SSUTA to remedy the negative ramifications of the Wayfair decision.

TABLE OF CONTENTS

I. INTRODUCTION

Across the globe, businesses and start-ups have started engaging in online retail as a form of generating profits.[1] For many years,

1. Mikal Belicove, *How Many U.S.-Based Online Retail Stores Are on the Internet?*, FORBES (Sept. 18, 2013, 2:23 pm), https://bit.ly/2UTifIj [https://perma.cc/

these businesses could escape the burdens of tax liability.[2] Now, these businesses are susceptible to potentially thousands of tax jurisdictions.[3] For small-business owners, this susceptibility signifies additional risk, uncertainty, and cost, as well as a stall in e-commerce business formation, growth, and hiring.[4] The increased compliance costs will have to come from somewhere, and many businesses will make up for these costs by cutting employment.[5] Many small businesses are considering pulling their online sales out of some states entirely due to their increasing costs from the tax collection requirement.[6]

Since its establishment in the Supreme Court case *Nat'l Bellas Hess v. Dep't of Revenue of Ill.* ("*Nat'l Bellas*"),[7] the physical presence rule has played an important role in determining the validity of state taxation on an out-of-state seller.[8] The physical presence rule permits states to collect sales tax from retail purchases from out-of-state sellers only if the seller has a physical presence in the state where the purchase is made.[9] Over time, the physical presence rule has imposed a burden on states that cannot collect the sales tax they believe they deserve.[10] States have made legislative attempts to gain sales taxes from remote sellers but, with the physical presence rule in place, have faced difficulty in doing so.[11]

With the growing rates of e-commerce transactions surging since the 1970s, the Supreme Court has, unsurprisingly, reevaluated

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8VNL-G7KG] (explaining that U.S.-based online retail stores are growing in number and increased 13.5 percent between 2012 and 2013).

2. *See* Chavie Lieber, *The Supreme Court's Online Sales Tax Decision Is Going to Cost You*, RACKED (June 21, 2018, 2:45 pm), https://bit.ly/2UU66CT [https://perma.cc/JB6K-VUSY].

3. *Id.*

4. Zoe Henry, *A Supreme Court Ruling on Internet Sales Tax Is 'Absolutely Hair Raising' for Small Businesses*, INC. (July 16, 2018), https://bit.ly/2L34AOB, [https://perma.cc/DL9Q-BY8W].

5. *Id.*

6. *Id.*

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

8. *See id.* at 763–766. A seller is "out of state" if it sells its goods in one state but has its principle place of business in another state. *See id.* at 755 (classifying National as an out-of-state business in Illinois because National has a principal place of business in another state). For example, if a business is incorporated in Missouri and sells its goods in Illinois, the business is an out-of-state seller in Illinois. *Id.* at 760–761.

9. *See id.* at 758.

10. *See* Press Release, U.S. Census Bureau News, Quarterly Retail E-Commerce Sales: 4th Quarter 2017 (Feb. 16, 2018), https://bit.ly/2UU8BVN [https://perma.cc/M58W-LWPX] [hereinafter *Quarterly Report*] (showing the increased amount of online retail sales, which is an indicator for the increasing amount of tax dollars the states could not collect under the physical presence rule).

11. *See, e.g.*, In re Intercard, Inc., 14 P.3d 1111, 1121–3 (Kan. 2000).

the physical presence rule several times since *Nat'l Bellas*.[12] In the 2018 Supreme Court decision, *South Dakota v. Wayfair, Inc.* ("*Wayfair*"),[13] the Court overturned the physical presence rule, allowing states to tax out-of-state sellers even if the seller does not have a physical presence in the state.[14] *Wayfair* has opened a new door for states to create their own internet sales tax laws with fewer limitations than prior state laws had.[15] With fewer restrictions, concerns have continued to grow about the possibility that states can take advantage of businesses and that these businesses will face an undue burden to collect and maintain taxes of various sorts for each state.[16]

This Comment seeks to establish the need for Congressional action in the wake of *Wayfair*. Part II discusses the background of the physical presence rule, includes an explanation of the Commerce Clause and the growth of e-commerce, and lays out the evolution of the physical presence rule through four landmark cases.[17] Part III establishes the need for congressional action, explains the states' response to *Wayfair* and the resulting impact on businesses, describes various bills and options previously and currently before Congress that could resolve the issue, and recommends the course of action Congress should take.[18]

II. BACKGROUND

Since 1967, the Supreme Court has been interpreting the validity of out-of-state seller taxation by the states.[19] The Court's interpretations have revolved around the Commerce Clause's meaning as well as e-commerce's evolution throughout the decades.[20]

A. *The History of the Commerce Clause*

The Commerce Clause[21] of Article I of the U.S. Constitution is at the center of the discussion about the physical presence

12. *See generally* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (reevaluating the physical presence rule and overturning it entirely); Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (reevaluating the physical presence rule and overturning its application in the context of the Due Process Clause).
13. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).
14. *Id.* at 2093.
15. *See infra* Part III, Subsection A.
16. *See infra* Part III, Subsection A.
17. *See infra* Part II.
18. *See infra* Part III.
19. *See* Nat'l Bellas Hess v. Dep't of Revenue of Ill., 386 U.S. 753, 753 (1967).
20. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097 (2018).
21. U.S. CONST. art. I, § 8, cl. 3.

rule.[22] The Commerce Clause grants Congress the power "[t]o regulate commerce . . . among the several States."[23] The Commerce Clause's impetus was structural concerns[24] about the effects of state regulation on the national economy.[25] In *Gibbons v. Ogden*,[26] one of the first cases interpreting the Commerce Clause, the Supreme Court defined "commerce" to include both "interchange of commodities" and "commercial intercourse."[27]

The Court's Commerce Clause interpretations have evolved substantially over the years, fluctuating between broad and narrow, meaning that the interpretations were more or less inclusive of what qualifies as "commerce."[28] The Commerce Clause's early interpretations had a broad scope.[29] The Court later narrowed the scope to

22. *See Nat'l Bellas*, 386 U.S. at 756 ("[I]n determining the power of a State to impose the burdens of collecting use taxes upon interstate sales . . . the Constitution requires 'some definite link, some minimum connection . . . .'" (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954))); *Wayfair*, 138 S. Ct. at 2089–91 (giving the history of the Commerce Clause and explaining how it pertains to the Court's analysis); Quill Corp. v. North Dakota, 504 U.S. 298, 309–11 (1992) (describing the Commerce Clause and how it pertains to the Court's analysis); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 274 (1977) ("The issue in this case is whether Mississippi runs afoul of the Commerce Clause. . . .").

23. U.S. CONST. art. I, § 8, cl. 3.

24. Randy E. Barnett & Andrew Koppelman, *The Commerce Clause*, NAT'L CONST. CENT., https://bit.ly/2BvzaJK [https://perma.cc/64JW-QZMZ] (last visited Sept. 28, 2019). Before the Constitution's adoption, states individually enacted laws to help debtors but simultaneously ended up hurting creditors. *Id.* States enacted trade barriers to protect themselves, and Congress could not enter trade agreements with foreign powers to open the American market. *Id.* These trade barriers created a nationwide economic downturn and a call for a constitutional convention. *Id.* To address the economic problems the states' incohesive commerce laws caused, the Constitutional Convention added the Commerce Clause into the Constitution. *Id.*

25. THE FEDERALIST NO. 11 (Alexander Hamilton) ("[R]ivalships of the parts would make them checks upon each other, and would frustrate all the tempting advantages which nature has kindly placed in our reach. In a state so insignificant our commerce would be a prey to the wanton intermeddlings of all nations at war with each other . . . .").

26. Gibbons v. Ogden, 22 U.S. 1 (1824).

27. *Id.* at 189, 193.

28. *See generally* PAUL HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 52–101 (1981) (detailing the history of the Court's Commerce Clause interpretations).

29. *See* Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888) ("[N]o State has the right to lay a tax on interstate commerce in any form . . . ."); Brown v. Maryland, 25 U.S. 419, 438–39 (1827) (reasoning that states are forbidden to tax interstate commerce with the exception of the tax or duty of inspection). The Court in these cases ruled that the Commerce Clause generally prohibited state taxation on interstate commerce. *Id.*

differentiate between direct burdens[30] and indirect burdens[31] on interstate commerce[32] before reverting to a broader approach.[33] The Court's modern-day approach focuses on finding the right balance between federal and state power.[34]

The Supreme Court has identified two primary principles that limit states' authority to regulate interstate commerce[35]: (1) states may not discriminate against interstate commerce[36] and (2) states may not impose undue burdens on interstate commerce.[37] Additionally, the Court has upheld state laws that even-handedly regulate commerce for public interest purposes unless the burden on commerce is excessive in relation to the local benefits.[38] The *Wayfair* Court used these principles when deciding whether to overturn the physical presence rule.[39]

B. The History of the Physical Presence Rule

The Court used the physical presence rule to analyze state taxes on out-of-state retailers.[40] Four cases exemplify the physical presence rule's evolutionary periods: *Nat'l Bellas*, *Complete Auto*

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30. Pub. Util. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 88 (1927). "Direct burdens" are burdens that put a direct restraint on commerce, which should be free without the presence of a federal regulation. *Id.*

31. *See id.* at 89. "Indirect burdens" are essentially local and have an incidental, but not direct, effect on interstate commerce. *Id.*

32. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992). The Court prohibited direct burdens but not indirect burdens. *Id.*

33. *See, e.g.*, Sanford v. Poe, 69 F. 546, 556 (6th Cir. 1895). The Court rejected the distinction between direct and indirect burdens during this period in favor of a multiple-taxation doctrine that focused on whether a tax subjected interstate commerce to a multiple taxation risk. W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 256–58 (1938). The Court reverted to embracing the formal distinction between direct and indirect taxation in 1946. Freeman v. Hewit, 329 U.S. 249, 256 (1946).

34. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090 (2018).

35. *Id.*

36. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994) (". . . '[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid.").

37. *Id.* ("[N]ondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970))).

38. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). A local benefit is a legitimate, local purpose that effectuates a legitimate, local public interest. *Id.*

39. *See Wayfair*, 138 S. Ct. at 2091.

40. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 314 (1992); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 283–85 (1977); Nat'l Bellas Hess v. Dep't of Revenue of Ill., 386 U.S. 753, 758 (1967).

Transit, Inc. v. Brady ("*Complete Auto*"),[41] *Quill Corp. v. North Dakota* ("*Quill Corp.*"),[42] and *Wayfair*.

1. The Beginning of the Physical Presence Rule: Nat'l Bellas

The Supreme Court first established the physical presence rule in *Nat'l Bellas*.[43] National Bellas Hess, Inc., was a mail order house with its principal place of business in Missouri—not Illinois.[44] The company had no contacts with Illinois other than mailing out biannual catalogues and supplemental flyers that led to sales within Illinois.[45] Nevertheless, under Illinois law,[46] National Bellas Hess, Inc., fell within the category of a retailer maintaining a place of business in the state.[47] National Bellas Hess, Inc., argued that the Illinois statute imposed liabilities that violated the Fourteenth Amendment's Due Process Clause and that unconstitutionally burdened interstate commerce.[48]

The *Nat'l Bellas* Court reasoned that the Constitution requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[49] The Court provided examples of various situations in which an out-of-state seller was liable for taxes based on prior court decisions.[50] Following these examples, the Court set forth the physical presence rule, reasoning that a state could tax out-of-state sellers if the taxing state plainly afforded protection and services to those sellers.[51] The

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

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

43. *Nat'l Bellas*, 386 U.S. at 757–58.

44. *Id.* at 753. The principal place of business was important because the business conduct at issue here occurred in Illinois. *Id.* at 754.

45. *Id.* at 754. The company did not maintain any office, agent, salesman, or ownership of any tangible asset in Illinois and did not advertise using newspapers, billboards, radio, or television. *Id.* Twice a year, the company mailed out catalogues to active or recent customers and supplemented the catalogues with advertising flyers targeting past and potential customers. *Id.*

46. Ill. Rev. Stat. c. 120, § 439.2 (1965) (now codified at 35 ILL. COMP. STAT. 105/2 (2018)).

47. *Nat'l Bellas*, 386 U.S. at 755 ("[Retail includes] [e]ngaging in soliciting orders within [the] State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without [the] State." (quoting Ill. Rev. Stat. c. 120, § 439.2 (1965))).

48. *Id.* at 756.

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

50. *See, e.g.*, Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 372 (1941) (Roberts, J., dissenting) (stating that the tax was constitutional when the mail order seller maintained local retail stores); Felt & Tarrant Co. v. Gallagher, 306 U.S. 62, 67–68 (1939) (stating that tax was constitutional when local agents in the taxing state arranged the sales).

51. *Nat'l Bellas*, 386 U.S. at 757.

Nat'l Bellas Court determined that a state cannot impose tax collection on sellers who only have a connection to customers in another state through mail.[52] States must have a "legitimate claim" to impose a fair share of the cost of maintaining local government on an out-of-state seller.[53]

2. *The Establishment of the Substantial Nexus Requirement:* Complete Auto

In *Complete Auto*, the Court had to evaluate a Mississippi law that imposed a tax on "'the privilege of . . . doing business' within the State . . . ."[54] Complete Auto Transit, Inc., was a corporation that transported vehicles for the General Motors Corporation.[55] The vehicles came to Mississippi by railroad.[56] Once the vehicles entered Mississippi, Complete Auto Transit loaded them onto trucks and transported them to the in-state dealers.[57] A Mississippi statute[58] imposed "privilege taxes for the privilege of engaging or continuing in business or doing business within [the] state" and required the taxes to be calculated by applying rates against gross proceeds of sales, gross income, or another value.[59] For transportation businesses, the Mississippi tax was equal to five percent of the business's gross income.[60] Complete Auto Transit, Inc., argued that Mississippi's taxes "were unconstitutional as applied to operations in interstate commerce."[61]

The Supreme Court ultimately held the Mississippi tax constitutional.[62] The Court noted that the Commerce Clause's purpose was not to relieve sellers participating in interstate commerce from collecting state taxes—even if doing so "'increases the cost of doing

52. *Id.* at 758 ("[A] State [cannot] impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail . . . [because they] 'are not receiving benefits . . . for which it has the power to exact a price.'").

53. *Id.* at 760. A legitimate claim allows a state to impose a duty on the seller to pay its fair share of the cost of local government, meaning the seller must have a physical presence in the state beyond a connection solely through the mail. *See id.* at 759–760.

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

55. *Id.* at 276.

56. *Id.*

57. *Id.*

58. MISS. CODE ANN. § 27-65 (1972).

59. *Id.* § 27-65-13.

60. *Complete Auto*, 430 U.S. at 275.

61. *Id.* at 277.

62. *Id.* at 289.

business.'"[63] The *Complete Auto* Court then set out a four-part test, requiring courts to determine whether the tax: (1) applies to an activity with a substantial nexus with the taxing state, (2) is apportioned fairly, (3) is nondiscriminatory against interstate commerce, and (4) relates fairly to the services the state provided.[64] Since 1977, courts have continued to use this four-part test when applying the Commerce Clause to cases.[65]

3. *Removing the Application of the Physical Presence Rule from the Due Process Analysis:* Quill Corp.

In *Quill Corp.*, the Supreme Court significantly changed the scope of the physical presence rule as applied to state taxation of out-of-state retailers by removing the physical presence rule requirement from the Due Process Clause interstate commerce analysis.[66] Quill Corporation was a mail-order house[67] incorporated in Delaware.[68] None of Quill's employees worked or resided in North Dakota, and Quill's tangible property in North Dakota was either "insignificant or nonexistent."[69] The company delivered all of its merchandise to consumers in North Dakota "by mail or common carrier from out-of-state locations."[70]

North Dakota required every retailer with a place of business in the state to collect sales tax from the consumer to remit to the state.[71] The relevant North Dakota statute defined "retailer" as a person or entity that regularly engages in business in the state.[72] The North Dakota Administrative Code expanded this definition by setting a minimum requirement to reach the level of regularity

63. *Id.* at 288 (citing W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

64. *Id.* at 279.

65. *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018); Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 310–311 (1994); Grand River Enter. Six Nations v. King, 783 F. Supp. 2d 516, 545 (S.D.N.Y. 2011); Mayor and City Council v. Vonage Am. Inc., 569 F. Supp. 2d 535, 537 (D. Md. 2008).

66. Quill Corp. v. North Dakota, 504 U.S. 298, 307, 314 (1992).

67. *Mail-Order House*, MERRIAM-WEBSTER, https://bit.ly/2R7cvKu [https://perma.cc/7QC3-N6L9] (last visited Sept. 28, 2019) (defining "mail-order house" as "a retail establishment whose business is conducted by mail").

68. *Quill Corp.*, 504 U.S. at 301–302.

69. *Id.* at 302 (noting that Quill sold office equipment and supplies by "solicit[ing] business through catalogs and flyers, advertisements in national periodicals, and telephone calls").

70. *Id.*

71. *Id.* (citing N.D. CENT. CODE § 57-40.2-07 (1991)).

72. *Id.* at 302–303 (defining "retailer" as "every person who engages in regular or systematic solicitation of a consumer market in the state") (citing N.D. CENT. CODE § 57-40.2-01(6)).

required for the Century Code to apply.[73] The Supreme Court of North Dakota declined to follow *Nat'l Bellas* because "the tremendous social, economic, commercial, and legal innovations" had rendered it obsolete.[74] The U.S. Supreme Court refused to adopt this interpretation, and therefore upheld *National Bellas*.[75]

The U.S. Supreme Court ultimately determined that the North Dakota tax in question imposed an undue burden on interstate commerce.[76] The Court departed from *Nat'l Bellas*, stating that the Due Process Clause and the Commerce Clause are analytically distinct and, therefore, must have different forms of analysis.[77] In the Court's opinion, requiring physical presence for a Due Process Clause analysis was no longer necessary.[78] The Court abandoned tests that focused on the defendants' presence within a state and instead adopted an inquiry into whether the defendants' contacts with the forum made it reasonable for others to sue them in that state.[79] Whether a defendant had minimum jurisdictional contacts that offended the "'traditional notions of fair play and substantial justice'" became the relevant inquiry and caused the courts to abandon formalistic tests.[80]

The Supreme Court chose to continue applying the physical presence rule to the Commerce Clause as it had in the past.[81] The Court determined that *Nat'l Bellas*'s bright-line rule "further[ed] the ends of the dormant[82] Commerce Clause."[83] The Court further

73. *Id.* at 303 (defining "regular or systematic solicitation" as "three or more advertisements within a 12-month period") (citing N.D. ADMIN. CODE 81-04.1-01-03.1 (1988)).

74. *See* North Dakota v. Quill Corp., 470 N.W.2d 203, 208 (1991) ("In the quarter-century which has passed in the interim, 'mail order' has grown from a relatively inconsequential market niche into a Goliath now more accurately delineated as 'direct marketing.' The burgeoning technological advances of the 1970's and 1980's have created revolutionary communications abilities and marketing methods which were undreamed of in 1967.").

75. *Quill Corp.*, 504 U.S. at 301–302 ("[W]e must either reverse the State Supreme Court or overrule *Bellas Hess*. While we agree with much of the state court's reasoning, we take the former course.").

76. *Id.* at 302.

77. *Id.* at 305. The main purpose of the Due Process Clause is fundamental fairness, while the main purpose of the Commerce Clause is "protection of interstate business against discriminatory local practices." *Id.* at 304, n.2.

78. *See id.* at 307.

79. *Id.*

80. *Id.* (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

81. *Id.* at 314.

82. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 451 (Erwin Chemerinsky et al. eds., 5th ed. 2017) ("The 'dormant Commerce Clause' [is the notion that] state and local laws are unconstitutional if they place an undue burden on interstate commerce. . . . Even if Congress has not acted, even if its commerce power lies

reasoned that evaluating the burdens imposed and demarcating the applicable taxes on a case-by-case basis would avoid undue burdens on interstate commerce.[84] The *Quill Corp.* Court also discussed the relationship between *Nat'l Bellas* and *Complete Auto*, determining that *Nat'l Bellas* factored into the "substantial nexus" analysis of *Complete Auto* and, therefore, was still valid law.[85]

4. Removing the Physical Presence Rule: Wayfair

The Supreme Court granted certiorari to *Wayfair* to "reconsider the scope and validity" of the physical presence rule.[86] South Dakota enacted S.B. 106[87] to "provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency."[88] S.B. 106 required online sellers to collect and remit sales tax "as if the seller had a physical presence in the state."[89] S.B. 106 only applied to sellers that, on an annual basis, delivered more than $100,000 of goods or services into the state or had 200 transactions in the state.[90]

Wayfair, Overstock, and Newegg were online retailers that did not have employees or properties in the state; however, they conducted business online[91] in South Dakota.[92] South Dakota filed a

dormant, state and local governments cannot place an undue burden on interstate commerce.").

83. *Quill Corp.*, 504 U.S. at 314.

84. *Id.* at 315.

85. *Id.* at 313–315.

86. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2088 (2018).

87. S.B. 106 (2016), codified at S.D. CODIFIED LAWS § 10-64-2 (2016).

88. *Id.*

89. *Id.*

90. *Id.*

91. *See* Rus Shuler, *How Does the Internet Work?*, STANFORD.EDU, https://stanford.io/2dn4Llk [https://perma.cc/5QLX-JKRH] (last visited Sept. 28, 2019). A business physically located in one state can do business in another state through an online platform. *Id.* The internet transfers information using a system of networks and routers. *Id.* Each computer has its own unique internet address as an identifier. *Id.* The information is translated from text to electronic signals and sent in packets before being translated back to text upon arriving at its destination. *Id.* The packets go through a public network—for example, a telephone network—and routers, which determine where to send the packet next. *Id.* Once the customer hits the "pay" button, the order information travels through this network system to the company, which stores the information on its servers. *Id.* The payment is authenticated to eliminate fraud. Sandra Wróbel-Konior, *Online Payments in a Nutshell: A Guide for Beginners*, SECURIONPAY, https://bit.ly/2SNJuGW [https://perma.cc/XG9A-8DFQ] (last visited Sept. 28, 2019). Authentication occurs when the customer's bank receives a request to authorize the payment amount and sends back the accepted/declined message based on the funds in the customer's account. *Id.* The payment then goes to the company's eCommerce merchant account, which captures funds before transferring them to the company's regular bank account. *Id.* Every merchant that deals with large amounts of money

declaratory judgment action against these companies for not collecting sales tax even though the companies met the minimum requirements of S.B. 106.[93] The companies argued that S.B. 106 was unconstitutional based on precedent.[94]

The Court ultimately held that the South Dakota tax was constitutional under the Commerce Clause analysis.[95] The Supreme Court stated that "[e]ach year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States."[96] The Court ruled that the physical presence rule "is not necessary to create a substantial nexus" because "'a business may be present in a state in a meaningful way without' that presence 'being physical in the traditional sense of the term.'"[97] One key reason why the Supreme Court chose to overrule the physical presence rule was to "ensure that artificial competitive advantages are not created by [the] Court's precedents."[98]

The Court also reasoned that "[m]odern e-commerce does not align analytically with a test that relies on . . . physical presence."[99] The Court explained that many local and interstate businesses with physical presence were at a competitive disadvantage compared to remote sellers.[100] The physical presence rule even produced an incentive for businesses to avoid physical presence to escape the state tax.[101] At the time the case was pending in the Supreme Court, 41 states, 2 territories, and the District of Columbia petitioned the Court to reject the test.[102] The Court determined that the rule was

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must have a customer e-commerce merchant account. *Id.* Many companies use a payment gateway, which connects the company's website to the payment processor. *Id.* The payment methods are encrypted and placed in the merchant account through this gateway. *Id.*

92. South Dakota v. Wayfair, Inc. 138 S. Ct. 2080, 2089 (2018).

93. *Id.* S.B. 106 only applied to sellers that, on an annual basis, delivered more than $100,000 of goods or services into the state or had 200 transactions in the state. S. 106 § 1, 2016 Leg. Assemb., 91st Sess. (S.D. 2016).

94. *Wayfair*, 138 S. Ct. at 2089 (using Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753 (1967) and Quill Corp. v. North Dakota, 504 U.S. 298 (1992) as binding precedent).

95. *Id.* at 2099.

96. *Id.* at 2092.

97. *Id.* at 2093, 2095 (citing Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring)).

98. *Id.* at 2094.

99. *Id.* at 2095.

100. *Id.* at 2094.

101. *Id.*

102. Brief for Colorado et al. as Amici Curiae Supporting Petitioner at 1, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494) (stating the reasoning behind their support of the removal of the physical presence rule). The brief stated:

unfair to competitors with a physical presence, unfair to the states that could not collect the tax, and unfair to the consumers of the state.[103] The Court also stated that the physical presence rule "is no longer a clear or easily applicable standard," as the variety among different states' statutes obviated its clarity.[104] The Court recognized that removing the physical presence rule still presented some problems but determined that the decision to remove the rule was a step in the right direction based on the development of e-commerce.[105]

While the Supreme Court did not definitively rule that S.B. 106 was constitutional on all grounds, the Court did give guidance for interpreting the substantial nexus element of the test.[106] The Supreme Court said that the nexus was sufficiently based on economic and virtual contacts.[107] The Court also emphasized that South Dakota's tax system had several features that prevented discrimination and undue burdens on interstate commerce, helping S.B. 106 avoid unconstitutionality under the Commerce Clause.[108]

> *Amici curiae* are 41 States, two United States territories, and the District of Columbia — all jurisdictions that have a compelling interest in supporting South Dakota and seeing that the physical-presence rule is abrogated. As jurisdictions that rely on various forms of consumption taxes to fund their critical government operations, including sales and use taxes, the *amici* States seek to eliminate the artificial barriers that currently block the efficient and full collection of owed tax revenue or infringe their sovereign authority to enforce their tax laws. The physical-presence rule does both, to the States' detriment. The *amici* States thus strongly support abrogating the unprincipled physical-presence rule in favor of adhering to the Court's standard dormant Commerce Clause jurisprudence.

Id.

103. *Wayfair,* 138 S. Ct. at 2095–2096.

104. *See id.* at 2097–98 ("The argument, moreover, that the physical presence rule is clear and easy to apply is unsound. Attempts to apply the physical presence rule to online retail sales are proving unworkable."); *see, e.g.*, 830 MASS. CODE REGS. 64H.1.7 (2018) (establishing a regulation that defines "physical presence" to include making apps available for in-state residents to download and placing cookies on in-state residents' web browsers); N.Y. TAX LAW § 1101(b)(8)(vi) (Consol. 2017) (including in the definition of "nexus" any out-of-state sellers that contract with in-state residents, for commission or other consideration, to refer potential customers, whether it is by link, website, or another form of referral).

105. *See Wayfair*, 138 S. Ct. at 2098 ("These burdens may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States.").

106. *See id.* at 2099–2100 (remanding the case to the lower court to determine whether the tax was unconstitutional on other Commerce Clause grounds).

107. *Id.* at 2099.

108. *Id.* ("[T]he Act applies a safe harbor to those who transact only limited business in South Dakota . . . [and] ensures that no obligation to remit the sales tax may be applied retroactively.").

C. E-Commerce and the Changes to Online Presence

E-commerce has been a steadily evolving commerce sector since the early 1960s.[109] The history of e-commerce shows its evolution into a major revenue source for companies over the course of 40 years.[110] The rapid growth in consumers' use of the internet has also contributed to the rapid growth of e-commerce.[111] E-commerce's changing landscape and online presence was a major factor for the *Wayfair* Court's determining whether physical presence was still a fair rule to apply in e-commerce taxation cases.[112]

1. The History of E-Commerce

The internet originated in the 1960s under the Department of Defense's Advanced Research Project Agency (ARPA).[113] The internet soon became a small network[114] to promote sharing supercomputers among researchers but also grew in data sharing usage among businesses.[115] In 1972, Ray Tomlinson invented the email program, which allowed users "to send messages across a distributed network."[116] In 1973, Robert Kahn and Vinton Cerf developed the Transmission Control Protocol/Internet Protocol (TCP/IP).[117] Following this protocol, Robert Metcalfe developed a system called the Ethernet, which allowed users to transfer more data

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109. *A Timeline of the Internet and E-Retailing: Milestones of Influence and Concurrent Events*, KELLY.IU.EDU, https://bit.ly/2WM5FjH [https://perma.cc/MJ84-9883] (last visited Sept. 28, 2019) [hereinafter *Timeline*].

110. *See id.*; Tricia Hussung, *From Storefronts to Search Engines: A History of E-Commerce,* CONCORDIA ST. PAUL BLOG (Jul. 28, 2016), https://bit.ly/2qNPVKO [https://perma.cc/7U7Q-WYUS].

111. *See Internet/Broadband Fact Sheet*, PEW RES. CTR., https://pewrsr.ch/2E7oqTG [https://perma.cc/39FQ-VUD6] (last visited Sept. 28, 2019); *see also Wayfair*, 138 S. Ct. at 2097.

112. *Wayfair*, 138 S. Ct. at 2095.

113. Hussung, *supra* note 110 (explaining that the military wanted to circulate information in the event of nuclear attack); DEFENSE ADVANCED RESEARCH PROJECTS AGENCY, https://bit.ly/2AlUamt [https://perma.cc/TD6Z-YUXF] (last visited Sept. 28, 2019).

114. *See supra* note 91 (explaining that a network connects various systems together to allow information to transfer from one computer to another).

115. *Timeline, supra* note 109 (explaining that businesses such as Walmart used the internet to manage distribution systems); Hussung, *supra* note 110 (explaining that businesses used primitive computer networks to share documents with other companies' machines).

116. *Internet History Timeline*, INTERNET HALL OF FAME, https://bit.ly/2hufoaM [https://perma.cc/ZN5K-FMXS] (last visited Sept. 28, 2019).

117. Brian Engard, *From ARPAnet to World Wide Web: An Internet History Timeline*, JEFFERSON ONLINE (Nov. 22, 2016), https://bit.ly/2Jj993b [https://perma.cc/P4Z2-KL9W]. This protocol links multiple networks together in a way that allows a network to be brought down without the others collapsing. *Id.*

over a network.[118] In 1982, Dave Farber used dial-up phone lines to broaden access to the internet and to allow for email communication between multiple nations.[119] The World Wide Web came into existence in 1990 after the decommission of ARPANET and went public in 1991.[120]

Security became an issue almost immediately after the World Wide Web's invention.[121] In response to the security issue, a protocol called Secure Socket Layer was created to protect the sending and receiving of communications.[122] The creation of the Secure Socket Layer made secure online retail transactions possible, which allowed the first credit card processing companies to launch.[123] The *New York Times* reported the first online purchase, which occurred on August 11, 1994.[124]

The major online retailers followed shortly behind this first online purchase with the creation and launch of Amazon and eBay in 1995.[125] Amazon's first sale in 1995 was a book, but the company has expanded the breadth of products it offers since its inception.[126] Now, Amazon, a remote seller, is the world's largest retailer.[127] The convenience of starting an online store has also contributed to

118. *Id.*

119. *Id.* The development of phone line usage established the PhoneNet and connected the system to the ARPANET and to the first commercial network, Telenet, to create this broadened access and email communication. *Id.*

120. *Id.* The developers at the European Organization for Nuclear Research (CERN) developed hypertext markup language (HTML) and the uniform resource locator (URL) to create the World Wide Web. *Id.*; *see also* Kim Ann Zimmermann and Jesse Emspak, *Internet History Timeline: ARPANET to the World Wide Web*, LIVE SCIENCE (June 27, 2017), https://bit.ly/2v2GUk9 [https://perma.cc/4AFG-DEWR].

121. *Timeline, supra* note 109.

122. *Id.* The Secure Sockets Layer (SSL) is still the standard security technology that establishes an encrypted link between a web server and a browser. *FAQ: What is SSL?*, SSL.COM (last modified Mar. 30, 2016), https://bit.ly/1q8JreG [https://perma.cc/N78J-MP3W]. The link ensures that data passed between the server and the browser remains private. *Id.*

123. *Timeline, supra* note 109.

124. Peter H. Lewis, *Attention Shoppers: Internet Is Open*, N.Y. TIMES (Aug. 12, 1994), https://nyti.ms/2R8XUka [https://perma.cc/XNW9-ER74]. Phil Brandenberger, of Philadelphia, purchased a compact audio disk with his credit card online. *Id.*

125. Hussung, *supra* note 110. Amazon and eBay are online retailers that allow consumers to purchase products from sellers online. *See generally* AMAZON, https://bit.ly/2x6Nczt [https://perma.cc/43PX-6UP4] (last visited Sept. 28, 2019); *see also* EBAY, https://bit.ly/2xckkWE [https://perma.cc/X95Y-AYV5] (last visited Sept. 28, 2019).

126. Hussung, *supra* note 110.

127. Shan Li, *Amazon Overtakes Wal-Mart as Biggest Retailer*, L.A. TIMES (July 24, 2015, 1:06 pm), https://lat.ms/2GDaSRq [https://perma.cc/U2FA-38F7].

e-commerce's evolution.[128] In 1999, building an online store required at least $100,000.[129] Now, startup costs can be as low as $344.[130]

2. *The Growth of E-Commerce*

E-commerce is growing steadily and has been for some time.[131] In the past two years, e-commerce has grown around 15 percent per quarter.[132] In 2009, e-commerce made up four percent of all retail sales.[133] Less than ten years later, in 2017, e-commerce more than doubled to almost nine percent, growing at four times the rate of traditional retail sales.[134] In 2017 alone, e-commerce sales were $453.5 billion.[135] The growth of e-commerce and the amount of sales coming from e-commerce have caused states to lose between $8 to $33 billion per year due to an inability to tax the majority of online retailers.[136] These taxes are important for states to collect because the tax income helps the states fund education programs and infrastructure.[137] This loss of state revenue from taxes, coupled with the steady growth of e-commerce sales, drove the Supreme Court to rethink the physical presence rule.[138]

In the 1960s, when the Supreme Court decided *Nat'l Bellas*, computer networks remained small and benefitted only a small group of researchers and government agencies.[139] In 1992, when the Supreme Court decided *Quill*, "less than [two] percent of Americans had internet access."[140] In 2018, 89 percent of Ameri-

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128. Hussung, *supra* note 110.

129. *Id.*

130. *Id.* Starting a website for your business is now free. *Costs and Issues Starting an E-Commerce Business or Online Store*, ECORNER, https://bit.ly/2Sibe2t [https://perma.cc/3XA3-7MN4] (last visited Sept. 28, 2019). Costs associated with maintaining the business's credibility include purchasing a domain, a business email, and an SSL Certificate. *Id.* In total, the cost to start an online store with these purchases is around $344. *Id.*

131. *See Quarterly Report*, *supra* note 10.

132. *Id.*

133. *Id.*

134. *Id.*; South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097 (2018).

135. *Quarterly Report*, *supra* note 10.

136. *Id.*

137. *Policy Basics: Where Do Our State Tax Dollars Go?*, CTR. ON BUDGET AND POL'Y PRIORITIES (last updated July 25, 2018), https://bit.ly/2AmlQVM [https://perma.cc/D5JJ-DC28]. Businesses transporting goods within the state use the infrastructure which tax income funds. *Id.*

138. *Quarterly Report*, *supra* note 10.

139. *Timeline, supra* note 109.

140. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097 (2018) (citing Brief for Retail Litigation Center, Inc., et al. as *Amici Curiae* 11, and n. 10).

can adults were using the internet.[141] This change in online presence required the Supreme Court to reevaluate physical presence.

3. Wayfair *and the Evolution of E-Commerce*

The Supreme Court stated that "[m]odern e-commerce does not align analytically with a test that relies on . . . physical presence."[142] Consumers are more connected to most major retailers than ever before because of the "'technological and social changes'" our "'increasingly interconnected economy'" has experienced.[143] Now, companies can leave cookies[144] on hard drives through their websites, have consumers download applications[145] onto their cell phones, and lease data storage[146] that is permanently or occasionally located in a state.[147] These observations led the Supreme Court to determine that the interconnectedness between consumers and retailers through the internet made it necessary to remove the physical presence rule from the taxation analysis under the Commerce Clause.[148]

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141. *Internet/Broadband Fact Sheet*, PEW RES. CTR., https://pewrsr.ch/2E7oqTG [https://perma.cc/LV5L-SQRJ] (last visited Sept. 28, 2019).

142. *Wayfair*, 138 S. Ct. at 2095.

143. *Id.* (citing Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015)).

144. *What are Cookies?*, IND. U., https://bit.ly/2PFA2At [https://perma.cc/4XAY-C7ZN] (last visited Sept. 28, 2019) ("'Cookies' are messages that web servers pass to your web browser when you visit Internet sites. Your browser stores each message in a small file . . . [that] contain[s] information about your visit to the web page [and] any information [you have] volunteered [on that page].").

145. *Understanding Mobile Apps*, FED. TRADE COMMISSION, https://bit.ly/28KjSlG [https://perma.cc/R776-5FHJ] (last visited Sept. 28, 2019). A mobile application is a software program that users download on their mobile devices and can access directly using the device. *Id.*

146. Margaret Rouse, *Data Storage*, TECHTARGET, https://bit.ly/2BzRK3l [https://perma.cc/H73J-Z479] (last visited Sept. 28, 2019). Data storage refers to both general data and integrated hardware and software systems used to capture and manage data. *Id.* Data storage can also include databases, archives, and backup appliances. *Id.* People can "lease" data storage—meaning they pay a monthly fee to continue storing data with a company's storage system instead of having their own. Greg Schulz, *Leasing vs. Buying Storage: A Closer Look*, TECHTARGET, https://bit.ly/2RUajol [https://perma.cc/C8M7-32DV] (last visited Sept. 28, 2019).

147. Wayfair, 138 S. Ct. at 2095 (citing Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015)).

148. *Id.* at 2099.

D. Streamlined Sales and Use Tax Agreement

The Streamlined Sales and Use Tax Agreement (SSUTA)[149] is a state-adopted agreement created in 2002 in an effort to "simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance."[150] The SSUTA focuses on uniformity in state and local tax bases and on the simplification of state and local tax rates.[151] Additionally, the SSUTA strives to create uniform sourcing rules and to simplify tax returns and administration of exemptions.[152] The SSUTA also seeks to protect consumer privacy.[153] Generally, the SSUTA has built-in mechanisms to prevent Commerce Clause discrimination.[154] The SSUTA played an important role in the *Wayfair* Court's determination of whether the scope of the South Dakota tax violated the Commerce Clause.[155] The Supreme Court gave weight to South Dakota's adoption of the SSUTA, reasoning that the South Dakota law in question was likely not discriminatory because the SSUTA provisions prevented discrimination.[156]

III. ANALYSIS

A. The Need for Clear Guidance to Resolve the Issues That State Online Taxation Presents

Although removing the physical presence rule allowed states to collect taxes to fund infrastructure, new concerns have emerged that must be addressed. Congress should act before states can impose a harmful burden on businesses that generate sales through the internet.[157] The biggest concern about removing the physical

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149. *See generally* Streamlined Sales and Use Tax Agreement, STREAMLINED SALES TAX GOVERNING BD., INC., https://bit.ly/2UVftSJ [https://perma.cc/DS5Y-XDGP] (last updated Dec. 14, 2018) [hereinafter SSUTA].

150. *Id.* at Article I, Section 102.

151. *See generally id.* (listing requirements for states to simplify taxation models).

152. *Id.*

153. *Id.*

154. *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2099–2100 (2018).

155. *See id.*

156. *Id.* ("[The SSUTA] standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State.").

157. *See, e.g.*, Ethan T. Kirner, Notes and Comment, *The Overturning of Quill and the New Nexus Standard*, 17 DEPAUL BUS. & COMM. L. J. 39, 64 (2019); *see also* Nick Surma, Note, *Overturning* Quill*: Why* Wayfair *Was Correctly Decided and What Lies Ahead*, 93 N.D. L. REV. 521, 551–52 (2018).

presence rule is the states' reaction to the new decision since many states have enacted laws similar to the law in South Dakota.[158] For example, Hawaii announced in July 2018 that, under Act 41, remote sellers meeting the prescribed threshold must remit taxes.[159] With most states reconsidering their laws pertaining to taxes on sellers that generate sales through the internet, Congress needs to take action to minimize the devastating impact of individual state taxation on businesses.[160]

The implementation of these state laws will negatively impact businesses.[161] While large corporations are now on a level playing field with small businesses due to their inability to escape the collection of taxes, small businesses will face new hardships.[162] *Wayfair* will impact large and small businesses alike.[163] Smaller companies will see an increase in fees for sales-tax processing due to the added tax burdens that the states will impose.[164] Furthermore, online retailers that must collect taxes will need to register.[165] If a business faces either numerous or complex tax issues with the states in which that business anticipates online purchases, then that business may have to purchase automated tax solutions.[166] Regard-

158. *See States Respond to the US Supreme Court Ruling in* South Dakota v. Wayfair, ERNST & YOUNG (Aug. 1, 2018), https://go.ey.com/2E8V6MF [https://perma.cc/FP9J-4H9E] [hereinafter *States Respond*].

159. *See id.* (explaining that sellers must remit taxes to Hawaii "if they have more than $100,000 in gross income from sales to Hawaii customers or engage in 200 or more separate transactions involving the sale of tangible personal property delivered in the state").

160. *Id.*

161. *See* Steven M. Hogan & Alan J. LaCerra, Column, *South Dakota v. Wayfair: The Case that Changes Everything*, 93 FLA. BAR J. 22, 25–26 (2019) (explaining that every sale to a state might cause a tax collection, which makes small businesses face compliance costs and risks in all 50 states and that, without definitive guidelines, states are free to do virtually anything).

162. *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2098 (2018) (explaining that the complexity of states' imposing taxes at different rates and on different categories of goods may burden small businesses).

163. *See* Laurence Kotlikoff, *Did the Supreme Court Potentially Bankrupt Tens of Thousands of Small Online Businesses?*, FORBES (Jun. 21, 2018, 3:14 pm), https://bit.ly/2N1cWnk [https://perma.cc/WBS2-RSJ2] (giving the example that 200 transactions of one $40 item would only bring in $8,000, which highlights the reality that 200 transactions in a single state creates tax liability, even for a small number of transactions). The costs of tax compliance may be more devastating to small business than the actual tax liability. *Id.* (explaining that tax-compliance costs of one online business owner exceed $10,000 for each state where he is subject to sales tax).

164. *Id.*

165. South Dakota v. Wayfair *Is Decided: What Does It Mean for You?*, SALES TAX INST. (June 26, 2018), https://bit.ly/2GAziep [https://perma.cc/E8ZF-3VX9].

166. *Id.*

less of whether states require businesses to collect taxes, online retailers must still submit a form of non-filing or prepare for state audits.[167] Basically, the removal of the physical presence rule now incentivizes small businesses to sell fewer goods to avoid collecting taxes.[168]

As early as when *Nat'l Bellas* was decided, a concern existed that localities, such as county or city governments, would start taxing in addition to states, adding an additional burden to the taxpaying businesses.[169] While some laws do not allow certain local tax collection on out-of-state sellers' sales, states can still change these laws because of the *Wayfair* decision.[170] Amazon is already collecting some local taxes from localities that can collect.[171] The localities' collecting taxes in addition to states' collecting taxes will place a larger burden on businesses that meet the threshold limits of tax collection for each state or locality.[172]

B. Congress's Ability to Fix the Problem

Congress has had many opportunities to address internet sales and use taxes, but it has not passed the introduced bills, even though some have been introduced multiple times.[173] The reintroduction of these bills shows that there are members of Congress interested in tackling this issue. However, before the Court removed physical presence and overturned *Quill*, Congress was una-

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167. Lucas Flood, South Dakota v. Wayfair: *A Loss for Small Business Owners*, FREEDOMWORKS (July 2, 2018), https://bit.ly/2WVvBWt [https://perma.cc/TKJ2-XHGX].

168. *Id.*

169. Nat'l Bellas Hess v. Dept. of Revenue of Ill., 386 U.S. 753, 759 (1967) (stating that, if the state could impose tax burdens, so could every municipality, school district, and other political subdivision throughout the nation that has the power to impose sales and use taxes).

170. *See Many Localities Are Unprepared to Collect Taxes on Online Purchases: Amazon.com and Other E-Retailers Receive Tax Advantage Over Local Businesses*, INST. ON TAX'N AND ECON. POL'Y, https://bit.ly/2SrRzlf [https://perma.cc/G86X-3PPD] (last visited Sept. 28, 2019).

171. *Id.*

172. *Id.*

173. *See, e.g.*, Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017); Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2014); Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013).

ble to "reach a consensus" because of the *Quill* precedent.[174] Now, because of *Wayfair*, Congress has more incentive to act.[175]

Four bills were introduced in the 115th Congress that addressed this issue, but none were passed.[176] The Marketplace Fairness Act of 2017 ("MFA") allowed taxation but would have required states to follow requirements to make the collection process simpler and to institute the small-seller exception laid out in the bill.[177] The Remote Transactions Parity Act of 2017 ("RTPA") was similar to the MFA; but it had more protections for the remote seller, and the small-seller exception had a phase-in provision.[178] The No Regulation Without Representation Act of 2017 ("NRWR") kept the physical presence rule, defining it in terms of business activities and adding a de minimis exception.[179] The Stop Taxing Our Potential Act of 2018 ("STOP") was similar to the NRWR in that it kept the physical presence rule by setting limits for physical presence and defined the de minimis physical presence exception.[180]

In previous Congressional sessions, the MFA,[181] RTPA,[182] and NRWR[183] had previous versions introduced that did not pass, partly because of *Quill*.[184] So far, STOP is the only bill that has been rein-

174. Alana Semuels, *Will a New Supreme Court Decision Change Online Shopping?*, THE ATLANTIC (June 21, 2018), https://bit.ly/2INIjA7 [https://perma.cc/6EFJ-RP2V].

175. Rep. Steve Womack, South Dakota v. Wayfair*: A Win for States that Necessitates Congressional Action to Protect Sellers*, THE HILL (Jun. 28, 2018, 8:20 a.m.), https://bit.ly/2E5FJ7m [https://perma.cc/CWJ5-EBE3].

176. Stop Taxing Our Potential Act of 2018, S. 3180, 115th Cong. (2018); Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017); Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017); No Regulation Without Representation Act of 2017, H.R. 2887, 115th Cong. (2017).

177. Marketplace Fairness Act of 2017, S. 976, 115th Cong. at §§ (b), (c) (2017).

178. Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. at §§ 2(b)(2)(E), (F), (G), 2(c) (2017).

179. No Regulation Without Representation Act of 2017, H.R. 2887, 115th Cong. §§ 2(b)(1), (2) (2017).

180. Stop Taxing Our Potential Act of 2018, S. 3180, 115th Cong. §2(b) (2018).

181. Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017); Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2014); Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013).

182. Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017); Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. (2015).

183. No Regulation Without Representation Act of 2017, H.R. 2887, 115th Cong. (2017); No Regulation Without Representation Act of 2016, H.R. 5893, 114th Cong. (2016).

184. Semuels, *supra* note 174; *see* Womack, *supra* note 175 (stating that Congress must act promptly because the *Wayfair* decision has opened the *Quill* "can of worms").

troduced into the 116th Congressional session.[185] Although Congress has previously failed to adopt one of the various bills before it, circumstances have changed that make it imperative for Congress to act.[186] The need for congressional action stems from the lack of state law regulation in this area in *Quill*'s absence.[187] While the courts could decide the required minimum nexus (in other words, the small-seller exception), Congress must act to prevent small businesses from suffering until the courts have a chance to weigh in on the issue.[188]

C. Adoption of the SSUTA

The growing prominence of e-commerce and online retail activity made it necessary for the Supreme Court to reject the physical presence rule, but Congress still needs to address the growing concerns over states' freedom to tax.[189] While enacting legislation similar to MFA and RTPA would be a step forward in regulating states' taxation powers, Congress needs to do more than adopt those two bills to prevent discrimination against out-of-state sellers.[190] Reinstating the physical presence rule under legislation similar to NRWR or STOP would be a step backwards in regulating the states, a step the U.S. e-commerce community does not want.[191]

The best course of action for Congress is to adopt the SSUTA with some modifications.[192] The SSUTA's goals—to protect consumers and to simplify the method of tax compliance within the states—would prove beneficial for states.[193] Further, the Supreme Court approves of the SSUTA and previously stated that its nondis-

185. Stop Taxing Our Potential Act of 2019, S. 128, 116th Cong. (2019).

186. Womack, *supra* note 175.

187. *Id.*; Semuels, *supra* note 174; *see also* Michael Knoll, *The Implications of the Supreme Court's Wayfair Decision*, THE REG. REV. (July 24, 2018), https://bit.ly/2mLPLkF [https://perma.cc/DTH6-ENV3] (indicating that the *Wayfair* court did not set a minimum nexus requirement).

188. Knoll, *supra* note 187; *see* Womack, *supra* note 175 (noting the urgent need for Congressional action).

189. *See generally* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (explaining that the physical presence rule is outdated and suggesting that Congress should retain the authority to regulate the states' taxing powers).

190. *See id.* at 2099 (explaining the importance of anti-discrimination provisions in deciding the constitutionality of a state tax on out-of-state online retailers).

191. *See id.* at 2097 (explaining that the removal of the physical presence rule was necessary because of the growth of e-commerce).

192. *See* Knoll, *supra* note 187 ("An approach based on the SSUTA would advance the states' needs for revenue, the traditional retailers' call for a level playing field, and remote sellers' concerns with unfair compliance burdens.").

193. *See generally* SSUTA, *supra* note 149 (providing guidelines to create a uniform tax structure with consumers in mind).

criminatory provisions contributed to the Court's deciding that the South Dakota law did not violate the Commerce Clause.[194] The Supreme Court also previously acknowledged that small businesses will face difficult burdens and suggested congressional action.[195]

Although the SSUTA is a good starting point for new legislation that Congress should adopt, the SSUTA needs modifications to create a stronger barrier to prevent states from taking advantage of businesses through tax burdens.[196] Congress's task in modifying this legislation would be to find a balance between setting a regulation that is helpful to the states but that is not overly burdening to the businesses.[197] A key concern Congress must consider is that businesses might choose to reduce operations to avoid reaching the threshold which requires tax collection.[198] Congress should institute a minimum gross sales[199] exemption that protects small businesses from state taxes besides those taxes of states in which the business has substantial sales.[200] Congress could also institute a sales percentage-based threshold, which would allow tax collection only if a certain percentage of the business's profits came from a particular state.

Congress should include a small-seller exception.[201] This exception should be a tax threshold consisting of a gross sales amount that does not turn on the number of transactions.[202] A transaction-based threshold would potentially negate a dollar-based threshold

194. *Wayfair*, 138 S. Ct. at 2099, 2100.

195. *Id.* at 2098.

196. *See States Respond*, *supra* note 158 (presenting evidence that states are beginning to follow South Dakota's lead by imposing tax collection on out-of-state sellers).

197. *See* Knoll, *supra* note 187 (suggesting that there must be a balance of advancing the states' needs for revenue, creating a level playing field for retailers, and avoiding unfair compliance burdens for remote sellers).

198. Flood, *supra* note 167.

199. *Gross Sales Definition*, INVESTOPEDIA (last updated June 25, 2019), https://bit.ly/2Q0GTVa [https://perma.cc/H7XT-CBFC]. "Gross sales" refers to the overall sales of a company without adjustments for costs incurred in generating those sales and for discounts and returns from customers. *Id.* This number is calculated by totaling all invoices. *Id.*

200. Aspyn S. Butzler, Article & Comment, *The Eradication of Online Retailers' Tax Shelter: How* South Dakota v. Wayfair *Eliminated the Physical Presence Standard and Reinterpreted the Commerce Clause to Allow Collection of State Sales Tax on Remote Sellers*, 58 GONZ. L. REV. 173, 188 (2018).

201. Womack, *supra* note 175.

202. *See id.* (stating that a small-seller exception is necessary); *see also* Kotlikoff, *supra* note 163 (explaining that setting a transaction threshold would allow states to collect from small remote sellers that generate little revenue in the state).

and would make it easier for states to impose tax burdens.[203] For example, if a business were to produce $5 items, and the transaction-based threshold was 200, a mere $1,000 would require the state to impose the tax burden on that business if that $1,000 originated from 200 customers who each purchased one $5 item.[204] This $1,000 amount is significantly less than what the dollar-based threshold would be.[205] A percentage-based threshold would create more complications for businesses which would in turn have to determine the percentage of sales for each taxing jurisdiction while also accomplishing nearly the same goal as a gross sales-based threshold.

Congress should not only adopt the SSUTA but should also add a dollar-based threshold that businesses must meet to be taxed in a particular state.[206] Additionally, the legislation Congress adopts should prohibit the retroactivity of already-existing state laws and should establish liability protections for sellers.[207] The combination of the SSUTA, dollar-based threshold, prohibition of retroactivity, and liability protections would provide a uniform, reasonable method of imposing tax burden on small and large businesses alike.[208] Larger businesses would be unable to use lack of physical presence to avoid the tax burden in a state, while small businesses would not have to face the struggle of pooling resources to comply with a tax burden in a state where the business's sales are minimal.[209] Implementing these recommendations would reduce states' ability to discriminate against out-of-state sellers.[210]

IV. CONCLUSION

Physical presence presented a barrier—albeit the wrong barrier—to states' taking advantage of businesses through taxation. The physical presence rule's history, paired with e-commerce's growth, combine to create conditions that make U.S. congressional

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203. *See* Kotlikoff, *supra* note 163 (explaining that the transaction threshold makes small businesses susceptible to the tax after a minimal amount of revenue).

204. *See id.* (giving a similar example).

205. *See, e.g.*, S. 106 § 1, 2016 Leg. Assemb., 91st Sess. (S.D. 2016) (establishing a $100,000 threshold).

206. *See* Knoll, *supra* note 187 (explaining that a minimum nexus must be set and that Congress would most likely adopt something similar to the SSUTA if it were to act).

207. Womack, *supra* note 175.

208. *See id.* (urging his fellow Congressmen to act quickly to institute these changes).

209. *See supra* note 193.

210. See Womack, *supra* note 175 (suggesting that implementing changes through congressional action will provide a level playing field for all retailers).

action necessary, considering the unrestricted taxation methods states can currently institute if such methods meet the substantial nexus test. While the current predictions and trends suggest states should adopt South Dakota's tax thresholds, such actions create the concern that states will discriminate against out-of-state online retailers. Congress has a variety of options to use to resolve this concern, but each of the bills previously before Congress did not pass. Adopting the SSUTA with modifications and adding stronger seller protection is the best option and one that Congress should strive to act on quickly. Without congressional action in the near future, businesses, especially smaller ones, may face uncharted and dangerous territory in online sales' taxation.

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